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OF

PERCY V. LONG

CITY ATTORNEY

OF THE

City and County of San Francisco

STATE OF CALIFORNIA

PUBLISHED BY
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NOTE

This volume contains a record of opinions which issued from the City Attorney's Office between July 8, 1912, and December 15, 1916. There will be found, in addition to a full index, a list of citations to the Charter, the Constitution, State Statutes, Codes, and ordinances, orders and resolutions of the Board of Supervisors.

CITATIONS

CHARTER

PAGE.

ARTICLE I—Boundaries, Rights and Liabilities.

Section 1 371
Section 5 ..... 424, 690

ARTICLE II—Legislative Department.

Chapter I 656
I, section 4, subdivision 1 ..... 63, 963, 964
I, section 9 ..... 203, 609
I, section 11 535
I, section 13 ..... 179, 339, 340, 675, 744, 994
II 622
II, section 1 ..... 134, 139, 426, 448, 501, 618, 724, 793
II, section 1, subdivision 1 ..... 59, 98, 139, 191, 278, 289, 481, 564, 710, 989
II, section 1, subdivision 2 ..... 98, 278, 410, 412, 948
II, section 1, subdivision 3 28
II, section 1, subdivision 6 513
II, section 1, subdivision 7 ..... 520, 521
II, section 1, subdivision 13 ..... 98, 410, 412, 717
II, section 1, subdivision 14 ..... 410, 411, 525
II, section 1, subdivision 15 ..... 481, 482, 484, 520, 522, 797
II, section 1, subdivision 24 ..... 133, 724
II, section 1, subdivision 27 234
II, section 1, subdivision 28 ..... 226, 234, 310, 317, 318, 358, 361
II, section 1, subdivision 29 371
II, section 1, subdivision 31 ..... 371, 372
II, section 1, subdivision 32 ..... 853, 998
II, section 1, subdivision 37 457
II, section 1, subdivision 40 ..... 1004, 1019
II, section 2 ..... 625, 630
II, section 3 884
II, section 4 884
II, section 5 ..... 410, 525
II, section 6 ..... 137, 190, 525
II, section 7 ..... 98, 136, 138, 139, 411, 525
II, section 8 805

ARTICLE II—Legislative Department—(Continued). PAGE.

II, section 9 ..... 58, 339-44, 370, 371, 854
II, section 10 ..... 339, 342, 609
II, section 15 146
II, section 21 179
III 1, 3, 80, 795
III, section 1 ..... 16, 18, 80, 133, 539, 540, 777, 795, 834, 926, 935, 988
III, section 1, subdivision 3 550
III, section 2 ..... 491, 492, 743, 777
III, section 3 926
III, section 5 926
III, section 10 890

ARTICLE III—Finance and Taxation.

Chapter I 891, 892
I, section 1 5
I, section 2 ..... 5, 891
I, section 3 ..... 4, 5, 388
I, section 5 5
I, section 8 388
I, section 10 56
I, section 11 5
II, section 1 ..... 891, 893
II, section 2 ..... 776, 811, 892, 893
II, section 3 ..... 730, 892
II, section 5 892
III 892
III, section 12 567
III, section 13 ..... 3, 567, 953, 1007
IV 714
IV, section 1 ..... 713, 714, 756, 981

ARTICLE IV—Executive Department.

Chapter I, section 3 ..... 253, 254
II, section 2 29
II, section 5 729
II, section 7 621
III, section 5 ..... 121, 122, 946
IV, section 1 822
V, section 2 930
VII 769
VII, section 1 977

ARTICLE V—Legal Department.

Chapter II, section 1 468
II, section 2 425

ARTICLE VI—Department of Public Works. PAGE.

Chapter I, section 3 ..... 807, 884
I, section 4 189
I, section 9 ..... 135, 203, 448, 467, 609
I, section 9, subdivision 1 717
I, section 9, subdivision 4 ..... 885, 890, 924
I, section 9, subdivision 5 ..... 510, 710, 711
I, section 9, subdivision 6 ..... 486, 885, 924
I, section 9, subdivision 8 ..... 545, 886, 887, 889
I, section 14 ..... 695, 696, 697, 698, 699, 927, 1000, 1001
I, section 15 927
I, section 16 927
I, section 17 927
I, section 18 927
I, section 21 ..... 859, 927, 999
II 518
II, section 1 499
II, section 7 628
II, section 8 502
II, section 8, subdivision 3 ..... 868, 869
II, section 9, subdivision 1 502
II, section 9, subdivision 8 503
II, section 9, subdivision 9 826
II, section 21 179
II, section 22 918
II, section 23 ..... 696, 918
II, section 26 ..... 453, 499, 500, 518
II, section 28 ..... 71, 72
II, section 30 ..... 695, 696, 697, 829
II, section 31 ..... 698, 699
II, section 32 ..... 698, 699
II, section 33 869
III 310, 565
III, section 1 565
III, section 14, subdivision 6 845
IV 501
VI 440, 441
VI, section 1 ..... 65, 950, 969
VI, section 2 ..... 542, 543
VIII, section 1 311
VIII, section 2 ..... 311, 312
VIII, section 4 605

ARTICLE VII—Public Schools and Libraries.

Chapter III, section 1 23
III, section 1, subdivision 1 893
III, section 1, subdivision 9 ..... 952, 953
III, section 1, subdivision 10 1007
III, section 2 703

ARTICLE VII—Public Schools and Libraries—(Continued). PAGE.

V, section 1 951
V, section 2 952
VI, section 1 952
VI, section 2 952
VII, section 2 305
VII, section 6, subdivision 1 305
VII, section 6, subdivision 5 ..... 305, 306
VII, section 7 58

ARTICLE VIII—Police Department.

Chapter I, section 3 252
III, section 1, subdivision 1 683
III, section 1, subdivision 3 ..... 481, 482
III, section 3 484
III, section 4 704
IV 683
IV, section 5 1009
V 579
VI 579
VII 580
VII, section 1 716
VII, section 2 683
VII, section 3 683
VIII, section 3 808
X 579, 584
X, section 2 ..... 579, 580
X, section 3 579
X, section 11, subdivision 9 ..... 578, 579

ARTICLE IX—Fire Department.

Chapter I, section 1 267
I, section 4 29
I, section 5 267
I, section 6 ..... 14, 268
I, section 7 ..... 684, 747, 750, 752, 754
I, section 8 ..... 288, 684, 813
II, section 1 ..... 103, 268, 282, 284, 837
II, section 2 ..... 684, 747, 750, 752, 754, 766
II, section 4 ..... 80, 795
III, section 1 ..... 747, 937
III, section 2 684
III, section 4 ..... 347, 348, 349
VII, section 3 ..... 128, 837, 838
VII, section 4 ..... 129, 620

ARTICLE IX—Fire Department—(Continued). PAGE.

VII, section 5 ..... 352, 443
VIII 714
VIII, section 1 ..... 76, 938
VIII, section 2 387

ARTICLE X—Department of Public Health.

Section 3 ..... 1, 3, 448
Section 5 ..... 1, 3
Section 7 ..... 126, 127
Section 10 ..... 1, 3

ARTICLE XI—Department of Elections.

Chapter I, section 1 ..... 101, 724
I, section 4 ..... 43, 44, 45, 46, 486
I, section 5 722
II 314, 722
IV, section 3 317

ARTICLE XII—Acquisition of Public Utilities 887, 889

Section 1 ..... 887, 888
Section 7 373
Section 8 ..... 373, 374, 379
Section 10 ..... 51, 58, 373, 603, 780
Section 16 885
Section 16, subdivision 1 ..... 605, 606
Section 16, subdivision 2 ..... 606, 993

ARTICLE XIII—Civil Service—

29, 63, 268, 284, 390, 391, 392, 558, 672, 677, 683, 775, 803, 823, 831, 897, 898, 899, 901, 938, 964, 967, 983, 997, 1008
Section 1 ..... 920, 921
Section 2 ..... 74, 75, 390, 452, 454, 898, 900, 1008
Section 3 ..... 224, 405
Section 5 921
Section 6 491
Section 8 ..... 74, 75, 76, 901
Section 10 ..... 83, 130, 333, 938
Section 11 ..... 75, 452, 455, 456, 747, 879, 897, 898, 965, 967

ARTICLE XIII—Civil Service—(Continued). PAGE.

Section 11, subdivision A 389, 391, 771, 802, 830, 897, 1017, 1019
Section 11, subdivision B 463, 901
Section 11, subdivision B-2 ..... 836, 837
Section 12 ..... 223, 224, 225, 298, 676, 678, 682, 684, 685, 693, 694, 861, 862, 900, 997
Section 14 ..... 677, 678, 921, 967
Section 17 921
Section 19 ..... 672, 939, 963, 968

ARTICLE XIV—Park Commissioners 260

Section 1 ..... 467, 499, 612, 680
Section 6 ..... 468, 469, 499, 612, 957, 958
Section 8 801
Section 9 469
Section 11 ..... 775, 776, 941, 942

ARICLE XIVA—Playground Commission 636

Section 5 7
Section 8 687
Section 9 546
Section 10 ..... 7, 635, 636, 740

ARTICLE XV—Bonds of Officials.

Section 1 189
Section 2 ..... 189, 497
Section 3 220
Section 6 220

ARTICLE XVI—Miscellaneous.

Section 2 ..... 20, 21, 22, 23, 24
Section 6 ..... 344, 346, 445, 447, 487, 488, 841
Section 9 841
Section 10 ..... 346, 816, 817, 818
Section 12 841
Section 25 ..... 491, 492, 744
Section 29 58
Section 30 391
Section 33 583
Section 35 ..... 62, 608, 823, 812, 898, 1008, 1009, 1017, 1018

CONSTITUTIONS

PAGE.

CALIFORNIA—

Article I, section 11 ..... 427, 555
I, section 14 ..... 485, 542, 738, 780
IV, section 15 71
XI, section 6 ..... 584, 750, 850
XI, section 7 748
XI, section 8 ..... 21, 58, 72, 100, 694, 751
XI, section 8½ 21, 22, 751-754, 897
XI, section 11 ..... 36, 72, 248, 278, 362, 426, 710, 711, 989
XI, section 18 58
XI, section 19 ..... 96, 134, 135, 137, 176, 201, 241, 243, 249, 293, 295, 408, 409, 411, 412, 523-525, 597, 642, 761
XII, section 19 619
XII, section 21 362
XII, section 23 ..... 758, 760, 761
XIII, section 1¼ 472
XIII, section 14 597
XX, section 16 746-754
XX, section 18 427

STATES—

Massachusetts 32
New York 148

UNITED STATES 427, 702

STATUTES

CALIFORNIA—

1851, March 26 327
1856, p. 145 404
1858, March 11 ..... 547, 548
1859, p. 281 827
1862, April 26 ..... 246, 540
1862, p. 391 404
1865-66, p. 445 261
1867-68, p. 379 ..... 260, 261, 499, 662

STATUTES—(Continued) PAGE.

CALIFORNIA—

1867-68, p. 716 852
1870, April 4 957
1871, p. 765 686
1872, March 12 382
1872, p. 804 404
1873-74, p. 333 260
1873-74, p. 359 852
1877-78, p. 263 ..... 382, 534
1878, March 4 ..... 772, 773
1878, March 15 ..... 382, 383, 534
1883, pp. 269-270, 295 ..... 361, 363, 365, 800
1885, pp. 160-161 689
1885, March 18 90
1889, p. 400 374
1893, February 27 ..... 132, 133
1893, p. 54 ..... 132, 133
1895, p. 17 908
1901, March 23 314
1901, p. 589 902
1903, p. 363 852-856
1905, p. 535 965
1905, March 18 330
1905, March 22 1020
1907, pp. 55, 290 ..... 70, 618
1909, March 22 68
1911 475
1911, April 10 537
1911, p. 1099 ..... 396, 397
1911, p. 1115 424
1913 526
1913, p. 279 424
1913, p. 639 940
1913, p. 678 416
1913, chap. 306 416
1913, June 11 416
1913, June 16 455

STATES—

Massachusetts 32, 143
Minnesota 33
New Jersey 81
New York 147, 148, 447
Pennsylvania 17, 92

STATUTES—(Continued) PAGE.

UNITED STATES—
1864, July 1 ..... 116, 547
1866, March 8 117
1866, July 24 239
1901, p. 1332 702
1906, June 30 ..... 300, 302
Vol. 6, p. 874 304

CODES

Civil Code

SECTION.	PAGE.	SECTION.	PAGE.
49	86	549	295
70	581	629	292, 293, 294, 295
73	582	731	450
74	582	832	315
465, subdivision 5	227, 358	880	112
465, subdivision 8	105	1158	369
466	27	1161	369, 769
468	229, 230, 231	1458	706
470	359, 361, 363	1622	72
473a	105	1942	590
497	88, 90, 95	2168	563
498	87, 833	3494	448
502	907, 908	Div. Second, Part IV, Title IV, Chap. IV	769
536	240, 242		

Code of Civil Procedure

SECTION.	PAGE.	SECTION.	PAGE.
692	167	1184	316
945	480	1452	610
1183	9	2077	112

Penal Code

SECTION.	PAGE.	SECTION.	PAGE.
63b	678, 679	413	757
310½	572	413½	757
372	450	414a	757
373a	450	928	406, 407
412	757	1305	562, 589

Political Code

Section.	Page.	Section.	Page.
51	702	3631	614
52	14, 702	3632	614
687	1005, 1006	3633	614
996	23, 817	3634	614
996, subdivision 5	23	3635	614
1072	721, 722	3636	614
1076	567	3637	614
1127	722, 723	3638	614
1216	724	3639	614
1548	1006, 1007	3640	614
1616	23	3641	614
1755	798	3642	614
1756	798	3643	614
1757	798	3644	614
1818	384, 798	3645	614
1839	798	3646	614
1840	384, 798	3647	614, 971
2283	400, 401	3648	614, 615
2285	400	3649	610, 615
2286	400	3650	472
2287	400	3697	473
2289	400	3764	973
2524	280, 382, 383, 565	3771	973
2525	381-84, 534	3785	19, 973, 975
2875	800	3785b	973
2979	848	3804	631, 632, 658, 659, 970
2979a	849	3804a	174
2984	849	3805b	174
3617	594, 614	3809	174
3618	614	3840	304
3619	614	3849	304
3620	614	3850	304
3621	614	3881	610, 611
3622	614	3888	631
3623	614	3897	657, 973, 974
3624	614	3907	466
3625	614	3950	466
3626	614	4131	769
3627	614	4137	369
3628	594, 614	4139	519
3629	614	4300c	9, 10, 416, 519
3630	614		

ORDERS, BOARD OF SUPERVISORS

NUMBERS.	PAGE.
214 (Second Series)	277
551	206
800	260, 261, 467, 468, 686
822	547, 548
871	460
966	174, 175, 357, 460, 692
1025	211, 213, 214
1154	213, 214
1274	469
1275	469
1465	205
1514	832
1525	86
1534	469
1549	205
1588	979
1667	244, 245, 248
1676	832
1684	692
1736	469
1907	86-88, 91, 93-95
1975	213
2015	205
2086	169, 170
2304	420, 421
2385	420, 421
2406	211
2419	205
2492	469
2621	205
2833	565
2904	906-909
2933	212, 217
2978	681

ORDINANCES, BOARD OF SUPERVISORS

NUMBERS.	PAGE.
16 (New Series)	31, 38, 42
20 (New Series)	421
31 (New Series)	512
40 (New Series)	24, 25, 26, 27, 105, 226, 229, 230
51 (New Series)	205
69 (New Series)	336
72	648
115	42
138	418

ORDINANCES, BOARD OF SUPERVISORS—(Continued)

NUMBERS.	PAGE.
144	161
152 (New Series)	213
168 (New Series)	824
260	799
270	317, 318, 798
324	314
334 (New Series)	919, 920
345 (New Series)	251, 395
415 (New Series)	440, 441, 950, 951, 968, 969
453 (New Series)	842
501 (New Series)	417, 433, 434, 448, 449
510 (Third Series)	94
547 (New Series)	205, 206
551 (New Series)	206
615	909
658	258, 259
658 (New Series)	97, 204
698	336, 337
708	840
719	335, 336
746 (New Series)	529, 573, 633-35
752	613, 614
752 (New Series)	190, 191, 192
754	508
758 (New Series)	226, 227, 229
761 (New Series)	793, 876, 931, 1011
777	398-400, 569, 648
782	532, 533
822	846, 847
823	349, 350, 351, 438
828 (New Series)	211
862	331
916	84, 85
923 (New Series)	48
942	535
946	57
964 (New Series)	48, 49
979 (New Series)	49
1008 New Series)	102, 103, 251, 265, 271, 272, 331, 332, 349, 350, 392-94, 448, 449, 461-63, 511-15, 537, 552, 556, 596, 597, 649, 652, 654, 666, 667
1025	335
1038 (New Series)	568, 569, 577, 578
1061 (New Series)	176
1062 (New Series)	51
1095	317, 318
1114	57

ORDINANCES, BOARD OF SUPERVISORS—(Continued)

NUMBERS.	PAGE.
1139 (New Series)	184, 185
1144	331
1265 (New Series)	300, 301, 302, 303
1470	212
1564	135, 204, 248, 586, 588
1604	233
1610 (New Series)	306, 307
1623	233, 234, 650
1651 (New Series)	166, 167
1672	853
1677	522, 528, 537, 556, 557
1699	212
1751	213, 214
1764	665
1791 (New Series)	757
1808	25, 226, 229, 230, 233, 234
1808 (New Series)	105
1809 (New Series)	812
1842 (New Series)	177
1857 (New (Series)	947
1864 (New Series)	573
1958 (New Series)	62, 63
1971 (New Series)	64
2070 (New Series)	189, 497
2109 (New Series))	195, 197, 200, 202, 203, 204, 270, 271
2201 (New Series)	402, 559-61, 575, 576, 642, 643
2235 (New Series)	541, 968, 969
2261 (New Series)	456-59, 780, 793
2265 (New Series)	343
2269 (New Series)	338
2297 (New Series)	387, 862, 977, 980, 981
2328 (New Series)	652-54
2329 (New Series)	652, 654
2365 (New Series)	824
2439 (New Series)	440, 533, 628, 655, 826, 864-66, 868, 917
2442 (New Series)	454, 455
2451 (New Series)	604
2489	619
2489 (New Series)	575, 576
2509 (New Series)	1008
2582	596-98, 601, 603
2582 (New Series)	985
2636	602
2637	598
2639 (New Series)	920
2659 (New Series)	788-90
2839 (New Series)	732
3158 (New Series)	868

ORDINANCES, BOARD OF SUPERVISORS—(Continued)

NUMBERS.	PAGE.
3212 (New Series)	947, 949
3295 (New Series)	892
3335 (New Series)	822
3361 (New Series)	929, 930, 1011-16
3426 (New Series)	862, 977, 980, 981, 984, 985
3521 (New Series)	885
3535 (New Series)	898, 899, 1008
3765 (New Series)	1026
3776 (New Series)	999
3893 (New Series)	1011, 1012
6164 (New Series)	177
6403 (New Series)	94
6896 (New Series)	177
7197 (New Series)	177
10796 (Third Series)	94
11322 (New Series)	94
11988 (Third Series)	94
14556 (Third Series)	94
14610 (New Series)	94
15063 (New Series)	94
19950 (New Series)	94

RESOLUTIONS, BOARD OF SUPERVISORS

NUMBERS.	PAGE.
58 (New Series)	772
991 (Fourth Series)	205
1790 (New Series)	950
1842 (New Series)	177
2458 (Fourth Series)	925, 927
2727 (Fourth Series)	244
2752 (New Series)	186, 331
3154	213, 214, 217
3332 (New Series)	686
3593 (New Series)	264, 499
4009 (New Series)	227
4065 (New Series)	826
5040 (New Series)	477
5055 (New Series)	477, 478
5400 (New Series)	324, 325
5637	57
5967	269
6164 (New Series)	177
6183	853
6654 (New Series)	177
6781 (New Series)	599
6878 (Third Series)	205

RESOLUTIONS, BOARD OF SUPERVISORS (Continued)

NUMBERS.	PAGE.
6896 (New Series)	177
7151 (New Series)	880-82
7197 (New Series)	177
9010 (New Series)	729
9014 (New Series)	729
9104 (New Series)	207
9622 (New Series)	197
9702 (New Series)	101
9846 (New Series)	205
9896 (New Series)	969
9931	357
10184 (New Series)	431
10266 (New Series)	772
10614 (Third Series)	299
11062 (New Series)	646-49
11812 (New Series)	839
12120 (Third Series)	205
12466 (New Series)	895
12627 (Third Series)	205
12897 (New Series)	954
13423 (New Series)	1004, 1016-18
13595 (New Series)	1016, 1017
13644 (New Series)	1026
15139 (New Series)	244

JOURNAL RESOLUTIONS, BOARD OF SUPERVISORS

NUMBERS.	PAGE.
94	771, 773, 774
299	8
396	105
617	279
684	430-32
753	327
759	430-32
985	484
1116	541, 542
1157	565
1254	607
1273	608
1762	851, 856
1799	818
1907	839
1991	880

OPINIONS

PAGE.

City Attorney Lane—1, 2, 3, 16, 17, 287, 288, 289, 372, 509, 536, 557, 558, 579, 683, 716, 726, 727, 740, 809, 811, 935, 953, 1019

City Attorney Long—149, 255, 266, 268, 273, 274, 297, 321, 332, 333, 386, 395, 478, 508, 579, 582, 635, 636, 658, 660, 662, 679, 707, 714, 716, 809, 912, 913, 978, 1019.

CASES CITED

A.

Aberdeen v. Honey, 8 Wash., 251 364
Accident Insurance Co. v. Crandal, 120 U. S., 527 353
Ackerman, In re, 6 Cal. App., 5 435
Aetna Life Insurance Co., Bassett v. 645
Aikens v. Wisconsin, 195 U. S., 205 60
Aitken, Kliegel v., 94 Wis., 432 905
Alameda, Bramman v., 162 Cal., 648 639
Alameda M. Co. v. Pringle, 130 Cal., 226 124
Alexandria, Matthews v., 68 Mo., 115 507
All Persons, Khuner v. 662
All Persons, Mandonnet v. 479, 783, 839
All Persons, O'Reilly v. 657
Allan v. Boston, 34 N. E., 519 905
Allgeyer v. Louisiana, 165 U. S., 578 32
Allison v. Cash, 137 S. W., 245 770
Amyx v. Taber, 23 Cal., 372 39
Andrews, Butler v., 90 Pac., 785 1009
Arcata v. Arcata, etc., R. R. Co., 92 Cal., 639 363
Arcata v. Green, 156 Cal., 759 364-67
Ardmore v. State ex rel. Best, 100 Pac., 913 887
Arey, Hinckley v., 27 Me., 362, 364 613
Argenti v. San Francisco, 16 Cal., 255 656
Armstrong, Eureka v., 83 Cal., 623 405
Armstrong v. Luco, 102 Cal., 272 739
Arnold v. San Jose, 81 Cal., 618 691
Aspinwall, Knox v., 21 How., 539 376
Association, Glaessner v., 100 Mo., 508 506
Atlanta, Matson v., 71 S. E., 664 965
Atlantic City etc. Co., Pleasantville v., 68 Atl., 60 (N. J.) 650
Auditor General, Moore v., 81 N. W., 561 631
Austin v. Austin City Cemetery Association, 47 Am. St. Rep., 114 395
Austin, Doyle v., 47 Cal., 358 829
Austin v. Murray, 16 Dick., 121 32

B.

PAGE.

Baker v. Board of Fire Pension Fund Commissioners, 18 Cal. App., 433 ..... 352, 353
Baker, Norwood v., 172 U. S., 669 870
Baldwin, Commissioners v., 162 Ill., 87 501-502
Ballantyne, Jenkins v., 30 Pac., 760 434
Banaz v. Smith, 133 Cal., 102 ..... 137, 750
Bannerman v. Boyle, 160 Cal., 197 22
Barber, Minnesota v., 136 U. S., 313 33
Barbier v. Connolly, 113 U. S., 27 ..... 551, 570
Barnes, State ex rel. Manhattan Construction Co. v., 97 Pac., 997 886
Barnett v. Contra Costa, 67 Cal., 77 691
Barta, Merritt v., 158 Cal., 376 ..... 404, 662
Bass, Haverty v., 66 Me., 71 770
Bassett v. Aetna Life Insurance Co. 645
Bates v. Board of Education, 139 Cal., 145 ..... 23, 24
Bates v. Twist, 138 Cal., 52 65
Bauer Pottery Co. et al., Johnson v. 664
Baumgartner v. Hasty, 100 Ind., 575 185
Bayne v. Riverside etc. Co., 148 N. W., 412 905
Bazette, Carrollton v., 42 N. E., 837 1015
Beaumette, Rondeau v., 4 Minn., 224 881
Belgarde, Freeman v., 108 Cal., 179 ..... 109, 110, 120
Belser, Williams v., 129 Cal., 461 669
Benicia, Corcoran v., 96 Cal., 1 738
Berka v. Woodward, 125 Cal., 119 447
Bertram v. Central T. Co., 25 Cal., 283 26
Bickel, Klingler v., 117 Pa. St., 328 185
Biddle v. Oaks, 59 Cal., 94-97 615
Binghampton v. P. D. Railway Co., 16 N. Y. S., 225 92
Bird, Sacramento v., 15 Cal., 294 242
Birmingham, Bryan v., 129 Am. St. Rep., 63 395
Bleecker St. & F. Ferry R. Co., Mayor etc. of New York v., 115 N. Y. Supp., 592 833
Blochman v. Spreckels, 135 Cal., 665 124
Block v. Chicago, 87 N. E., 1011 876
Board of Education, Bates v., 139 Cal., 145 ..... 23, 24
Board of Education, Harby v., 2 Cal. App., 418 809
Board of Education, Kennedy v., 82 Cal., 483 900
Board of Education, Mahoney v., 12 Cal. App., 293 549
Board of Education, Stuart v., 118 Pac. Rep., 713 ..... 22, 24
Board of Education of New York, People ex rel. Callahan v., 79 N. Y. Supp., 624 900
Board of Excise of City of Elizabeth, George et al. v., 63 Atl., 870 578
Board of Fire Pension Fund Commissioners, Baker v., 18 Cal. App., 433 ..... 352, 353
Board of Health, Cambridge, Wyeth v., 200 Mass., 474 ..... 32, 33
Board of Medical Examiners, Hewitt v., 148 Cal., 590 932

PAGE.

Board of Police Commissioners, Dodge v., 1 Cal. App., 608.....767
Board of Police Commissioners, Farrell v., 1 Cal. App., 5.....767
Board of Police Commissioners, Jones v., 141 Cal., 96.....766
Board of Police Commissioners, Wittman v., 19 Cal. App., 229.....809
Board of Police Pension Fund Commissioners, Kavanaugh v., 134 Cal., 50.....355
Bohen, Ex parte, 115 Cal., 372.....553
Boldrick, Hyman v. (Ky.), 154 S. W., 369.....570
Bonnett v. San Francisco, 56 Cal., 230.....264
Boston Adv. Co., Commonwealth v., 74 N. E., 601.....140
Boston, Allan v., 34 N. E., 519.....905
Boston, Thayer v., 206 Fed., 969.....549
Boston, Lincoln v., 20 N. E., 329.....706
Boston Ry. Co., Larsen v., 90 N. E., 1048.....905
Boston, Sears v., 173 Mass., 71.....870
Bowen v. John, 66 N. E., 357.....854
Boyle, Auditor, etc., Daly v.....984
Boyle, Bannerman v., 160 Cal., 197.....22
Boyle, McEvers v.....728, 730
Boyle, Scott v.....729, 730
Bradley v. Davis, 156 Cal., 267.....15
Bradley, Fallbrook Irrigation District v., 164 U. S., 176.....870
Brady v. Weeks, 3 Barb., 159.....40
Bramman v. Alameda, 162 Cal., 648.....639
Braudy, Grand Rapids v., 64 N. W., 29.....928
Braun v. City of Chicago, 110 Ill., 186, 197.....614
Braun, Ex parte, 141 Cal., 224.....482
Braveman, Mahoney v., 54 Cal., 565.....66
Breasted v. Farmers' Loan and Trust Co., 8 N. Y., 299.....353
Briant, McCoy v., 53 Cal., 250.....366
Bridge v. Bridge, 9 Law. Ed. (N. S.), 773.....26
Brite, People v., 55 Cal., 79.....818
Broderick, San Francisco v., 111 Cal., 302.....893
Brook v. Horton, 68 Cal., 557.....404
Brooklyn, Long Island Water Supply Co. v., 166 U. S., 685.....485
Brown v. Jenks, 98 Cal., 10.....124, 125
Bryan v. City of Birmingham, 129 Am. St. Rep., 63.....395
Bryan v. Steamboat "Pride of the West," 12 Mo., 371.....17
Budd v. New York, 143 U. S., 517.....929
Buffalo, Gunning System v., 75 App. Div., 31.....141, 142, 143
Buffalo, Hodges v., 2 Denio, 110.....364
Buffalo, Whitmier etc. Co. v., 118 Fed., 773.....141
Burke v. Holtzmann, 97 N. Y. S., 218.....148
Burnett v. Llewelyn, 32 Pac. Rep., 702.....124
Bush, Laurelle v., 17 Cal. App., 409.....482, 483
Butcher, Franklin v., 144 Mo. Ap., 660.....905
Butcher, Hendricks v., 144 Mo. Ap., 671.....905
Butler v. Andrews, 90 Pac., 785.....1009
Butte v. Paltrovitch (Mont.), 75 Pac., 521.....570
Byrne v. Drain, 127 Cal., 663.....137

C.

PAGE.

California Academy of Sciences v. San Francisco, 107 Cal., 334....686
California Hosiery Co., Wiley v., 32 Pac., 522....165
California Reduction Co. v. Sanitary Reduction Works, 126 Fed. Rep., 34....37, 1020
Cambridge, Board of Health, Wyeth v., 200 Mass., 474....32, 33
Campbell v. Gordon, 6 Cranch (U. S.), 176....702
Canfield v. United States, 167 U. S., 261....60
Carpenter, City of Oakland v., 13 Cal., 540....507
Carrollton v. Bazette, 42 N. E., 837....1015
Cash, Allison v., 137 S. W., 245....770
Central T. Co., Bertram v., 25 Cal., 283....26
Chafor v. Long Beach, 51 Cal. Dec., 618....972
Chambers v. Satterlee, 40 Cal., 526....656
Chandos, Warren v., 115 Cal., 382....182, 183, 656
Charters v. Stansbury, 10 Cal. App., 193....124
Chase, Commonwealth v., 6 Cush., 248....39
Chemical Co., Wagner v., 23 Atl., 772....905
Cheseborough v. San Francisco, 153 Cal., 559....411
Chicago and Mil. Ry. Co., State v., 68 Minn., 381....33
Chicago, Block v., 87 N. E., 1011....876
Chicago, Braun v., 110 Ill., 186, 194....614
Chicago etc. Co. v. People, 53 N. E. (Ill.), 986....650
Chicago, Foster v., 96 Ill. App., 4....705
Chicago, Launder v., 111 Ill., 291....928
Chicago v. Sheldon, 9 Wal. (U. S.), 50....92
Shope v. Eureka, 78 Cal., 588....690, 691
Citizens Street Railroad Co., Western Paving Co. v., 128th Indiana, 525....87, 92
City v. Huegle, 112 N. W., 234....967
City and County of San Francisco, Argenti v., 16 Cal., 255....656
City and County of San Francisco, Bonnett v., 56 Cal., 230....264
City and County of San Francisco v. Broderick, 111 Cal., 302....893
City and County of San Francisco, Cheseborough v., 153 Cal., 559....441
City and County of San Francisco, Donnelly v....729
City and County of San Francisco, Gafney v., 72 Cal., 146....183, 656
City and County of San Francisco, Herzo v., 33 Cal., 143....364, 366
City and County of San Francisco, Hoadley v., 50 Cal., 265....546, 547
City and County of San Francisco, Howard v., 51 Cal., 52....972
City and County of San Francisco, Josselyn v., 168 Cal., 436....798
City and County of San Francisco v. Larsen, 45 Cal. Dec., 423....522
City and County of San Francisco, Laurel Hill Cemetery v., 152 Cal., 470....36, 395
City and County of San Francisco, Law v., 144 Cal., 391....22, 377, 378
City and County of San Francisco, McCracken v., 16 Cal., 620....363
City and County of San Francisco, Norton v....172
City and County of San Francisco, Odd Fellows Cemetery Association v., 140 Cal., 226....395, 564

PAGE.

City and County of San Francisco v. Pac. Tel. & Tel. Co., 135 Pac., 971 597
City and County of San Francisco, Platt v., 110 Pac., 304..888, 958, 961
City and County of San Francisco, Reardon v., 66 Cal., 492.....738, 780
City and County of San Francisco, San Christina etc. Co. v., 167 Cal., 762 780
City and County of San Francisco, Shaw v., 13 Cal. App., 547..... 504
City and County of San Francisco v. Spring Valley Water Works, 48 Cal., 529 ..... 363, 364, 614, 971
City and County of San Francisco, Stanford v., 111 Cal., 202..... 737
City and County of San Francisco v. United States..... 116
City and County of San Francisco, Warren v., 88 Pac. Rep., 712.... 632
City Council v. Montgomery etc. Co., 31 Ala., 76..... 367
City of Alexandria, Matthews v., 68 Mo., 115..... 507
City of Arcata v. Green, 156 Cal., 759..... 364-67
City of Ardmore v. State ex rel. Best, 100 Pac., 913..... 887
City of Birmingham, Bryan v., 129 Am. St. Rep., 63..... 395
City of Boston, Thayer v., 206 Fed., 969..... 549
City of Buffalo, Gunning System v., 77 N. Y. S., 987..... 141, 142, 143
City of Buffalo, Whitmier etc. Co. v., 118 Fed., 773..... 141
City of Butte v. Paltrovitch (Mont.), 75 Pac., 521..... 570
City of Chicago, Braun v., 110 Ill., 186, 194..... 614
City of Chicago, Lingle v., 50 N. E., 192..... 501, 502
City of Chicago v. Sheldon, 9 Wal., 50..... 92
City of Cleveland, Cleveland Electric Railway Co. v., 137 Fed., 111..386
City of Detroit v. The Detroit Street Railway Co., 37 Mich., 558.... 90
City of Duluth, Macy v., 71 N. W., 687..... 447
City of Faribault v. Wilson, 25 N. W. (Minn.), 449..... 435
City of Fresno, McBean v., 112 Cal., 159..... 290
City of Hartford, Wright v., 50 Conn., 546..... 165
City of Haverhill, Wood v., 55 N. E. Rep., 381..... 289
City of Hoboken, Faist v., 60 Atl. Rep., 1120..... 81
City of Joliet, Sings v., 86 N. E., 663..... 449
City of Logansport, McGregor v., 79 Ind., 166..... 447
City of Long Beach, Chafor v., 51 Cal. Dec., 618..... 972
City of Los Angeles, Frick v., 115 Cal., 515..... 71
City of Los Angeles, Hayes v., 99 Cal., 74..... 658
City of Los Angeles v. Hollywood Cemetery, 124 Cal., 344..... 553
City of Los Angeles v. Lankershim, 160 Cal., 800..... 640
City of Los Angeles, Los Angeles C. Assn. v., 103 Cal., 461..... 738
City of Los Angeles, Los Angeles Lighting Co. v., 106 Cal., 156..... 66
City of Los Angeles, Los Angeles Railway Co. v., 152 Cal., 244..... 360
City of Los Angeles v. McCollum, 156 Cal., 151..... 404
City of Los Angeles, Perry v., 157 Cal., 146..... 699
City of Los Angeles, Spires v., 150 Cal., 64..... 841, 961
City of Los Angeles, Van Lanker v..... 878
City of Los Angeles, Winbigler v., 35 Cal., 36..... 691
City of Los Angeles, Yarnell v., 87 Cal., 603..... 751
City of Modesto, Derby v., 104 Cal., 515..... 374, 375, 377, 378

PAGE.

City of Mt. Vernon, De Agramonte v., 98 N. Y. S., 454 705
City of Muncie, Shea v., 46 N. E., 138 146
City of Napa v. Easterby, 61 Cal., 509 745
City of New Haven, Hine v., 40 Conn., 478 185
City of New York, Budd v., 143 U. S., 517 929
City of New York, Gushee v., 42 App. Div., 37 841
City of New York v. Harlem Bridge M. F. R. Co., 186 N. Y., 304 92
City of New York, Landan v., 85 N. Y. S., 606 705
City of New York, Lochner v., 198 U. S., 45 32
City of New York, McAdam v., 36 Hun., 340 447
City of New York v. Van de Carr, 199 U. S., 550 552
City of New York, Von Langerke v., 134 N. Y. S., 837 706
City of New York, Waters v., 88 N. Y. Supp., 238 900
City of Newton v. Joyce, 44 N. E., 116 145
City of Oakland v. Carpenter, 13 Cal., 540 507
City of Philadelphia v. Hertonville M. & F. Pass. Ry. Co., 177 Pa., 371 ..... 91, 92
City of Philadelphia v. Ridge Ave. Pass. Ry. Co., 143 Pa. St., 444 92
City of Philadelphia v. Thirteenth and Fifteenth Streets Pass. Ry. Co., 169 Pa., 269 87
City of Phoenix, Fifield v., 36 Pac., 916 706
City of Rochester v. West, 164 N. Y., 510 141
City of Sacramento v. Bird, 15 Cal., 294 242
City of Sacramento, Fountain v., 1 Cal. App., 461 ..... 325, 326
City of Sacramento, Tranter v., 61 Cal., 275 691
City of San Buenaventura v. McGuire, 8 Cal. App. Rep., 500-501 677
City of San Diego, San Diego Water Co. v., 59 Cal., 517 364
City of San Francisco, Bonnett v., 56 Cal., 230 264
City of San Francisco v. United States 116
City of San Jose, Arnold v., 31 Cal., 430 691
City of San Jose, Riehl v., 101 Cal., 442 292
City of San Luis Obispo v. Fitzgerald, 126 Cal., 279 135
City of San Luis Obispo, Murphy v., 119 Cal., 625 135
City of San Luis Obispo v. Pettit, 87 Cal., 499 615
City of Santa Barbara v. Davis, 6 Cal. App., 342 ..... 378, 379
City of Santa Rosa, Skinner v., 107 Cal., 464 374-78
City of South Pasadena v. Terminal Railway Co., 109 Cal., 315 ..... 360-64, 366
City of St. Joseph, Eichenlaub v., 113 Mo., 395 185
City of St. Joseph v. Levin, 31 S. W., 101 928
City of St. Louis, Fischer v., 194 U. S., 369 ..... 552, 554
City of St. Louis v. Russell, 116 Mo., 248 251
City of St. Louis, Schopp v., 117 Mo., 136 506
City of St. Louis, State ex rel. Belt v., 61 S. W. Rep., 658 ..... 505, 507
City of St. Paul, Oakland Cemetery Association v., 32 N. W. Rep., 781 828
City of Stockton v. Whitmore, 50 Cal., 554 ..... 181, 183
City of Topeka, Crawford v., 20 L. R. A., 691 141

PAGE.

City of Williamsport v. Williamsport Co., 203 Pa., 1 92
City of Wilmington, Hartman v., 41 A., 74 449
City Street Improvement Co., Schudel v. 607
City Street Improvement Co., Stanke v. 607
Clark, Jemmess v., 129 N. W., 357 967
Clark, People v., 47 Cal., 456 182
Cleveland, Cleveland Electric Railway Co. v., 137 Fed., 111 386
Cleveland Electric Railway Co. v. Cleveland, 137 Fed., 111 386
Coast Line R. R. v. Savannah, 30 Fed. Rep., 646 92
Cobb, People v., 43 N. Y. S., 123 ..... 147, 148
Coler, People v., 83 N. E., 18 ..... 500, 959
Collum, Finchner v., 59 S. E. (Ga.), 22 432
Columbus Street Railway & Light Co. v. Columbus, 86 N. E., 83 ..... 88, 91
Commissioners v. Baldwin, 162 Ill., 87 ..... 501, 502
Commonwealth v. Boston Adv. Co., 74 N. E., 601 140
Commonwealth v. Chase, 6 Cush., 248 39
Commonwealth v. Crowell, 30 N. E., 1015 1015
Commonwealth v. Dow, 10 Met., 382 39
Commonwealth v. Perry, 155 Mass., 117 32
Commonwealth v. Strauss, 191 Mass., 545 32
Comrs., Hawthorne v., 99 P., 598 770
Confer, Stockton Automobile Co. v., 154 Cal., 402 689
Conkling, State v., 19 Cal., 501 242
Connolly, Barbier v., 113 U. S., 27 ..... 551, 570
Connolly, Lawson v., 141 N. W., 623 564
Connor, Ogburn v., 46 Cal., 347 738
Conrad, Pacific etc. Co. v. 639
Contra Costa, Barnett v., 67 Cal., 77 691
Cook, Doeg v., 126 Cal., 213 691
Cooper, Ex parte, 30 A. R., 152 435
Cooper v. Metropolitan Board of Health, 32 How. P. R., 107 39
Copiah County, Martin v., 71 Mass., 407 354
Corcoran v. Benicia, 96 Cal., 1 738
Corrigan Consol. St. Ry. Co., State ex rel. Kansas v., 86 Mo., 67 92
County of Plumas v. Wheeler, 149 Cal., 758 36
Covington, Hengehold v., 56 S. W., 495 770
Coy v. Title etc. Co., 212 Fed., 520 971
Crandal, Accident Ins. Co. v., 120 U. S., 527 353
Crawford v. Topeka, 20 L. R. A., 691 141
Craycraft, People v., 111 Cal., 544 ..... 228, 359, 360
Crinkshamks, Johnson v., 20 Oregon, 340 854
Crowell, Commonwealth v., 30 N. E., 1015 1015
Crowell v. Sonoma County, 25 Cal., 315 691
Crowley v. Rochester Fireworks Co., 76 N. E., 470 706
Crowley, Sing Hoon v., 113 U. S., 703 551
Curtis Estate, In re, 7 N. Y. S., 208 438

D.

PAGE.

Dague, Hadley v., 130 Cal., 207 869
Daly v. Boyle 984
Davenport, Kind v., 98 Ill., 305 185
Davis, Bradley v., 156 Cal., 267 15
Davis, Santa Barbara v., 6 Cal. App., 342 ..... 378, 379
Davis v. State, 68 Ala., 58 929
Davis, Weaver, Adm'r v., 47 Ill., 235 536
De Agramonte v. Mt. Vernon, 98 N. Y. S., 454 705
Delafield v. Smith, 78 N. W., 170, 173 613
Denninger v. Recorder's Court, 145 Cal., 638 915
Dent v. State of West Virginia, 32 L. Ed., 625 34
Derby v. Modesto, 104 Cal., 515 ..... 374, 375, 377, 378
Detroit v. The Detroit Street Railway Co., 37 Mich., 558 90
Detroit etc. Co., Grosse Point v., 90 N. W. (Mich.), 42 650
Deyoe v. Superior Court, 140 Cal., 476 436
Dodge v. Board of Police Commissioners, 1 Cal. App., 608 767
Doeg v. Cook, 126 Cal., 213 691
Dondero, In re, 19 Cal. App., 66 ..... 393, 394, 461, 462, 530, 552, 553, 556
Donnelly v. San Francisco 729
Donnelly v. Tillman, 47 Cal., 40 745
Dore v. Truett 274-76, 327-29, 707
Dougherty v. Hitchcock, 35 Cal., 512 ..... 181, 183, 656
Dow, Commonwealth v., 10 Met., 382 39
Doyle v. Austin, 47 Cal., 358 829
Drain, Byrne v., 127 Cal., 663 137
Duffy v. Greenebaum, 72 Cal., 159 85
Duluth, Macy v., 71 N. W., 687 447
Dunn, Humbert v., 84 Cal., 57 812

E.

Easterby, Napa v., 61 Cal., 509 745
Education, Board of, Bates v., 139 Cal., 145 ..... 23, 24
Education, Board of, Harby v., 2 Cal. App., 418 809
Education, Board of, Kennedy v., 82 Cal., 483 900
Education, Board of, Mahoney v., 12 Cal. App., 293 549
Education, Board of, Stuart v., 118 Pac. Rep., 713 ..... 22, 24
Edwards v. Hoeffinghoff, 38 Fed., 635, 636 613
Edwards v. Lamb, 69 N. H., 599 905
Edwards v. Sweigert, 15 Cal. App., 503 ..... 353, 444
Egan, San Francisco Paving Co. v., 146 Cal., 639 66
Eichenlaub v. City of St. Joseph, 113 Mo., 395 185
Ellington, Town of, Enfield v., 34 Atl., 818 15
Elliott and Keppelmann, habeas corpus 402, 560, 596, 597, 642
Emery v. San Francisco Gas Co., 28 Cal., 346 66
Enfield, Town of, v. Town of Ellington, 34 Atl., 818 15
Engelbret, Kutchen v., 129 Cal., 637 ..... 183, 656

PAGE.

Equitable Trust Co. of N. Y. v. The Western Pacific Railway.....971
Estate of Michael J. Samuel, Myrick's Probate Rep., 1872-1879, 228 15
Estate of Sweet, 2 Coffey's Probate Decisions, 460 15
Estate of Woodworth, 31 Cal., 595.....610
Eureka, Chope v., 78 Cal., 588.....690-691
Eureka v. Armstrong, 83 Cal., 623.....405
Eureka v. Gates, 137 Cal., 89.....405
Evans v. Pac. Coast Cas. Co., 1 Repts. of Ind. Acc. Comm., 140.....878
Ex parte Bohen, 115 Cal., 372.....553
Ex parte Braun, 141 Cal., 224.....482
Ex parte Cooper, 30 A. R., 152.....435
Ex parte Felchlin, 96 Cal., 362.....428
Ex parte Fiske, 72 Cal., 125.....552
Ex parte Frank, 52 Cal., 608.....362, 366
Ex parte Hadacheck, 132 Pac., 584.....531, 712
Ex parte Haig, 157 Cal., 161.....427
Ex parte Haskell, 112 Cal., 412.....638
Ex parte Heylman, 92 Cal., 492.....638
Ex parte Hodges, 87 Cal., 165.....248
Ex parte Hong Shen, 98 Cal., 681.....989
Ex parte Jentzsch, 112 Cal., 468 572
Ex parte Kearny, 55 Cal., 225 362
Ex parte Lacey, 108 Cal., 326 530
Ex parte McKenna, 126 Cal., 429.....640
Ex parte McNulty, 77 Cal., 164.....933
Ex parte Moynier, 65 Cal., 33.....570
Ex parte Quong Wo, 161 Cal., 220.....145, 250, 530, 537, 554, 555, 712
Ex parte Russell, 163 Cal., 668..... .....136, 201, 243, 293, 413, 586, 587, 597, 642, 913
Ex parte San Chung, 11 Cal. App., 511.....427
Ex parte Shrader, 33 Cal., 280 39
Ex parte Stoltenberg, 46 Cal. Dec., 103.....462, 553, 712
Ex parte Sweetman, 5 Cal. App., 577.....137
Ex parte Taylor, 87 Cal., 91.....248
Ex parte Whitwell, 98 Cal., 73.....36, 555

F.

Faribault v. Wilson, 25 N. W. (Minn.), 449.....435
Faist v. Mayor of Hoboken, 60 Atl. Rep., 1120..... 81
Fallbrook Irrigation District v. Bradley, 164 U. S., 176.....870
Farmers' etc. Co., Reagan v., 154 U. S., 397.....363
Farmers' Loan and Trust Co., Breasted v., 8 N. Y., 299.....353
Farmers' Loan and Trust Co. v. Mayor, 4 Bosw., 80..... 17
Farrell v. Board of Police Commissioners, 1 Cal. App., 5.....767

PAGE.

Farrell, People v., 1 Cal. App., 5 749
Felchlin, Ex parte, 96 Cal., 362 428
Fifield v. City of Phoenix, 36 Pac., 916 706
Finchner v. Collum, 59 S. E. (Ga.), 22 435
Fire Commissioners of New York, People v., 72 New York, 445-9 753
Fire Pension Fund Commissioners, Baker v., 18 Cal. App., 433 ..... 352, 353
First National Bank v. Villegra, 92 Cal., 96 315
Fischer v. St. Louis, 194 U. S., 369 ..... 552, 554
Fisk, Ex parte, 72 Cal., 125 552
Fitzgerald, City of San Luis Obispo v., 126 Cal., 279 135
Flaherty, In re, 105 Cal., 558 ..... 483, 949
Fleming v. Hance, 153 Cal., 162 137
Fleming, People v., 100 Cal., 540 818
Fogarty v. York, 60 N. Y. Sup., 352 219
Fort Smith, McKibben v., 35 Ark., 352 185
Fort Wayne, Shuman v., 26 N. E., 560 928
Foster v. Chicago, 96 Ill. App., 4 705
Foster, State v., 46 Atl., 833 1015
Fountain v. City of Sacramento, 1 Cal. App., 461 ..... 325, 326
Fox, True v., 155 Cal., 534 124
Fragley v. Phelan, 126 Cal., 383 585
Frank, Ex parte, 52 Cal., 608 ..... 362, 366
Franklin v. Butcher, 144 Mo. Ap., 660 905
Franklin v. Kuhl 824
Franklin v. Woods 824
Freeman v. Belgarde, 108 Cal., 179 ..... 109, 110, 120
French v. Mayor of Millville, 49 Atl., 465 305
Fresno, McBean v., 112 Cal., 159 290
Frick v. Los Angeles, 115 Cal., 515 71
Fuchs etc. Co., Phelps v., 81 Atl., 728 165
Fulton Street, In re, 29 How. Pr., 429 92

G.

Gafney v. San Francisco, 72 Cal., 146 ..... 183, 656
Galbraith, People v., 127 N. W., 771 967
Gale v. Kalamazoo, 23 Mich., 344 507
Gardiner v. State Printing Office 627
Garnier, Kansas City v., 46 Pac., 707 928
Gates, Eureka v., 137 Cal., 89 405
George v. Board of Excise of City of Elizabeth, 63 Atl., 870 578
German Savings & Loan Society v. Ramish, 138 Cal., 120 137
Gillespie, Van Loenen v., 152 Cal., 223 124
Glaessner v. Association, 100 Mo., 508 506
Gleeson v. Virginia Railway Co., 140 U. S., 435 155
Goitino v. McAleer, 88 Pac. Rep., 991 ..... 482, 483

PAGE.

Goldtree v. Spreckels, 135 Cal., 666 124
Goodwill, State v., 25 Am. St. Rep., 878 35
Goodwin, People ex rel. v. Voorhis, 20 N. Y. Supp., 941 297
Gordon, Campbell v., 6 Cranch (U. S.), 176 702
Grand Rapids v. Braudy, 64 N. W., 29 928
Green, City of Arcata v., 156 Cal., 759 364-67
Green, Richert v., 98 Ind., 95 40
Greenebaum, Duffy v., 72 Cal., 159 85
Greismer v. Lake Shore etc. R. Co., 7 N. E., 828 154
Grosse Pointe v. Detroit etc. Co., 90 N. W. (Mich.), 42 650
Grumbach v. Lelande, 154 Cal., 679 ..... 145, 461, 531
Guerrero, In re, 69 Cal., 88-91 641
Gunning System v. City of Buffalo, 75 App. Div., 31 ..... 141, 142, 143
Gushee v. City of New York, 42 App. Div., 37 841
Guthrie Center, Lemmon v., 86 Am. St. Rep., 361 185

H.

Hadacheck, Ex parte, 165 Cal., 416, 420-1 ..... 531, 712
Hadley v. Dague, 130 Cal., 207 869
Haig, Ex parte, 157 Cal., 161 427
Hance, Fleming v., 153 Cal., 162 137
Hang Kie, In re, 69 Cal., 149 461
Hannibal & St. Joseph R. R. Co. v. Hunes, 24 Law Ed., 527 303
Hansen v. Van Winkle, 69 Atl. 1011 755
Harbor Commissioners, Talcott v., 53 Cal., 199 ..... 383, 384
Harby v. Board of Education, 2 Cal. App., 418 809
Hardenburg, Phillips v., 80 S. W., 891 854
Hardy, Holden v., 169 Cal., 368 ..... 36, 41
Harlem Bridge M. F. R. Co., New York City v., 186 N. Y., 304 92
Harrington v. La Rocque, 13 Oregon, 344 536
Harrison v. Horton, 5 Cal. App., 417 ..... 135, 812, 823, 1009
Harrison v. People, 121 Ill. App., 189 928
Harter v. San Jose, 141 Cal., 659 841
Hartford Bridge Co. v. Union Ferry Co., 29 Conn., 210 26
Hartford, Wright v., 50 Conn., 546 165
Hartman v. City of Wilmington, 41 A., 74 449
Hartwell, Ramish v., 126 Cal., 443 870
Haskell, Ex parte, 112 Cal., 412 638
Hasty, Baumgartner v., 100 Ind., 575 185
Hatch v. Nevills, 95 Pac., 44 124
Hatton, McClain v., 131 Cal., 132 17
Haverhill, Wood et al. v., 55 N. E. Rep., 381 289
Haverty v. Bass, 66 Me., 71 770
Hawthorne v. Comrs., 99 P., 598 770
Hayes v. Los Angeles, 99 Cal., 74 658
Hazen Township (Pa.), In re, 6 Kulp., 491-493 17
Health, Board of, Cambridge, Wyeth v., 200 Mass., 474 ..... 32, 33

PAGE.

Helber v. Noe, 3 Ire., 493 39
Hellman v. Shoulters, 114 Cal., 146 ..... 555, 556
Hendricks v. Butcher, 144 Mo. Ap., 671 905
Hengehold v. Covington, 56 S. W., 495 770
Hennessy v. St. Paul, 37 Fed., 565 449
Herzo v. San Francisco, 33 Cal., 143 ..... 364, 366
Hestonville M. & F. Pass. R. Co., Philadelphia v., 177 Pa., 371 ..... 91, 92
Hewitt v. Board of Medical Examiners, 148 Cal. 590 932
Hewitt v. Hospital, 64 Atl., 190 905
Hewston, Spring v., 52 Cal., 442 ..... 109, 111, 120
Heydenfeldt, Richardson v., 46 Cal., 68 182
Heylman, Ex parte, 92 Cal., 492 638
Hill, People v., 7 Cal., 97 749
Hinckley v. Arey, 27 Me., 362, 364 613
Hine v. City of New Haven, 40 Conn., 478 185
Hitchcock, Dougherty v., 35 Cal., 512 ..... 181, 183, 656
Hoadley v. San Francisco, 50 Cal., 265 ..... 546, 547
Hoag v. Howard, 55 Cal., 565 889
Hoboken, City of, Faist v., 60 Atl. Rep., 1120 81
Hodges v. Buffalo, 2 Denio, 110 364
Hodges, Ex parte, 87 Cal., 165 248
Hoeffinghoff, Edwards v., 38 Fed., 635 613
Hoffman, In re, 155 Cal., 114 990
Hoffman v. San Joaquin County, 31 Cal., 430 691
Holden v. Hardy, 169 Cal., 368 ..... 36, 41
Hollywood Cemetery, Los Angeles v., 124 Cal., 344 553
Holtzmann, Burke v., 97 N. Y. S., 218 148
Honey, Aberdeen v., 8 Wash., 251 364
Hong Shen, Ex parte, 98 Cal., 681 989
Hong Wah, In re, 82 Fed., 623 ..... 554, 555
Hood & Sons v. Md. Casualty Company, 92 N. E., 329 905
Hopkins, Western Union Telegraph Co. v., 160 Cal., 106 ..... 239, 240
Hopkins, Yick Wo v., 118 U. S., 356 ..... 32, 551, 552
Horton, Brook v., 68 Cal., 557 404
Horton, Harrison v., 5 Cal. App., 417 ..... 135, 812, 823, 1009
Horton, McKannay v., 151 Cal., 711 ..... 816, 817
Hospital, Hewitt v., 64 Atl., 190 905
Houghton, Treanor v., 103 Cal., 58 181
Housten v. Jersey City, 71 Atl., 1116 755
Howard, Hoag v., 55 Cal., 565 889
Howard v. San Francisco, 51 Cal., 52 972
Hudson etc. Co., Rutherford v., 63 Atl. (N. J.), 84 650
Huegle, City v., 112 N. W., 234 967
Humbert v. Dunn, 84 Cal., 57 812
Hunes, Hannibal & St. Joseph R. R. Co. v., 24 Law Ed., 527 303
Hurle, In re, 104 N. E., 336 905
Hurley v. Trenton, 66 N. J. L., 538 92
Hutchins, Low v., 41 Cal., 634 855
Hyman v. Boldrick (Ky.), 154 S. W., 369 570

I.

PAGE.

Industrial Commission, Mutual Film Corporation v. 931
In re Ackerman, 6 Cal. App., 5 435
In re Curtis' Estate, 7 N. Y. S., 208 438
In re Dondero, 19 Cal. App., 66 ..... 393, 394, 461, 462, 530, 552, 553, 556
In re Flaherty, 105 Cal., 558 ..... 483, 949
In re Fulton Street, 29 How. Pr., 429 92
In re Guerrero, 69 Cal., 88-91 641
In re Hang Kie, 69 Cal., 149 461
In re Hazen Township (Pa.), 6 Kulp., 491-493 17
In re Hoffman, 155 Cal., 114 990
In re Hong Wah, 82 Fed., 623 ..... 554, 555
In re Hurle, 104 N. E., 336 905
In re Johnston, 137 Cal., 115 ..... 138, 201, 249, 409, 915
In re Keppelmann, 166 Cal., 770 ..... 402, 560, 596, 597, 642
In re McMonagle, 84 N. Y. S., 1071 575
In re Mitchell, 120 Cal., 386 677
In re Philadelphia etc. R. R. Co., 6 Whart., 44 364
In re Russell, 163 Cal., 668 ..... 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
In re Sam Kee, 31 Fed., 681 ..... 554, 555
In re San Chung, 11 Cal. App., 511 ..... 413, 427, 553
In re Smith, 143 Cal., 272 ..... 36, 41
In re Stoltenberg, 46 Cal., 103 ..... 462, 553, 712
In re Wilshire, 103 Fed., 620 141
In re Wilson, 19 N. W., 723 146
In re Wong Wing, 47 Cal. Dec., 162 570
In re Zhizhuzza, 147 Cal., 324 ..... 461, 555
Irish, Smith v., 55 N. Y. S., 837 449

J.

Jacksonville etc. Co., State v., 10 So. (Fla.), 590 650
Jemmess v. Clark, 129 N. W., 357 967
Jenkins v. Ballantyne, 30 Pac., 760 434
Jenks, Brown v., 98 Cal., 10 ..... 124, 125
Jennings, State ex rel. v., 57 O. St., 514 165
Jentzsch, Ex parte, 112 Cal., 468 572
Jersey City, Housten v., 71 Atl., 1116 755
John, Bohen v., 66 N. E., 357 854
Johnson v. Bauer Pottery Co. 664
Johnson v. Crinkshamks, 20 Oregon, 340 854
Johnson v. London etc. Co., 104 N. E., 735 905
Johnson, S. O. v., 15 S. W., 21 154
Johnston, In re, 137 Cal., 115 ..... 138, 201, 249, 409, 915
Joliet, City of, Sings v., 86 N. E., 663 449
Jones v. Board of Police Commissioners, 141 Cal., 96 766
Josselyn v. San Francisco, 168 Cal., 436 798
Joyce, City of Newton v., 44 N. E., 116 145

K.

PAGE.

Kahn v. Sutro, 114 Cal., 316....1005, 1006
Kalamazoo, Gale v., 23 Mich., 344....507
Kansas City v. Garnier, 46 Pac., 707....928
Kansas City Gunning Adv. Co. v. Kansas, 144 S. W., 1099....142
Kansas City P. & G. R. Co. v. Williams, 58 S. W., 571....155
Kansas, Mugler v., 123 U. S., 623....531
Kansas, State ex rel. v. Corrigan Consol. St. Ry. Co., 85 Mo., 263....92
Karasek v. Peier, 61 Pac., 33....60
Kavanaugh v. Board of Police Pension Fund Commissioners, 134 Cal., 50....355
Kearny, Ex parte, 55 Cal., 225....362
Keil, Rapp v., 156 Cal., 702....482
Keller, Murphy v., 61 App. Div., 145....809
Kelley v. Pac. El. R. Co., 1 Repts. of Ind. Acc. Comm., 150....878
Kellock v. Parcher, 9 N. W., 67....17
Kennedy v. Board of Education, 82 Cal., 483....900
Kenyon, Meyers v., 7 Cal. App. Rep., 112....308, 309, 318, 319
Keppelmann, In re, 166 Cal., 770....402, 560, 596, 597, 642
Khuner v. All Persons....662
Kincaid's Appeal, 2 Am. Rep., 377....398
Kind v. Davenport, 98 Ill., 305....185
Kind v. W. U. T. Co., 65 S. E., 944....165
King, Vint v., 28 Fed. Cas. No. 16, 950....702
Kirk v. Wyman, 65 S. E., 387....770
Kliegel v. Aitken, 94 Wis., 432....905
Klingler v. Bickel, 117 Pa. St., 328....185
Knapp, Stout & Co. v. St. Louis Transfer Ry. Co., 126 Mo., 26....506
Knox v. Aspinwall, 21 How., 539....376
Knox, Rideout v., 148 Mass., 368....60
Koster, Nichol v., 157 Cal., 416....455
Kuhl, Franklin v. 824
Kutchen v. Engelbret, 129 Cal., 637....183, 656

L.

Lacey, Ex parte, 108 Cal., 326....530
Ladeen, State ex rel. Young v., 116 N. W., 486....297
Lake Shore etc. R. Co., Greismer v., 7 N. E., 828....154
Lamb, Edwards v., 69 N. H., 599....905
Landan v. New York, 85 N. Y. S., 606....705
Lane v. Lewiston, 39 Atl., 999....671
Lang, Southack v., 52 N. Y. S., 687....613
Lankershim, Los Angeles v., 160 Cal., 800....640
La Rocque, Harrington v., 13 Oregon, 344....536
Larsen v. Boston Ry. Co., 90 N. E., 1048....905
Larsen, San Francisco v., 45 Cal. Dec., 423....522
Launder v. Chicago, 111 Ill., 291....928

PAGE.

Laurel Hill Cemetery v. San Francisco, 152 Cal., 470.....36, 395
Laurelle v. Bush, 17 Cal. App., 409.....482, 483
Law v. San Francisco, 144 Cal., 384.....22, 377, 378, 527
Lawson v. Connolly, 141 N. W., 623.....564
Lawton v. Steele, 152 U. S., 133.....36
Leavenworth, Pacific R. R. Co., 1 Dill., 398.....363
Lelande, Grumbach v., 154 Cal., 679.....145, 461, 531
Lemmon v. Guthrie Center, 86 Am. St. Rep., 361.....185
Lent v. Tillson, 72 Cal., 428.....869, 870
Levi v. Louisville, 30 S. W., 973.....797
Levin, St. Joseph v., 31 S. W., 101.....928
Levy v. State, 68 N. E., 172.....1015
Lewiston, Lane v., 39 Atl., 999.....671
Lightner v. Steinagel, 85 Am. Dec., 292.....536
Lincoln v. Boston, 20 N. E., 329.....706
Lindblom, People v., 74 N. E., 73.....967
Lingle v. City of Chicago, 50 N. E., 192.....501, 502
Litchfield v. Vernon, 41 N. Y., 123.....870
Llewelyn, Burnett v., 32 Pac. Rep., 702.....124
Lochner v. New York, 198 U. S., 45.....32
London etc. Co., Johnson v., 104 N. E., 735.....905
Logansport, City of, McGregor v., 79 Ind., 166.....447
Long Beach, Chafor v., 51 Cal. Dec., 618.....672
Long Beach Land etc. Co. v. Richardson, 70 Cal., 206.....112
Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685.....485
Longest, Whitfield v., 6 Id., 268.....39
Los Angeles, Frick v., 115 Cal., 515.....71
Los Angeles, Hayes v., 99 Cal., 74.....658
Los Angeles v. Hollywood Cemetery, 124 Cal., 344.....553
Los Angeles v. Lankershim, 160 Cal., 800.....640
Los Angeles, Los Angeles C. Assn. v., 103 Cal., 461.....738
Los Angeles, Los Angeles Lighting Co. v., 106 Cal., 156.....66
Los Angeles, Los Angeles Railway Co. v., 152 Cal., 244.....360
Los Angeles v. McCollum, 156 Cal., 151.....404
Los Angeles, Perry v., 157 Cal. 146.....699
Los Angeles, Spires v., 150 Cal., 64.....841, 961
Los Angeles, Van Lanker v., 1 Repts. of Ind. Acc. Comm., 107.....878
Los Angeles, Winbigler v., 35 Cal., 36.....691
Los Angeles, Yarnell v., 87 Cal., 603.....751
Los Angeles C. Assn. v. Los Angeles, 103 Cal., 461.....738
Los Angeles Gas Co., People v., 150 Cal., 557.....409, 915
Los Angeles Lighting Co. v. Los Angeles, 106 Cal., 156.....66
Los Angeles Railway Co. v. Los Angeles, 152 Cal., 244.....360
Los Angeles Railway Co., People ex rel. v., 91 Cal., 340.....231
Louisiana, Allgeyer v., 165 U. S., 578.....32
Louisville, Levi v., 30 S. W., 973.....797
Love v. Raleigh, 21 S. E. Rep., 503.....364
Low v. Hutchins, 41 Cal., 634.....855
Lowell, Town of, McNay v., 84 N. E., 778.....446

PAGE.

Luco, Armstrong v., 102 Cal., 272 739
Lukrawka v. Spring Valley Water Co., 15 Cal. App. Dec., 793 295
Lumber Co., Vennen v., 154 N. W., 640 905

M.

Macy v. City of Duluth, 71 N. W., 687 447
Madera Railway Co. v. Raymond Granite Co., 3 Cal. App., 668 227
Maestretti, Nerio v., 154 Cal., 580 ..... 386, 844
Mahoney v. Board of Education, 12 Cal. App., 293 549
Mahoney v. Braveman, 54 Cal., 565 66
Mandonnet v. All Persons 479, 783, 839
Market etc. Railroad Co., Schmidt v., 90 Cal., 37 89
Martin v. Copiah County, 71 Mass., 407 354
Martin, People v., 137 N. Y. S., 677 532
Martin, People ex rel. Goodwin v., 82 Hun., 1 297
Maryland Casualty Co., Hood & Sons v., 92 N. E., 329 905
Matson v. Atlanta, 71 S. E., 664 965
Matter of Russell, 163 Cal., 668 ..... 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
Matthews v. City of Alexandria, 68 Mo., 115 507
Matthews v. Murphy, 23 Ky. Law Rep., 750 ..... 933, 965
Maximilian v. Mayor, 62 N. Y., 160 965
Mayor, Farmers' Loan & Trust Co. v., 4 Bosw., 80 17
Mayor, Maximilian v., 62 N. Y., 160 965
Mayor, McSpedon v., 7 Bosw., 601 17
Mayor of Hoboken, Faist v., 60 Atl. Rep., 1120 81
Mayor of New York, v. Bleecker St. & F. Ferry R. Co., 115 N. Y. Supp., 592 833
Mayor of New York, McAdam v., 36 Hun., 340 447
Mayor v. Scharf, 54 Md., 429 92
McAdam v. Mayor of New York, 36 Hun., 340 447
McAleer, Goitino v., 88 Pac. Rep., 991 ..... 482, 483
McBean v. Fresno, 112 Cal., 159 290
McBean v. Redick, 96 Cal., 191 ..... 183, 656
McBride v. Union Iron Works, 1 Repts. of Ind. Acc. Comm., 376 878
McClain v. Hatton, 131 Cal., 132 17
McCloskey v. Pacific Coast Co., 160 Fed., 794 467
McCoy v. Briant, 53 Cal., 250 366
McCracken v. San Francisco, 16 Cal., 620 363
McCollum, Los Angeles v., 156 Cal., 151 404
McCurdy v. Smith, 60 S. E., 78 1009
McEvers v. Boyle 728, 730
McGregor v. City of Logansport, 79 Ind., 166 447
McGuire, City of San Buenaventura v., 8 Cal. App. Rep., 500-501 677
McKannay v. Horton, 151 Cal., 711 ..... 816, 817
McKenna, Ex parte, 126 Cal., 429 640

PAGE.

McKibben v. Fort Smith, 35 Ark., 352 185
McMonagle, In re, 84 N. Y. S., 1071 575
McNay v. Town of Lowell, 84 N. E., 778 446
McNulty, Ex parte, 77 Cal., 164 933
McSpedon v. Mayor, 7 Bosw., 601 17
Medical Examiners, Board of, Hewitt v., 148 Cal., 590 932
Meekin, Woollacott v., 151 Cal., 703 124
Memphis R. R., People's R. R. v., 10 Wall., 51 363
Merced Falls Gas etc. Co. v. Turner, 2 Cal. App., 720 278
Merritt v. Barta, 158 Cal., 376 ..... 404, 662
Methodist Protestant Church, Went v., 30 N. Y. Supp., 157 398
Metropolitan Board of Health, Cooper v., 32 How. P. R., 107 39
Meyers v. Kenyon, 7 Cal. App. Rep., 112 ..... 308, 309, 318, 319
Middleton v. Pritchard, 38 Am. Dec., 112 113
Miller v. Sergeant, 37 N. E., 418 184
Miller, State ex rel. Edwards v., 96 Pac., 747 887
Millville, French v., 49 Atl., 465 305
Minnesota v. Barber, 136 U. S., 313 33
Mitchell, In re, 120 Cal., 386 677
Modesto, Derby v., 104 Cal., 515 ..... 374, 375, 377, 378
Moll v. Sbisa, 25 Southern, 141 165
Montgomery etc. Co., City Council v., 31 Ala., 76 367
Moore v. Auditor General, 81 N. W., 561 631
Moore, State v., 104 N. C., 714 929
Mount Vernon, City of, De Agramonte v., 98 N. Y. S., 454 705
Moynier, Ex parte, 65 Cal., 33 570
Mugler v. Kansas, 123 U. S., 623 531
Mulberry v. O'Dea, 4 Cal. App., 389 124
Mulvey v. Wangenheim, 23 Cal. App., 268 ..... 961, 962
Muncie, Shea v., 46 N. E., 138 146
Murphy v. City of San Luis Obispo, 119 Cal., 625 135
Murphy v. Keller, 61 App. Div., 145 809
Murphy, Matthews v., 23 Ky. Law Rep., 750 ..... 933, 965
Murphy, People v., 88 N. E., 17 140
Murray, Austin v., 16 Pick., 121 32
Murray, Travelers' Insurance Co. v., 16 Colo., 296 353
Mutual Benefit Life Insurance Co., Newton v., 76 N. Y., 426 353
Mutual Film Corporation v. Industrial Commission 931
Mutual Life Insurance Co. v. Terry, 82 U. S., 580 353
Myers v. Kenyon, 7 Cal. App. Rep., 112 ..... 308 309, 318, 319

N.

Napa, City of, v. Easterly, 61 Cal., 509 745
National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. Rep., 33 248
Neal Publishing Co. v. Rolph, 169 Cal., 190 925
Nerio v. Maestretti, 154 Cal., 580 ..... 386, 844

PAGE.

Nevills, Hatch v., 95 Pac., 44 124
Nevills, Quinn v., 7 Cal. App., 233 15
Nevin, Walston v., 128 U. S., 582 870
New England Chocolate Co., Winthrop v., 180 Mass., 464 32
New Haven, Hine v., 40 Conn., 478 185
New York, Budd v., 143 U. S., 517 929
New York, Gushee v., 42 App. Div., 37 841
New York, Landan v., 85 N. Y. S., 606 705
New York, Lochner v., 198 U. S., 45 32
New York, McAdam v., 36 Hun., 340 447
New York v. Harlem Bridge M. F. R. Co., 186 N. Y., 304 92
New York v. Van De Carr, 199 U. S., 550 552
New York, Von Langerke v., 134 N. Y. S., 837 706
New York, Waters v., 88 N. Y. Supp., 238 900
Newkirk, West Coast Lumber Co. v., 80 Cal., 275 17
Newton v. Joyce, 44 N. E., 116 145
Newton v. Mutual Benefit Life Insurance Co., 76 N. Y., 426 353
Nichol v. Koster, 157 Cal., 416 455
Noe, Helber v., 3 Ire., 493 39
Norton v. San Francisco 172
Norwood v. Baker, 172 U. S., 669 870

O.

Oakland, Carpenter v., 13 Cal., 540 507
Oakland Cemetery Association v. City of St. Paul, 32 N. W. Rep., 781 828
Oaks, Biddle v., 59 Cal., 94-97 615
Oconto Water Co., National Foundry & Pipe Works v., 52 Fed. Rep., 33 248
Odd Fellows Cemetery Assn. v. San Francisco, 140 Cal., 226 ..... 395, 564
O'Dea, Mulberry v., 4 Cal. App., 389 124
Ogburn v. Connor, 46 Cal., 347 738
Oklahoma City v. State, 115 Pac., 1108 886
Opinion of the Justices to the Governor and Council, 126 Mass., 603 716
O'Reilly v. All Persons 657

P.

Pacific Coast Casualty Co., Evans v., 1 Repts. of Ind. Acc. Comm., 140 878
Pacific Coast Co., McCloskey v., 160 Fed., 794 467
Pacific Electric Railway Co., Kelley v., 1 Repts. of Ind. Acc. Comm., 150 878

PAGE.

Pacific Electric Railway Co., Reynolds v., 146 Cal., 261 ..... 88, 90
Pacific etc. Co. v. Conrad 639
Pacific Railway Co. v. Leavenworth, 1 Dill., 398 363
Pacific Telephone & Telegraph Co., San Francisco v., 135 Pac., 971 597
Paltrovitch, City of Butte v. (Mont.), 75 Pac., 521 570
Parcher, Kellock v., 9 N. W., 67 17
Park and Ocean Railway Co., People v., 76 Cal., 156 ..... 842, 955, 957, 959, 962
Pasadena, Sunset Telephone & Telegraph Co. v., 161 Cal., 265 ..... 137, 239, 240
P. D. Railway Co., Binghampton v., 16 N. Y. S., 225 92
Peier, Karasek v., 61 Pac., 33 60
Pendleton, Pruner v., 40 Am. Rep., 738 40
People v. Brite, 55 Cal., 79 818
People, Chicago etc. Co. v., 53 N. E. (Ill.), 986 650
People v. Clark, 47 Cal., 456 182
People v. Cobb, 43 N. Y. S., 123 ..... 147, 148
People v. Coler, 83 N. E. Rep., 18 ..... 500, 959
People v. Craycroft, 111 Cal., 547 ..... 228, 359, 360
People v. Farrell, 1 Cal. App., 5 749
People v. Fire Commissioners of New York, 72 N. Y., 445-449 753
People v. Fleming, 100 Cal., 540 818
People v. Galbraith, 127 N. W., 771 967
People, Harrison v., 121 Ill. App., 189 928
People v. Hill, 7 Cal., 97 749
People v. Lindblom, 74 N. E., 73 967
People v. Los Angeles Gas Co., 150 Cal., 559 ..... 409, 915
People v. Los Angeles Railway Co., 91 Cal., 340 231
People v. Martin, 137 N. Y. S., 677 532
People v. Murphy, 88 N. E., 17 140
People v. Park and Ocean Railway Co., 76 Cal., 156 ..... 842, 955, 957, 959, 962
People v. Pinckney, 32 N. Y., 277 165
People v. Suburban Railway Co., 53 N. E., 349 651
People v. Sutter Street Railway Co., 117 Cal., 604 ..... 231, 908, 909
People v. Voorhis, 20 N. Y. Supp., 741 297
People v. Wemple, 39 N. E., 297 147
People v. Williamson, 135 Cal., 415 ..... 823, 850
People ex rel. Callahan v. Board of Education of New York, 79 N. Y. Supp., 624 900
People ex rel. Goodwin v. Martin, 82 Hun., 1 297
People ex rel. Goodwin v. Voorhis, 66 Hun., 88 297
People ex rel. Lawlor v. Williamson, 135 Cal., 415 585
People's Railway v. Memphis Railway, 10 Wall., 51 363
Pereria v. Wallace, 129 Cal., 397 ..... 409, 587, 915
Perry v. City of Los Angeles, 157 Cal., 146 699
Perry, Commonwealth v., 155 Mass., 117 32

PAGE.

Peterson, H. P., Habeas Corpus 31
Pettit, San Luis Obispo v., 87 Cal., 499 615
Phelan, Fragley v., 126 Cal., 383 585
Phelps v. Fuchs etc. Co., 81 Atl., 728 165
Philadelphia v. Hestonville M. & F. Passenger Railway Co., 177 Pa., 371 ..... 91, 92
Philadelphia v. Ridge Avenue Passenger Railway Co., 143 Pa. St., 444 92
Philadelphia v. Thirteenth & Fifteenth Streets Passenger Railway Co., 169 Pa., 263 ..... 87, 91
Philadelphia etc. Railway Co., In re, 6 Whart., 44 364
Phillips v. Hardenburg, 80 S. W., 891 854
Phoenix, City of, Fifield v., 36 Pac., 916 706
Pinckney, People v., 32 N. Y., 277 165
Pioche, Polack v., 35 Cal., 416 590
Pitte v. Shipley, 46 Cal., 154 889
Platt v. San Francisco, 158 Cal., 81 ..... 888, 958, 961
Pleasantville v. Atlantic City etc. Co., 68 Atl. (N. J.), 60 650
Plumas, County of, Wheeler v., 149 Cal., 758 36
Plymouth, Wheeler v., 18 N. E., 532 706
Poindexter, Stansbury v., 164 Cal., 710 ..... 124, 125, 126
Polack v. Pioche, 35 Cal., 416 590
Police Commissioners, Board of, Dodge v., 1 Cal. App., 608 767
Police Commissioners, Board of, Farrell v., 1 Cal. App., 5 767
Police Commissioners, Board of, Jones v., 141 Cal., 96 766
Police Commissioners, Board of, Wittman v., 19 Cal. App., 229 809
Police Pension Fund Commissioners, Cavanaugh v., 134 Cal., 50 355
Pringle, Alameda M. Co. v., 130 Cal., 226 124
Prisque Isle Circuit Judge, Starke v., 139 N. W., 29 577
Pritchard, Middleton v., 38 Am. Dec., 112 113
Pruner v. Pendleton, 40 Am. Rep., 738 40

Q.

Quinn v. Nevills, 7 Cal. App., 233 15
Quong Wo, Ex parte, 161 Cal., 220 ..... 145, 250, 530, 537, 554, 555, 712

R.

Railroad Co. v. Schurmeir, 7 Wall., 272 113
Railroad Co. v. State, 37 Ind., 489 650
Railway Co., Sherlock v., 142 Mo., 172 506
Railway Co., State v., 85 Mo., 263 92
Raleigh, Love v., 21 S. E. Rep., 503 364
Ramish, German Savings & Loan Society v., 138 Cal., 120 137
Ramish v. Hartwell, 126 Cal., 443 870

PAGE.

Rapp v. Keil, 159 Cal., 702 482
Raymond Granite Co., Madera Railway Co. v., 3 Cal. App., 668 227
Reagan v. Farmers' etc. Co., 154 U. S., 397 363
Reardon v. San Francisco, 66 Cal., 492 ..... 738, 780
Recorder's Court, Denninger v., 145 Cal., 638 915
Redick, McBean v., 96 Cal., 191 ..... 183, 656
Reynolds v. Pacific Electric Railway Co., 146 Cal., 261 ..... 88, 90
R. G. R. Petroleum Co., San Francisco Savings Union v., 144 Cal., 134 467
Richardson v. Heydenfeldt, 46 Cal., 68 182
Richardson, Long Beach Land etc. Co. v., 70 Cal., 206 112
Richert v. Green, 98 Ind., 95 40
Rideout v. Knox, 148 Mass., 368 60
Ridge Avenue Passenger Railway Co., City of Philadelphia v., 143 Pa. St., 444 92
Riehl v. San Jose, 101 Cal., 442 292
Riverside etc. Co., Bayne v., 148 N. W., 412 905
Rochester, City of, v. West, 164 N. Y., 510 141
Rochester Fireworks Co., Crowley v., 76 N. E., 470 706
Rolph, Neal Publishing Co. v., 169 Cal., 190 925
Rondeau v. Beaumette, 4 Minn., 224 881
Russell, Ex parte, 163 Cal., 668 ..... 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
Russell v. Sebastian, 233 U. S., 195 913
Russell, St. Louis v., 116 Mo., 248 251
Rutherford v. Hudson etc. Co., 63 Atl. (N. J.), 84 650

S.

Sacramento v. Bird, 15 Cal., 294 242
Sacramento, Fountain v., 1 Cal. App., 461 ..... 325, 326
Sacramento, Tranter v., 61 Cal., 275 691
Sam Kee, In re, 31 Fed., 681 ..... 554, 555
Samuel, Michael J., Estate, Myrick's Probate Rep., 1872-1879, 228 15
San Buenaventura v. McGuire, 8 Cal. App. Rep., 500-501 677
San Christiana etc. Co. v. San Francisco, 167 Cal., 762 780
San Chung, In re, 11 Cal. App., 511 ..... 413, 427, 553
San Diego Water Co. v. San Diego, 59 Cal., 517 364
San Francisco, Argenti v., 16 Cal., 255 656
San Francisco, Bonnett v., 56 Cal., 230 264
San Francisco, California Academy of Sciences v., 107 Cal., 334 686
San Francisco, Cheseborough v., 153 Cal., 559 411
San Francisco, Donnelly v. 729
San Francisco, Gafney v., 72 Cal., 146 ..... 183, 656
San Francisco Gas Co., Emery v., 28 Cal., 346 66
San Francisco, Herzo v., 33 Cal., 143 ..... 364, 366
San Francisco, Hoadley v., 50 Cal., 265 546-547

PAGE.

San Francisco, Howard v., 51 Cal., 52 972
San Francisco, Josselyn v., 168 Cal., 436 798
San Francisco, Laurel Hill Cemetery v., 152 Cal., 470 ..... 36, 395
San Francisco, Law v., 144 Cal., 391 ..... 22, 377, 378, 527
San Francisco, McCracken v., 16 Cal., 620 363
San Francisco, Norton v. 172
San Francisco, Odd Fellows Cemetery Association v., 140 Cal., 226 ..... 395, 564
San Francisco Paving Co. v. Egan, 146 Cal., 639 66
San Francisco, Platt v., 158 Cal., 81 ..... 888, 958, 961
San Francisco, Reardon v., 66 Cal., 492 ..... 738, 780
San Francisco, San Christiana etc. Co. v., 167 Cal., 762 780
San Francisco Savings Union v. R. G. R. Petroleum Co., 144 Cal., 134 467
San Francisco, Shaw v., 13 Cal. App., 547 504
San Francisco v. Broderick, 111 Cal., 302 893
San Francisco v. Larsen, 45 Cal. Dec., 423 522
San Francisco v. Pacific Telephone & Telegraph Co., 135 Pac., 971 597
San Francisco v. Spring Valley Water Works, 48 Cal., 529 ..... 363, 364, 614, 971
San Francisco v. United States 116
San Francisco, Stanford v., 111 Cal., 202 737
San Francisco, Warren v., 88 Pac. Rep., 712 632
San Joaquin County, Hoffman v., 31 Cal., 430 691
San Jose, Arnold v., 31 Cal., 430 691
San Jose, Harter v., 141 Cal., 659 841
San Jose, Riehl v., 101 Cal., 442 292
San Jose, Wallace v., 29 Cal., 186 364
San Luis Obispo, Murphy v., 119 Cal., 625 135
San Luis Obispo v. Fitzgerald, 126 Cal., 279 135
San Luis Obispo v. Pettit, 87 Cal., 499 615
Sanitary Reduction Works, California Reduction Co. v., 126 Fed. Rep. 34-37 1020
Santa Barbara v. Davis, 6 Cal. App., 342 ..... 378, 379
Santa Rosa, Skinner v., 107 Cal., 464 374-78
Satterlee, Chambers v., 40 Cal., 526 656
Savannah, Coast Line Railroad v., 30 Fed. Rep., 646 92
Sbisa, Moll v., 25 Southern, 141 165
Scharf, Mayor v., 54 Md., 429 92
Schindler v. Young, 13 Cal. App., 18 691
Schmidt v. Market etc. Railroad Co., 90 Cal., 37 89
Schopp v. City of St. Louis, 117 Mo., 136 506
Schudel v. City Street Improvement Co 607
Schullenburg & Boeckeler Lumber Co. v. St. Louis K. & N. W. R. Co., 129 Mo., 455 506
Schurmeir, Railroad Co. v., 7 Wall., 272 113

PAGE.

Scott v. Boyle....729, 730
Scott, Sheehan v., 145 Cal., 688.... 71
Sears v. Boston, 173 Mass., 71....870
Sebastian, Russell v., 233 U. S., 195....913
Sergeant, Miller v., 37 N. E., 418....184
Shaw v. San Francisco, 13 Cal. App., 547....504
Shea v. City of Muncie, 46 N. E., 138....146
Sheehan v. Scott, 145 Cal., 688.... 71
Sheldon, Chicago v., 9 Wall. (U. S.), 50.... 92
Sherlock v. Railway Co., 142 Mo., 172....506
Shipley, Pitte v., 46 Cal., 154....889
Shorter v. Smith, 9 Ga., 517.... 26
Shoulters, Hellman v., 114 Cal., 146....555, 556
Shrader, Ex parte, 33 Cal., 280.... 39
Shuman v. Fort Wayne, 26 N. E., 560....928
Sing Hoon v. Crowley, 113 U. S., 703....551
Singer Manufacturing Co. v. Wright, 97 Ga., 114....640
Sings v. City of Joliet, 86 N. E., 663....449
Skinner v. City of Santa Rosa, 107 Cal., 464....374-78
Slaughter House Cases, 21 L. Ed. 404....40, 41
Smith, Banaz v., 133 Cal., 102....137, 750
Smith, Delafield v., 78 N. W., 170-173....613
Smith, In re, 143 Cal., 272....36, 41
Smith v. Irish, 55 N. Y. S., 837....449
Smith, McCurdy v., 60 S. E., 78....1009
Smith, Shorter v., 9 Ga., 517.... 26
S. O. v. Johnson, 15 S. W., 21....154
Sonoma County, Crowell v., 25 Cal., 315....691
South Pasadena v. Terminal Railway Co., 109 Cal., 315....360-64, 366
Southack v. Lang, 52 N. Y. S., 687....613
Spires v. Los Angeles, 150 Cal., 64....841, 961
Spreckels, Blochman v., 135 Cal., 665....124
Spreckels, Goldtree v., 135 Cal., 666....124
Spring v. Hewston, 52 Cal., 442....109, 111, 120
Spring Valley Water Co., Lukrawka v., 15 Cal. App. Dec., 793....295
Spring Valley Water Works, San Francisco v., 48 Cal., 529.... 363, 364, 614, 971
St. Joseph, Eichenlaub v., 113 Mo., 395....185
St. Joseph v. Levin, 31 S. W., 101....928
St. Louis, Fischer v., 194 U. S., 369....552, 554
St. Louis v. Russell, 116 Mo., 248....251
St. Louis, Schopp v., 117 Mo., 136....506
St. Louis, State ex rel. Belt v., 61 S. W. Rep., 658....505, 507
St. Louis, K. & N. W. R. Co., Schullenburg & Boeckeler Lumber Co. v., 129 Mo., 455....506
St. Louis Transfer Railway Co., Knapp, Stout & Co. v., 126 Mo., 26....506
St. Paul, Hennessy v., 37 Fed., 565....449
St. Paul, Oakland Cemetery Association v., 32 N. W. Rep., 781....828

PAGE.

St. Paul etc. Co., State v., 78 Minn., 331 650
Stanford v. San Francisco, 111 Cal., 202 737
Stanke v. City Street Improvement Co 607
Stansbury, Charters v., 10 Cal. App., 193 124
Stansbury v. Poindexter, 164 Cal., 710 ..... 124, 125, 126
Starke v. Prisque Isle Circuit Judge, 139 N. W., 29 577
State v. Chicago & Milwaukee Railway Co., 68 Minn., 381 33
State v. Conkling, 19 Cal., 501 242
State, Davis v., 68 Ala., 58 929
State v. Foster, 46 Atl., 833 1015
State v. Goodwill, 25 Am. St. Rep., 878 35
State v. Jacksonville etc. Co., 10 So. (Fla.), 590 650
State v. Levy, 68 N. E., 172 1015
State v. Moore, 104 N. C., 714 922
State, Oklahoma City v., 115 Pac., 1108 886
State, Railroad Co. v., 37 Ind., 489 650
State v. Railway Co., 85 Mo., 263 92
State v. St. Paul etc. Co., 135 N. W., 976 650
State v. Von Sachs, 45 La. An., 1416 504
State v. Whitlock, 63 S. E., 123 ..... 140, 141
State ex rel. Belt v. City of St. Louis, 61 S. W. Rep., 658 ..... 505, 507
State ex rel. Best, City of Ardmore v., 100 Pac., 913 887
State ex rel. Edwards v. Miller, 96 Pac., 747 887
State ex rel. Jacksonville v. Jacksonville Street Railway Co., 29 Fla., 590 92
State ex rel. Jennings, 57 O. St., 514 165
State ex rel. Kansas v. Corrigan Consolidated Street Railway Co., 85 Mo., 263 92
State ex rel. Manhattan Construction Co. v. Barnes, 97 Pac., 997 886
State ex rel. Young v. Ladeen, 116 N. W., 486 297
State Harbor Commissioners, Talcott v., 53 Cal., 199 ..... 383, 384
State of West Virginia, Dent v., 32 L. Ed., 625 34
State Printing Office, Gardiner v. 627
Steamboat "Pride of the West," Bryan v., 12 Mo., 371 17
Steele, Lawton v., 152 U. S., 133 36
Steinagel, Lightner v., 85 Am. Dec., 292 536
Stevens v. Tittle & Western Indemnity Co 787
Stockton Automobile Co. v. Confer, 154 Cal., 402 689
Stockton Laundry Case, 26 Fed., 611 ..... 554, 555
Stockton v. Whitmore, 50 Cal., 554 ..... 181, 183, 656
Stoltenberg, In re, 165 Cal., 789 ..... 462, 553, 712
Strauss, Commonwealth v., 191 Mass., 545 32
Stuart v. Board of Education, 118 Pac. Rep., 713 ..... 22, 24
Suburban Railway Co., People v., 53 N. E., 349 651
Sunset Telephone & Telegraph Co. v. Pasadena, 161 Cal., 265 ..... 137, 239, 240
Superior Court v. Deyoe, 140 Cal., 476 436
Sutter Street Railway Co., People v., 117 Cal., 604 ..... 231, 908, 909

PAGE.

Sutro, Kahn v., 114 Cal., 316 ..... 1005, 1006
Swasey, Welch v., 79 N. E., 746 143-45
Sweet, Estate of, 2 Coffey's Probate Decisions, 460 15
Sweetman, Ex parte, 5 Cal. App., 577 137
Sweigert, Edwards v., 15 Cal. App., 503 ..... 353, 444

T.

Taber, Amyx v., 23 Cal., 372 39
Talcott v. Harbor Commissioners, 53 Cal., 199 ..... 383, 384
Taylor, Ex parte, 87 Cal., 91 248
Terminal Railway Co., South Pasadena v., 109 Cal., 315 ..... 360-64, 366
Terry, Mutual Life Insurance Co. v., 82 U. S., 580 353
Thayer v. City of Boston, 206 Fed., 969 549
Thirteenth & Fifteenth Streets Passenger Railway Co., Philadelphia v., 169 Pa., 263 ..... 87, 91
Tillman, Donnelly v., 47 Cal., 40 745
Tillson, Lent v., 72 Cal., 428 ..... 869, 870
Title etc. Co., Coy v., 212 Fed., 520 970
Tittle & Western Indemnity Co., Stevens v. 787
Topeka, Crawford v., 20 L. R. A., 691 141
Town of Ellington, Town of Enfield v., 34 Atl., 818 15
Town of Enfield v. Town of Ellington, 34 Atl., 818 15
Town of Lowell, McNay v., 84 N. E., 778 446
Tranter v. City of Sacramento, 61 Cal., 275 691
Travelers' Insurance Co. v. Murray, 16 Colo., 296 353
Treanor v. Houghton, 103 Cal., 58 181
Trenton, Hurley v., 66 N. J. L., 538 92
True v. Fox, 155 Cal., 534 124
Truett, Dore v. 274-76, 327-29, 707
Turner, Merced Falls Gas etc. Co. v., 2 Cal. App., 720 278
Twist, Bates v., 138 Cal., 52 65

U.

Union Ferry Co., Hartford Bridge Co. v., 29 Conn., 210 26
Union Iron Works, McBride v., 1 Repts. of Ind. Acc. Comm., 376 878
United States, Canfield v., 167 U. S., 261 60
United States, San Francisco v. 116

V.

Van de Bogert, Yates v., 56 N. Y., 526 113
Van De Carr, New York v., 199 U. S., 550 552
Van Lanker v. Los Angeles, 1 Repts. of Ind. Acc. Comm., 107 878

PAGE.

Van Loenen v. Gillespie, 152 Cal., 223.....124
Van Winkle, Hansen v., 69 Atl., 1011.....755
Varney & Green v. Williams, 155 Cal., 318.....140
Vennen v. Lumber Co., 154 N. W., 640.....905
Vernon, Litchfield v., 41 N. Y., 123.....870
Villegra, First National Bank v., 92 Cal., 96.....315
Vint v. King, 28 Fed. Cas. No. 16950.....702
Virginia Railway Co., Gleeson v., 140 U. S., 435.....155
Von Langerke v. New York, 134 N. Y. S., 837.....706
Von Sachs, State v., 45 La. An., 1416.....504
Voorhis, People ex rel. Goodwin v., 20 N. Y. Supp., 941.....297

W.

Wagner v. Chemical Co., 23 Atl., 772.....905
Wallace, Pereria v., 129 Cal., 397.....409, 587, 915
Wallace v. San Jose, 29 Cal., 186.....364
Walston v. Nevin, 128 U. S., 582.....870
Wangenheim, Mulvey v., 23 Cal. App., 268.....961, 962
Warren v. Chandos, 115 Cal., 382.....182, 183, 656
Warren v. San Francisco, 88 Pac. Rep., 712.....632
Waters v. New York, 88 N. Y. Supp., 238.....900
Weaver, Adm'r v. Davis, 47 Ill., 235.....536
Weeks, Brady v., 3 Barb., 159.....40
Welch v. Swasey, 79 N. E., 746.....143-45
Wemple, People v., 39 N. E., 397.....147
Went v. Methodist Protestant Church, 30 N. Y. Supp., 157.....398
West, City of Rochester v., 164 N. Y., 510.....141
West Coast Lumber Co. v. Newkirk, 80 Cal., 275.....17
West Virginia, State of, Dent v., 32 L. Ed., 625.....34
Western Paving Co. v. Citizens Street Railroad Co., 128 Indiana, 525.....87, 92
Western Union Telegraph Co. v. Hopkins, 160 Cal., 106.....239, 240
Western Union Telegraph Co. Kind v., 65 S. E., 944.....165
Wheeler, County of Plumas v., 149 Cal., 758.....36
Wheeler v. Plymouth, 18 N. E., 532.....706
Wheeler v. Yarde-Buller.....872
Whitfield v. Longest, 6 Id., 268.....39
Whitlock, State v., 63 S. E., 123.....140, 141
Whitmier etc. Co. v. City of Buffalo, 118 Fed., 773.....141
Whitmore, Stockton v., 50 Cal., 554.....181, 183, 656
Whitwell, Ex parte, 98 Cal., 73.....36, 555
Wiley v. California Hosiery Co., 32 Pac., 522.....165
Williams, v. Belser, 129 Cal., 461.....669
Williams, Kansas City P. & G. R. Co. v., 58 S. W., 571.....155
Williams, Varney & Green v., 155 Cal., 318.....140
Williamson, People v., 135 Cal., 415.....823, 850
Williamson, People ex rel. Lawlor v., 135 Cal., 415.....585

PAGE.

Williamsport v. Williamsport Co., 203 Pa., 1 92
Wilmington, City of, Hartman v., 41 A, 74 449
Wilshire, In re, 103 Fed., 620 141
Wilson, City of Faribault v. 25 N. W. (Minn.), 449 435
Wilson, In re, 19 N. W., 723 146
Winbigler v. Los Angeles, 35 Cal., 36 691
Winthrop v. New England Chocolate Co., 180 Mass., 460 32
Wisconsin, Aikens v., 195 U. S., 205 60
Wittman v. Board of Police Commissioners, 19 Cal. App., 229 809
Wo See, 26 Fed., 471 552
Wong Wing, In re, 47 Cal. Dec., 162 570
Wood v. City of Haverhill, 55 N. E. Rep., 381 289
Woods, Franklin v. 824
Woodward, Berka v., 125 Cal., 119 447
Woodworth, Estate of, 31 Cal., 595 610
Woollacott v. Meekin, 151 Cal., 703 124
Wright v. City of Hartford, 50 Conn., 546 165
Wright, Singer Manufacturing Co. v., 97 Ga., 114 640
Wyeth v. Board of Health, Cambridge, 200 Mass., 474 ..... 32, 33
Wyman, Kirk v., 65 S. E., 387 770

Y.

Yarde-Buller, Wheeler v. 872
Yarnell v. Los Angeles, 87 Cal., 603 751
Yates v. Van de Bogert, 56 N. Y., 526 113
Yick Wo v. Hopkins, 118 U. S., 356 ..... 36, 551, 552
York, Fogarty v., 60 N. Y. Supp., 352 219
Young, State ex rel. v. Ladeen, 116 N. W., 486 297

Z.

Zhizhuzza, In re, 147 Cal., 324 ..... 461, 555

OFFICIAL OPINIONS

Budget, As Prepared by Board of Supervisors, for Fiscal Year 1912-13, So Far As Affecting Salaries and Maintenance of Board of Health, Conforms to Charter.

July 8, 1912.

Gentlemen: I am in receipt of your request for an opinion under date of June 28, 1912, as follows:

"At a special meeting of the Board of Health, held on June 27th I was directed to request that you inform this Department, if possible, before the commencement of the fiscal year, if the Board of Health has, in accordance with the Charter, exclusive control and disposition, except as provided in Article II, Chapter III, of the Charter, of all expenditures necessary for the proper management of the Health Department.

"The Board of Health feels that the budget for the fiscal year 1912-13, as prepared in detail by the Board of Supervisors, is a violation of the Charter, and to accept the same is to acquiesce in such violation. Your attention is especially called to Sections 3, 5 and 10 of Article X of the Charter, and also to the opinion of City Attorney Franklin K. Lane, San Francisco, 1899-1902, page 175.

"The powers of the Board of Supervisors in reference to the budget are prescribed as follows:

"'The budget shall be prepared in such detail as to the aggregate sum and the items thereof, as the Supervisors shall deem advisable.' The aggregate refers to the total of budget expenditures for salaries and maintenance of the Department of Health. In this way only, it appears to the Board of Health, can the different sections here referred to, be harmonized. The Board of Supervisors in one of the departments of the Board of Health followed this line of procedure, for the new budget provides:

"'Relief Home—

"'Salaries ..... $ 64,000

"'Maintenance 130,000

"There does not seem to be any logical reason for differentiating appropriations between the different departments of the Board of Health, nor why each department should not be sim-

ilarly summarized, leaving the actual expenditures within the limiting total appropriations to the sound discretion of those vested with authority 'to appoint the officers and employes, prescribe their duties and fix their salaries.'"

A comparison of the budget, as prepared in 1911-12, and for 1912-13, for the Department of Public Health, shows that the appropriations have been itemized minutely in the latter to a far greater extent than in the former budget. Under the former budget there was one general item, "Salaries, omitting salary of Dental Inspector, $112,260." Then there were items for the different employees at fixed salaries in the Emergency and Insane Detention Hospitals.

For the City and County Hospital there was one general salary item, $75,000. For the Relief Home for the Aged and Infirm there was a general aggregation, "Salaries, including increase of salary to Superintendent Wollenberg to $3,600-$69,000," and for the Isolation Hospital there was an aggregation of "Salaries, $11,100."

In the budget for 1912-13, however, we find under the Health Department that in almost every case the salary of each particular employee in the various departments under control of the Board of Health is itemized.

As an example, under Isolation Hospital we find "One resident physician, $2,400; one stenographer-bookkeeper, $1,080; one nurse, $1,080; one male nurse, $960; one nurse, $900; two cooks at $1,080 each, $2,160; six pupil nurses at $144 each, $864; one interne, $480; one waitress, $480; one night watchman, $960; one day watchman, $720; three wardmen at $360 each, $1,080; one helper, $480; one helper, $120; one laundryman, $240."

And so we find an attempt to itemize specifically in almost every department under the control of the Board of Health.

My predecessor, Franklin K. Lane, passed upon this same question in an opinion given to the Board of Supervisors on February 13, 1900, shortly after the Charter went into effect, and in this opinion Mr. Lane said:

"I have your communication of the 1st instant, inquiring as to your powers under the Charter in the matter of expenditures in the Health Department, and in reply beg leave to submit my construction of the provisions of law involved. The general

management of the financial affairs of the municipality is entrusted to your care, and with few exceptions you have discretionary power in the allowance or disallowance of claims made against the Treasury. The Board of Health, however, has exclusive control and disposition of all expenditures necessary in the institutions under its immediate control, excepting as to supplies furnished under contracts, which latter are to be provided by your Board in the manner laid down in Article II, Chapter III. * * * Finally, as to the necessity for approving demand upon the Treasury originating in the Health Department—it would seem from Section 13, Chapter III, Article III, that all such demands, excepting those for salaries, must receive the approval of your Board—so far, however, as such demands are lawful your duty is merely ministerial and you are required to approve them without question by your Board as to the advisability of the expenditures. The discretion in that matter is vested in the Health Department. If, however, such demands should exceed the appropriation provided in the budget or be in other respects actually unlawful, then you are justified in withholding your approval."

Article X of the Charter, treating of the Department of Health, provides, in Section 3 thereof, that "except as provided in Article II, Chapter III of this Charter it (the Board of Health) shall have exclusive control and disposition of all expenditures necessary in the institutions under its immediate control."

Section 5 provides that "the Board may appoint such officers, agents and employees as may be necessary for the proper and efficient carrying out and enforcement of the purposes and duties of the Board, and may fix their salaries and prescribe their duties."

Section 10 provides that "the Board shall fix, annually, the salaries of all officers and employees of the Board. * * *"

It seems very clear that the purpose of the Charter is to give to the Department of Health control over the number of employees to be appointed by the Board of Health and as to their compensation, exclusive from any control of the Board of Supervisors. The Board of Supervisors has absolutely no power in this matter except as to the first step of appropriating funds for that department. The Board of Health cannot, of course, exceed in its expenditures the amount which may be appropriated in

the budget by the Board of Supervisors, but if the Board of Supervisors may, as they have in the last budget done, itemize specifically the number of employees of the Board of Health, and the salary to be paid to each of them, then the purpose expressed in the Charter of giving control over just such matters to the Board of Health would be defeated. As an example, the Board of Health may, when it presents its estimate of expenses to the Board of Supervisors at the beginning of the year, prior to the making of the budget, be of the opinion that it will need ten internes at the City and County Hospital at a salary of $500 per annum each, and it would therefore estimate that the money needed for that purpose would be the amount of $5,000. However, it may be that prior to the fixing of salaries the Board of Health might ascertain that the needs of the hospital would be better met by the engaging of five internes at a salary of $1,000 each. Or an emergency might arise which would lead the Board of Health to the conclusion that money appropriated for salaries on an assumption that a certain number of internes were needed, might be better spent as to a portion thereof for a salary of, let us say a specialist in some particular disease that might become a serious menace to the city subsequent to the adoption of the budget. These are but some of the many contingencies which might arise in the Department of Health with reference to matters which are placed within its province by the Charter, and in my opinion there is no power in the Supervisors to take from the Health Department the use of the discretionary power vested by the Charter in the Board of Health in the matter of the number of its employees or the fixing of their compensation. The language of the Charter, "the Board may appoint such officers, agents and employees as may be necessary for the proper and efficient carrying out and enforcement of the purposes and duties of the Board, and may fix their salaries and prescribe their duties," is rendered meaningless if the Supervisors may adopt a budget which will be the rule of action for the Board of Health for the fiscal year for which the budget is adopted. In my opinion the language of Section 3, Chapter I, Article III, "the budget shall be prepared in such detail as to the aggregate sum and the items thereof allowed to each department, office, board or commission, as the Supervisors may deem advisable," when read in its relation to the Department of Health, does not permit of any such construction as to warrant the adoption of a budget in the form of the

last budget for the Health Department. "Aggregate sum" refers, of course, to the total sum of the budget and "the items thereof allowed to each department" refers to the segregation of this fund among the different departments.

Section 1 of Chapter I of Article III of the Charter provides that "on or before the first Monday in April in each year the heads of departments, offices, boards and commissions of the City and County shall send to the Supervisors an estimate in writing of the amount of expenditure, specifying in detail the objects thereof, required in their respective departments, offices, boards and commissions, including a statement of the salaries of their subordinates. Duplicates of these estimates shall be sent at the same time to the Auditor."

Section 2 provides that "On or before the first Monday of May in each year the Auditor shall transmit to the Supervisors an estimate of the probable expenditures of the city and county government for the next ensuing fiscal year, stating * * * the wants of all the departments in the municipal government in detail."

Section 3 provides that the Supervisors shall meet annually, between the first Monday of May and the first Monday of June, and adopt a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the City for the next ensuing fiscal year. And then, as above, "the budget shall be prepared in such detail as to the aggregate sum and the items thereof allowed to each department, office, board or commission, as the Supervisors shall deem advisable."

Section 5 provides that "The Supervisors must cause to be raised annually, according to law, and collected by tax, the amounts so appropriated, etc."

Section 11 provides that on or before the last Monday in June in each year the Supervisors shall levy the amount of taxes required to be levied upon all property not exempt from taxation.

We see, therefore, that the evident purpose of preparing the budget is to serve as a basis of action for the Supervisors for their understanding in determining what the tax rate shall be for the ensuing fiscal year. The Supervisors are assisted in reaching this conclusion by general estimates given by the

various departments, as well as by the judgment of the Auditor, who has been furnished with the same information. And also, in order that there may be no deficit at the end of the fiscal year, the Supervisors are given the general control over the various departments of the City, to limit the amount of money which may, in the aggregate, be spent by those departments. The function of the Supervisors is first, to estimate the amount of money that may be needed for each of the departments of the city government and then, having fixed a tax rate to meet the needs of all the departments, to control the various departments by forbidding their spending, in the aggregate, an amount which would lead to a deficit at the end of the fiscal year. But this purpose of giving general supervisory power to the Board of Supervisors over the finances of the City is in no way in conflict with the separate and distinct purposes of the Charter to give to certain departments absolute control over their affairs within the limits above described.

The purpose of the Charter framers in giving to the Board of Health control of its own department is clearly expressed in the Charter just as is the purpose of giving to the Board of Supervisors control over the amount of money that is to be allowed to the Board of Health. And as the former purpose would be defeated if the Board of Health is held to the terms of the budget as recently prepared by the Board of Supervisors, I am of the opinion and therefore advise, in conformity with the views expressed by former City Attorney Lane, that your Board is not controlled in the amount of salaries or the number of employees in your department, by that budget, except that you cannot expend more in the aggregate than has been allowed to you by the Supervisors. If the budget as prepared is to govern your Board in all its items, then the mere estimate of expenses furnished by you, which was the basis of the budget prepared, would become of greater significance than the actual use of discretion by your Board in fixing the number and salaries of the different employees. This would clearly defeat the express provisions of the Charter chapter dealing with the Department of Health. The Budget itself is described in the Charter as "the amounts *estimated* to be required to pay the expenses of conducting the public business." It is contrary to the spirit and letter of the Charter to say that this estimate of the Supervisors shall control in the manner above described.

I refer you further to my opinion of December 22, 1909, in which I advised the Playground Commission that the appropriation of money to that Commission by the Board of Supervisors in the annual budget did not fix the amount of salaries to be paid to employees of the Commission. In that opinion I advised as follows:

"Gentlemen: Under date of December 21st you ask to be advised whether the appropriation of money to the Playground Commission by the Board of Supervisors in the annual budget fixes the amount of salaries to be paid to each employee of the Commission.

"Section 5 of Article XIV-a of the Charter provides, among other things:

" 'That the Commission may employ superintendents, surveyors, engineers, laborers and other employees and assistants, and prescribe and fix their duties, authority and compensation. They shall have the exclusive management and disbursement of all funds legally appropriated or received from any source for the support and equipment of the aforesaid playgrounds.'

"Section 10 of the same Article provides that the Board of Supervisors shall annually appropriate to the Playground Commission such amount as may be necessary 'for the purchase, development, equipment and maintenance of playgrounds, and the Playground Commission shall have the exclusive management and disbursement of the same.'

"Under these provisions of the Charter it is evident that the Playground Commission has exclusive control over the amount appropriated by the Supervisors, and also that the Commission has the power to fix salaries of all employees, assistants, etc. The power to fix salaries and compensation includes the power to alter the same. That the appropriation in the budget is not the fixing of compensation was explained in the opinion of this office rendered to the Board of Police Commissioners on December 13, 1909. It was there held that the salaries of the employees of the Police Department could be fixed by Ordinance of the Board of Supervisors only, but the case differs from this in that the power to fix salaries was not given to the Board of Police Commissioners, as it is given to the Playground Commissioners."

I am of the opinion further that the general distinction between maintenance and salary allowances which has been made by the Supervisors is a proper one, and that your Board should restrict itself in the payment of salaries to the aggregate that has been allowed for that purpose; and the same with reference to the payment of maintenance expenses. Also, I am of the opinion that the classification made by the Supervisors, between different institutions under the control of your Board is one which, under the Charter, the Supervisors are authorized to make.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Health.

Board of Supervisors Is Without Power to Employ a Non-Resident Leader of Municipal Band.

July 9, 1912.

Gentlemen: I am in receipt of your communication of July 8th, as follows:

"Please be advised that the Board of Supervisors today adopted the following Journal Resolution No. 299.

" 'Resolved, That the City Attorney be and he is hereby requested to furnish this office with an opinion as to the power of the Board of Supervisors to provide for the employment of a non-resident as leader of the Municipal Band.'

"The Public Welfare Committee, before whom this subject matter is pending, wishes you to give this opinion by Tuesday afternoon, July 9th, which will be the last meeting of the Committee before the vacation period."

Opinion.

In reply, you are advised that the Board of Supervisors has no power, under the Charter, to provide for the employment of a non-resident as leader of the Municipal Band.

Respectfully,

PERCY V. LONG,
City Attorney.

Public Welfare Committee.
Board of Supervisors.

Recorder's Fees for Filing Builder's Contract and Builder's Bond, 25 Cents Each.

July 10, 1912.

Sir: I am in receipt of your communication of the 8th instant, as follows:

"Will you please inform me what fee I am legally entitled to charge for filing a building contract, and what fee for filing a builder's bond? I will appreciate a prompt opinion from you."

Opinion.

Section 1183 of the Code of Civil Procedure, as it existed before the amendment thereto approved May 1, 1911, made the filing of a building contract, when the amount agreed to be paid thereunder exceeded $1,000, in the Recorder's office in the county in which the property is located, mandatory to the extent that the non-filing of such contract made the same void. The section also prescribed that the County Recorder should receive the sum of $1.00 for such filing.

The amendment to Section 1183 of the Code of Civil Procedure, approved May 1, 1911, eliminates any reference to any filing fee for building contracts. It will be noticed, moreover, that Section 1183, as amended, does not make it obligatory upon the owner or any other party to the contract, to file the same in the Recorder's office. Such filing, however, takes the place and is equivalent to the giving of actual notice by the owner to all persons performing work or furnishing material thereunder.

Section 4300-C of the Political Code prescribes what fees the Recorder shall charge and collect for official services rendered by him. The sixteenth item of said section is as follows:

"For filing, indexing, and keeping each paper not required by law to be recorded, 25 cents."

In the absence of any special statute, such as Section 1183, as it was before amended in 1911, the sum of 25 cents was the only sum that could be collected by the Recorder for filing a building contract, being entirely eliminated from Section 1183 as amended in 1911, the only fee that can be collected by the Recorder for the filing of any building contract is the sum of 25 cents, as provided in Section 4300-C of the Political Code.

There being no special statute fixing a filing fee for a builder's bond, we must look to the provisions of Section 4300-C of the Political Code to ascertain what fee can be charged and collected by the Recorder for the filing of such bond. Item sixteen of said section provides for the collection, by the Recorder, of the sum of 25 cents for the filing of each paper not required by law to be recorded, which class includes building bonds.

The remedy to supply any deficiencies in the law regarding the filing fees of the Recorder lies with the Legislature of the State, and we are compelled to take the provisions of the law as they exist at the present time in determining this question.

You are therefore advised, in view of the foregoing, that you may charge only the sum of 25 cents for filing a building contract, and the sum of 25 cents for the filing of a builder's bond.

Respectfully,

PERCY V. LONG,
City Attorney.

Recorder.

Question of Residence Is Not Conclusively Determined by Re-Registration in a Particular Locality—Other Evidence May Be Considered.

July 14th, 1912.

Gentlemen: I am in receipt of your communication of July 11th, as follows:

"We are enclosing herewith testimony of Samuel Bermingham, Superintendent of Engines in this Department, taken before the Board of Fire Commissioners at a regular meeting on July 9, 1912, in regard to his residential qualifications as prescribed by the Charter for employees of the Fire Department, with the request that you advise us whether or not in your opinion there is any reason why Mr. Bermingham should not continue to act in the capacity of Superintendent of Engines in this Department, which position he has held since his appointment by this Commission on May 9, 1912."

You attached to this communication testimony of Samuel Bermingham, Superintendent of Engines, taken before the Board of Fire Commissioners on July 9, 1912, of which the following is a copy:

TESTIMONY OF SAMUEL BERMINGHAM, SUPERINTENDENT OF ENGINES, BEFORE THE BOARD OF FIRE COMMISSIONERS, JULY 9, 1912.

(Mr. Bermingham is sworn.)

President Brandenstein:

Q. This is a communication addressed to the Board of Fire Commissioners by Jos. T. Curley, representing the Municipal Civil Service Employees' Association, enclosing what purports to be a copy of your registration in the Great Register of Adameda County, September 23, 1908. Is it or is it not a correct copy of your registration?

A. I didn't see the copy.

Q. Did you register there?

A. According to that affidavit I must have done so, but I thought it was in 1906.

Q. State to the Commission when you first went over to Alameda County and the circumstances of your residence in that county, if you ever did acquire any residence there.

A. I came from Pinole, Contra Costa County, in August, 1906, and I resided in San Francisco on a towboat at Mission Street wharf. I must have been in Oakland in 1908. My wife came down from Contra Costa County, and that is where she lived at that time.

Q. How long have you been a resident of San Francisco prior to 1908?

A. Practically resided here all my life.

Q. Born in San Francisco and raised in San Francisco?

A. Yes, sir.

Q. And never resided outside of San Francisco?

A. No, sir.

Q. You always voted in San Francisco?

A. Yes, sir.

Q. Did you or did you not intend to take up your residence in Alameda County when you registered with the Registrar as an elector of that county?

A. No, sir, I did not.

Q. Why did you register in Alameda County?

A. Well, I was walking along Broadway with a party by the name of Charley Matthews, and he said, "Let's go over and register," and we went.

Q. For the purpose of voting there?

A. Yes, sir.

Q. The election took place in November?

A. Yes, sir.

Q. State whether or not you intended at that time or any other time to abandon your residence in San Francisco?

A. No, sir, I did not. As a matter of fact, I don't think I voted there.

Q. Do you remember whether you voted or not?

A. I hardly think so.

Q. You don't recall for a fact whether you did or not?

A. No, sir.

Q. How long did your wife reside in Alameda County?

A. Until, I think, the latter part of 1910.

Q. Did you at any time after this registration in Alameda County or before the removal of your wife therefrom register in San Francisco?

A. No, sir. I was away, back East, and just prior to this last election in November I went up to Contra Costa County for the Sugar Company, is the reason I did not register.

Q. When you say you maintained a residence in San Francisco during all this time, did you mean that you actually slept over here?

A. Yes, sir.

Q. Did you visit your wife in Alameda County?

A. I did occasionally. About once a week.

Q. Then you had no intention of abandoning your residence in San Francisco when you registered in Oakland?

A. No, sir.

Q. Did you own property in Oakland?

A. No, sir. My wife owns property and is on the assessment roll there.

Q. Are you on the assessment roll in San Francisco?

A. Only for personal property.

Q. In 1908, if you recall?

A. In my wife's name, I think, only.

Q. You don't think you were on the assessment roll there?

A. No, sir.

Q. In your judgment, where was your domicile, your actual residence, in 1908?

A. In San Francisco.

Q. In 1907?

A. In San Francisco.

Q. In 1906?

A. In San Francisco.

Q. And all the time prior thereto from the date of your birth?

A. Yes, sir.

Q. The only evidence of your having abandoned your residence in San Francisco being your registration in Oakland in 1908?

A. Yes, sir.

Q. You state you did not intend to abandon your residence here?

A. I did not intend to, no, sir.

Q. And you registered there only for the purpose of voting at the election there that year?

A. Yes, sir, and I am not sure that I voted there then.

Q. You assumed you had the right to register on the theory that your family was residing in Oakland?

A. Yes, sir.

Q. And when you gave your residence as 5335 Grove street you intended thereby to indicate the residence of your family, did you not?

A. Yes, sir.

There has also been submitted to this office the following affidavit of John J. Kriess:

State of California,
City and County of San Francisco. } ss.

JOHN J. KREISS, being first duly sworn, according to law, deposes and says:

That he is a resident of the City and County of San Francisco, State of California, of the age of forty years. That he has resided in the said City and County of San Francisco since his childhood.

That he has known Samuel Bermingham, who is now Assistant Superintendent of Engines of the San Francisco Fire Department, since boyhood.

That the said Samuel Bermingham is a resident of the City and County of San Francisco, State of California.

That the said Samuel Bermingham resided at affiant's house at No. 1724 Mason street, in said city and county, from the month of May, 1907, until September, 1908, and that the said Samuel Bermingham resided at affiant's home at No. 860 Green street, in said city and county, from September, 1908, up to February, 1912.

JNO. J. KREISS.

Subscribed and sworn to before me this 10th day of July, 1912. (Seal)

RICHARD H. JONES.

Notary Public, in and for the City and County of San Francisco, State of California.

Opinion.

It appears that Mr. Bermingham registered as a voter in Oakland on September 23, 1908, and your inquiry is whether this registration which was made less than five years prior to the date of his appointment to the position of Superintendent of Engines in the Fire Department, disqualifies Mr. Bermingham for such position by reason of the provision of Section 6, Chapter I, Article IX of the Charter of this city and county, to the effect "that all persons appointed to positions in the department must at the time of their appointment * * * have been residents of the city and county at least five years next preceding the date of their appointment. * * *"

The question of residence is always a question of fact, the primary consideration being *the intention* of the person whose residence is in question. Section 52 of the Political Code of this State provides:

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

"1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

"2. There can only be one residence.

"3. A residence is not lost until another is gained. * * *"

In Quinn vs. Nevills, 7 Cal. App., at 233 the Appellate Court of this State said:

"Neither voting nor registration as a voter is conclusive on the question of domicile."

The Supreme Court of California affirmed the above language of the Appellate Court in the case of Bradley vs. Davis, 156 Cal. 267, the Supreme Court saying:

"It has heretofore been held, and we think correctly, that the mere fact that one is registered in a certain place and has voted therein is not conclusive evidence upon the question of his domicile."

In Town of Enfield vs. Town of Ellington, 34 Atl., 818, at 819, col. 1, the Court said:

"Neither registry as an elector, nor the exercise as such of the right of suffrage, is conclusive evidence of domicile; but it tends to prove it, and may be shown by record entries."

In the case of the Estate of Michael J. Samuel, Myrick's Probate Reports of San Francisco, 1872-1879, at page 228, the decedent, who died in San Francisco, lived on a farm at Livermore, but for certain secondary objects he had his name enrolled on the Great Register in San Francisco and voted here. He also became a member of a lodge in San Francisco, wherein residence in this city was essential, and he made declarations to that effect. Sometimes he spoke of Livermore as his home and sometimes of San Francisco. The Court decided that his having registered to vote in San Francisco was not conclusive, and that as a matter of fact his residence was at Livermore.

In the "Estate of Sweet," 2 Coffey's Probate Decisions 460, it was held that the acts and conduct of a person are more conclusive in determining his domocile than are his declarations.

From the above authorities it is very clear that the question of residence is not conclusively determined by the registration for voting in any particular locality. I am therefore of the opinion that your Board, in considering the evidence which you have submitted to me, is not bound, as a matter of law, to hold that, merely because Mr. Bermingham registered in Oakland, his residence has not been continuous in San Francisco for five years immediately preceding his appointment as Superintendent of Engines. This is a question of fact to be determined by your Board, and you are advised that the law does not make it incumbent upon your Board to consider the registration as a conclusive element, although it is, of course, a factor which your Board may properly take into consideration in finally determining this matter.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Teams and Buggies Are Supplies Within the Meaning of Section 1, Chapter III, Article II of Charter, and a Bid to Supply Them Must Be Accompanied With Adequate Security.

July 17th, 1912.

Gentlemen: I am in receipt of your communication of the 12th instant, as follows:

"The Committee on Supplies requests your opinion on the interpretation of Section 1 of Chapter III, Article II of the Charter.

"Does the said section charge the Board of Supervisors with the duty of making contracts with the lowest bidder, offering adequate security, for the supplying of teams and buggies required by the various departments, offices, Boards and Commissions of the city and county?"

Opinion.

Hon. Franklin K. Lane, former City Attorney, rendered an opinion on the 17th day of April, 1900, to the Board of Fire Commissioners, holding, that a horseshoeing contract is a con-

tract for supplies, and as such, it was to be included in the contracts made by the Board of Fire Commissioners. As authorities to sustain his views he cited the following definitions of the word "supplies":

"The word 'supplies' has been held to include board for men (Kellock vs. Parcher, 9 N. W., 67), printed copies of a municipal charter (McSpedon vs. Mayor, 7 Bosw., 601), labor employed in cooking (Winslow vs. Ulquehart, 39 Wis., 261), money (Bryan vs. Steamboat 'Pride of the West,' 12 Mo. 371), a pier used for dumping purposes (Farmers' Loan and Trust Company vs. Mayor, 4 Bosw., 80), and it seems quite broad enough to include the supplying of the city's horses with proper shoes."

In addition to the authorities cited by Mr. Lane and bearing directly upon the matter involved in your communication, I refer to the case of in re Hazel Township (Pa.), 6 Kulp, 491-493, in which the Court used the following language:

"If we are to stand upon the mere etymology of the word 'supply,' in the Act prohibiting any officer or agent of any corporation or municipality to be interested in the sale or furnishing of any supplies or materials to the organization or body which he represents or of which he is a member (Act March 31, 1860, Section 66), we find it derived from 'sub,' meaning under, and 'plere,' to fill, and defined by Webster as 'the act of furnishing with what is wanted.' As a noun it is generally used in the plural, and we are unable to see why the word 'supplies' cannot be applied to horses, wagons, cars, or labor indiscriminately. Under such section township supervisors are prohibited from employing their own teams or minor children upon the township roads."

While there is no decision of the Appellate Courts of this State holding that the word "supplies" includes the supplying of teams, etc., yet there are decisions holding that "cartage" is a portion of the cost of materials furnished for the construction of a building, and may properly be allowed as part of the materials furnished, upon foreclosure of a mechanic's lien.

West Coast Lumber Co. vs. Newkirk, 80 Cal. 275.

McClain vs. Hatton, 131 Cal. 132.

It appears to me that the Supreme Court, in the cases last cited, has gone to the extreme limit of construction in holding that "cartage" is a part of the materials furnished for a building, and in view of said decisions, it is not a violation of the rules of construction to hold that the supplying of teams, etc., which is but "cartage" expressed in another form, can be included in the word "supplies" as used in Section 1, Chapter III, Article II of the Charter.

You are advised, therefore, that the supplying of teams and buggies by the various departments, offices, boards and commissions of the city and county is a "supply" within the meaning of the word as used in Section 1, Chapter III, of Article II of the Charter, which provides that "All contracts for goods, merchandise, stores, supplies, * * * must be made by the Supervisors, with the lowest bidder offering adequate security, * * *".

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Delay of a Few Weeks in Recording Tax Deeds for Property Sold to State, Under Facts Stated, Does Not Affect Validity of State's Title.

July 17, 1912.

Sir: I am in receipt of your communication of July 16th, as follows:

"Please advise me in the following matter:

"Tax deeds for property sold to the State on the 24th day of June, 1907, for the fiscal year 1906, would, under ordinary circumstances, have been recorded about July 1st, 1912.

"These deeds have been made out, but, in consequence of the sickness of Mr. David Bush, are not signed, and consequently cannot be recorded.

"Kindly advise me if the delay in recording these deeds will in any way affect the validity of the State's title."

Opinion.

Section 3785 of the Political Code provides that if property is not redeemed within five years from the date of the sale to the State, "the Tax Collector, or his successor in office, must make the State a deed of the property. Said deed shall be in substance and may be in form as follows: * * *"

You are advised that, under the circumstances described in your communication, a delay in recording such a deed will not affect the validity of the State's title.

Respectfully,

PERCY V. LONG,
City Attorney.

J. O. LOW, Chief Deputy Tax Collector.

Permit to Open Certain Streets by the Owner of Waterworks, Since Constitutional Amendment Adopted October 10, 1911, Must be Denied, Unless the Streets Were Occupied by His Mains Prior to Said Amendment.

July 17th, 1912.

Gentlemen: I am in receipt of your communication of the 28th, which reads as follows:

"Application has been made to this Board by one J. W. Bloom for permission to open certain streets adjacent to Hillcrest, in connection with the operation of a waterworks owned by him. Certain property owners in that neighborhood have filed objections with this Board, and the matter has been in the courts. By Resolution No. 18,341, Second Series, passed June 26, 1912, it is requested that you furnish this Board with an opinion as to whether or not his petition should be granted."

Opinion.

On the 13th day of January, 1912, I advised your Board as to the rights of public service corporations in the streets of San Francisco. In accordance with the views therein expressed, I advise you that if Mr. Bloom is seeking permission to open streets for the purpose of extending his water system into streets

not occupied by his water system on the 10th day of October, 1911, his application should not be granted.

If, on the other hand, permission is sought to open streets which on the 10th day of October, 1911, were occupied by Mr. Bloom's water mains, his application should be granted upon his complying with the ordinances of the city and county regarding the opening of streets. The matter that came into the Courts did not concern the right of Mr. Bloom to use the streets for laying down water mains, but only concerned relations existing between Mr. Bloom and certain of his customers. The city was not a party to that case, and that action does not in any way affect Mr. Bloom's application.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Section 2 of Article XVI of the Charter, Relating to Residential Qualifications of City Employees and Officers, Not Applicable to Teachers.

July 23rd, 1912.

Gentlemen: I am in receipt of your communication of June 14th, 1912, which contains a copy of your Resolution of June 13th, 1912, as follows:

"Resolved, That the City Attorney be and is hereby respectfully requested to render opinion as to whether or not Section 2 of Article XVI of the Charter of the City and County of San Francisco, referring to residential qualifications of teachers, is mandatory upon the Board of Education, in view of Senate Amendment No. 48."

Opinion.

The above Resolution assumes that the provisions of Section 2 of Article XVI of the Charter are applicable to teachers, and your inquiry is whether the Charter provision is mandatory upon the Board of Education, in view of Senate Amendment No. 48.

Senate Constitutional Amendment No. 48 (see Statutes and Amendments to the Codes, 1911, part 2, page 2166), provides in all material part as follows:

"Section 8½. It shall be competent, in all Charters framed under the authority given by Section 8 of Article XI of this Constitution, to provide, in addition to those provisions allowable by this Constitution and by the laws of the State, as follows: * * *

"2. For the manner in which, the times at which and the terms for which the members of Boards of Education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such Boards. * * *

"4. * * * Where a city and county government has been merged and consolidated into one municipal government, it also shall be competent, in any charter framed under said Section 8 of said Article XI, or by amendment thereto, to provide for the manner in which, the times at which and the terms for which the several county and municipal officers and employees whose compensation is paid by such city and county, excepting judges of the Superior Court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. All provisions of any charter of any such consolidated city and county heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid."

Subdivision 2 of this Amendment is applicable to members of Boards of Education, and among other particulars, permits City Charters to provide for the qualifications, compensation and removal of such members. The words "for their qualifications, compensation and removal" have been recently added, and the whole section as it now stands was adopted October 10, 1911.

On the face of this subdivision the State does not yield up to the City the power to change the entire status of a member of the Board of Education from a State officer to a Municipal officer; and, so far as this subdivision 2 of said section 8½ is concerned the provisions of Section 2 of Article XVI of the Charter are not mandatory upon your Board.

In the recent case of Bannerman vs. Boyle, 160 Cal. 197, decided in June, 1911, the Supreme Court rather doubted the effect of this Constitutional Provision, there saying:

"We have also assumed that it is competent for the Charter of San Francisco to provide for the removal of a member of the Board of Education, although he may be, in law, an officer of the State, administering a branch of the State school system, and the constitution (Article XI, Section 8½), it is claimed, does not expressly allow the City Charter to do more than fix his term of office and the time and mode of appointment or election. We find it unnecessary to decide either of these propositions, and we express no opinion concerning them."

Bannerman vs. Boyle, 160 Cal. 209.

Subdivision 4 of this Constitutional Amendment purports to validate those provisions of the Charter which are in accordance with this Amendment, and it will be observed that this Amendment permits *the Charter to provide* for "the manner in which, the times at which, and the terms for which the *several county and municipal officers and employees* whose compensation is paid by such City and County, excepting judges of the Superior Court, shall be elected or appointed," and for their recall, etc.; and, among other matters, for the "qualifications, tenure of office, and removal" of their employees.

This section is specifically applicable to county and municipal officers and their employees, and cannot be said to extend the application of Section 2 of Article XVI of the Charter to those who, as I have several times advised you, are not included within its terms as county and municipal officers or employees, namely, teachers in the public schools.

It will be seen, then, that your resolution assumes a very important point of inquiry, namely, that Section 2 of Article XVI of the Charter applies to teachers. While in the recent case of Stuart vs. The Board of Education, 118 Pac. Rep. 713, it was, among other arguments, strongly urged by this office upon the Supreme Court's attention that, inasmuch as the public school buildings of this city were as much the property of the city as are its engine houses, hospitals, etc. (Law vs. San Francisco, 144 Cal. 391), that the public school buildings must be officered by teachers who are permanent inhabitants of the city, and that

the provisions of Section 2, Article XVI of the Charter should be held applicable to teachers, and, though it was also strongly contended by this office, in the Stuart case, that the public school teacher is an officer, and as such he is required by the provisions of General Law (Section 996 Political Code, Subdivision 5) to reside within the territorial limits of the school district; yet the Supreme Court, as you have already been made aware, in my opinion to your Board of January 3, 1912, did not pass on either of these points, but held, after showing that your Board, both under the general law (Pol. Code, Section 1616) and under the Charter (Article VII, Chapter III, Section 1), had full power to pass your resolution of March 10, 1909—that it was because of the Charter provisions requiring all officers and employees of the city to actually reside within municipal limits (Article XVI, Section 2) and, because of the general law provision (Section 996, Subdivision 5, Pol. Code) requiring all officers to reside within the territory where their duties are to be performed, that your resolution of March 10, 1909, was a reasonable requirement and must be upheld. The Supreme Court further advanced potential reasons why your resolution was proper, if not indispensable, saying:

"In view of the fact that the Charter of the City and County of San Francisco requires all of its officers, deputies, clerks, assistants, and other employees, including the members of the Board of Education itself, to be residents of the city and county, and in view of the further fact that the State law contemplates a like residence of officials within the territory where their duties are to be performed (Pol. Code, Section 996), it will not be said that the resolution of the Board of Education, requiring a residence of teachers within the municipality, is unreasonable. To the contrary, in contemplation of the fact that the teacher stands in loco parentis, that it may become her duty to devote her time to the welfare of individual pupils, even outside of school hours, that the hurrying for boats or trains cannot be regarded as conducive to the highest efficiency on the part of the teacher, that tardiness may result from delays or obstructions in the transportation which a non-resident teacher must use; and, finally, as has been said, that the 'benefit of pupils and resulting benefits to their parents and to the community at large, and not the benefit of teachers, is the reason for the creation and support of the public schools.' (Bates vs. Board of Education, 139 Cal. 145, 72 Pac. 907), all these, and many more

considerations not necessary to detail, certainly make the resolution in question a reasonable exercise of the power of the Board of Education."

So far, then, as the provision of Section 2 of Article XVI of the Charter is concerned, I must advise you, as heretofore, that the same is not applicable to teachers, and that the actual residence of teachers within the city finds its authorization in the reasonableness of your resolution of March 10, 1909, and in the decision of the Supreme Court in Stuart vs. Board of Education, 118 Pac. 713.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Education.

Ocean Shore Railroad Franchise—Board of Supervisors Alone Has the Power to Grant a Franchise for Laying Spur Tracks or Side Tracks—Resolution No. 7814 (New Series) of Board of Public Works Invalid.

July 23, 1912.

Gentlemen: I am in receipt of your communication, as follows:

"By direction of the Committee on Streets and Sewers, request is made for an opinion as to whether or not the Ocean Shore Railway Company has a legal right to operate cars over a spur track in Twelfth street from the tracks of the Ocean Shore Railway Company to the property of E. B. & A. L. Stone Company, at Twelfth and Mission streets."

Opinion.

On the 31st day of July, 1906, the Board of Supervisors adopted Ordinance No. 40 (New Series) entitled "An Ordinance Amending Section 1 of Ordinance No. 1808,"

"Providing for a grant to the Ocean Shore Railway Company, a railroad corporation, of a right-of-way for, and the right to construct, maintain and operate a railroad, together with all necessary branches, side-tracks, turn-outs, switches, crossings, spur-tracks, yard-tracks, depot-tracks and terminal tracks and

facilities, along, over, under, across and upon certain streets, avenues, alleys, places and properties in the City and County of San Francisco, and adding thereto a new section to be numbered seventeen."

Section 1 of said Ordinance No. 40, among other things, grants to the Ocean Shore Railway Company a franchise, over and along the following streets of the City and County of San Francisco, viz.:

"Commencing and connecting with the tracks of said Ocean Shore Railway Company, on Vermont street, where the same intersects the southerly line of Army street; * * * thence northerly crossing Harrison street and along Twelfth street to the southeasterly line of Market street. All street crossings, except Division street crossing, shall be at grade. Division street crossing on Florida street shall be by an overhead crossing, having a clear head-room of not less than fourteen (14) feet.

"Provided, however, that the grantee of this franchise shall be and is hereby authorized and permitted to construct, maintain and operate its said railroad over, along, upon and across any private right-of-way, which said grantee may acquire at any time hereafter, between said intersection of Vermont street with the southerly line of Army street and the intersection of the southeasterly line of Market street with Twelfth street, and across, over and upon such streets as will be intersected in the construction, maintenance and operation of said railway over said private right-of-way."

Ordinance No. 40 (New Series) was amendatory of Ordinance 1808, approved April 2nd, 1906.

The right of the Ocean Shore Railway Company to operate cars over a spur-track connecting with a track maintained by said company in Twelfth street, across Mission, thence across private property, thence across Otis street, connecting with the bunkers located on the northwesterly line of said Otis street, owned and operated by the E. B. & A. L. Stone Company, must be measured by the terms of the franchise granted to the said Ocean Shore Railway Company, under and by virtue of said Ordinance No. 40 (New Series).

This franchise gives the right to the Ocean Shore Railway Company to lay its tracks along and upon Twelfth street from Harri-

son street to the southeasterly line of Market street. It is a fact that Twelfth street northeastely from Mission street is not in a direct line with Twelfth street southeasterly from Mission street. It cannot be said, however, that the legislative body of this City and County at the time of the granting of said franchise, had in mind anything else than to grant said franchise along the streets as they existed at said time. The grant, therefore, being restricted to Twelfth street and running along said street to the southeasterly line of Market street, must be, strictly construed according to its terms and that being so, no rights were granted to said Company to proceed with its tracks in any other direction than as indicated.

The ordinance contains a proviso that the Ocean Shore Railway Company be authorized to construct and operate its railroad over private rights of way, etc., between Vermont and Army streets and the southeasterly line of Market street with Twelfth street and across such streets as will be intersected in such construction, etc.

That proviso, however, does not broaden the terms of the franchise to the extent to authorize the maintenance and operation of the spur-track in question. It does not appear that the Ocean Shore Railway Company has acquired any private rights of way in the property on which the bunkers are operated. On the contrary, it is conceded to be the fact that said property is in private ownership of others.

Assuming for the purpose of this opinion, but not admitting, that the franchise granted by Ordinance No. 40 (New Series) is ambiguous in not definitely locating the streets over which said Company may construct its tracks under the terms of the proviso, any ambiguity in the terms of the grant of said franchise must be construed against the grantee and in favor of the public and nothing passes by implication.

Bertram vs. Central T. Co. 25 Cal. 283;
Bridge vs. Bridge, 9 Law. Ed. (N.S.) 773;
Hartford Bridge Co. vs. Union Ferry Co. 29 Conn. 210;
Shorter vs. Smith, 9 Ga. 517.

Invoking the aid of that doctrine as universally enunciated by the Courts, the terms of the franchise granted to the Ocean Shore Railway Company must be construed against it and it would

require the strongest kind of a showing on its part, much stronger than I have been able to discover, to justify it in the operation of its cars over and upon the spur-track.

At my request Marsden Manson, Esq., City Engineer, prepared a map or diagram delineating the route or location of the tracks of said Ocean Shore Railway Company as per the franchise granted under Ordinance No. 40 (New Series) and on said diagram is shown the spur-track operated by said Ocean Shore Railway Company running to the said bunkers, connected with the main line of said company in Twelfth street at a point a short distance southeasterly from the southeasterly line of Mission street. Said diagram, which is hereto attached for your information, shows that all tracks authorized by Ordinance No. 40 (New Series) in the vicinity of Twelfth and Mission streets, can only be maintained along Twelfth street to Mission street; thence curving into Mission street and thence in a northeasterly direction across Mission street to Twelfth street, formerly Potter street, and thence to the southeasterly line of Market street.

Section 466 of the Civil Code requires that:

"Every railroad corporation in this state must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land required for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the Secretary of State; and also like maps of the parts thereof located in different counties, and file the same in the office of the Clerk of the county in which such parts of the road are there to remain of record forever. The maps and profiles must be verified by the chief engineer, the acting president and secretary of such company, and copies of the same so certified and filed, be kept in the office of the secretary of the corporation, subject to examination by all parties interested."

The Ocean Shore Railway Company, in compliance with said section, filed the map required in the Clerk's office of the Board of Supervisors on the 8th day of May, 1909. An examination of said map discloses that the Ocean Shore Railway Company made no claim that its franchise gave it the right to maintain the spur-track in question. I find, however, that the Board of Public Works on the 2nd day of April, 1909, adopted Resolution No. 7814 (New Series) as follows:

"Permission is hereby granted the Ocean Shore Railway Company to extend their tracks on Twelfth street over and across Mission street from a point seventy-three feet southwest of the junction of Mission and West Mission streets; thence northerly across private property to West Mission street; thence across West Mission street to Bunkers located on the north side thereof about one hundred and twenty-two feet west of Twelfth street, provided a girder rail satisfactory to the Board of Public Works be used.

"BOARD OF PUBLIC WORKS,

"By Robt. Loughery,
"Secretary."

In regard to said resolution, if the purpose of it was to grant a permit to the Ocean Shore Railway Company to operate a spur-track, I will say that the Board of Supervisors of this City and County, under Sub. 3, Sec. 1, Chap. II, Art. II of the Charter, is the only board or officer possessing the power to grant permits for the laying down of spur-tracks or side-tracks and running cars thereon. In view of said section and of the absence of any provision in the Charter granting to the Board of Public Works authority to grant permits for the laying down of spur or side-tracks, it is my opinion that the Resolution adopted by the Board of Public Works on the 2nd day of April, 1909, viz.: Resolution No. 7814 (New Series) is invalid and confers no rights on the Ocean Shore Railway Company to maintain said spur-track.

You are advised that the ordinance granting the franchise to the Ocean Shore Railway Company gives it no right to construct in the first instance and consequently no right to maintain said spur-track and therefore said Company has no legal right to operate cars thereon.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Clerks in Department of Elections, Appointed Under Sec. 4, Chap. I, Art. XI of Charter, Are Entitled to Salary for the Time Actually Employed.

July 26, 1912.

Gentlemen: I am in receipt of your query under date of July 15, as follows:

"Can allowance be made to employees in the Department of Elections appointed pursuant to Section 4, Chapter I of Article XI of the Charter of said City and County for salary while they are sick during the period of such employment?

"By the word 'sick' as above employed meaning that they are not able to report for duty and instead report that they are sick and cannot report for that day and perhaps report is kept up for several days while such sickness lasts."

In the matter of the employment of clerical assistance, your Board is governed by the following language of the Charter:

Section 4, Chapter I, Article XI. "The Board may appoint such other clerical assistants as may be necessary at a salary not to exceed one hundred dollars a month each for the time actually employed. The Board shall, by resolution adopted by a majority vote of all its members and entered upon its minutes, designate the service to be rendered by such assistants and the time for which they shall be employed. The time of employment of such assistants shall not be extended except by like resolution of the Board, and when a salary shall have been once fixed it shall not be increased. This section is subject to the provisions of Article XIII of this Charter."

The language, "each for the time actually employed," as found in the above section is to be found elsewhere in the Charter only in Section 2, Chapter II, Article IV, wherein the Auditor is authorized to employ "such number of extra clerks during the time their services may be necessary for the lawful discharge of his official duties, as the Board of Supervisors may designate. Such extra clerks shall each receive a salary not to exceed one hundred dollars a month for the time they shall be actually employed."

These provisions contemplate the employment of clerical assistants for broken periods and not by yearly or monthly

service. The undoubted intent of the Charter was to place such employment upon an actual time basis and it was not contemplated that compensation shall be had for any service except upon an actual time measurement, and you are so advised.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Election Commissioners.

Undertaking Establishments — Supervisors May Not Make the Right to Engage in Such Business Dependent Upon the Board's Will, But May Impose Reasonable Restrictions Upon Manner of Conducting the Business—Cattle-pens Should Be Near Slaughter Houses—Cattle in Any Unfenced Lot May Be Seized and Held by Pound-keeper.

July 27, 1912.

Gentlemen: I am in receipt of your communication as follows:

"I have been instructed by the Public Health Committee of the Board of Supervisors to request you to furnish legal opinions on the following questions arising in the course of investigations being made into certain complaints:

"1. Under the existing laws and ordinances of the City and County, is it necessary that permission be granted by the Board of Health and Board of Supervisors before an undertaking establishment can be legally opened for the transaction of business?

"If the existing laws are found by you to be inadequate or ineffective, kindly draft an ordinance remedying any defects found and file same with the Committee on or before Wednesday, May 15, 1912, at 10:30 a. m.

"2. What legal steps are necessary to abate the nuisance caused by the moving of cattle from corrals in the Bay View district to the slaughter houses in Butchertown; also to prevent the grazing of cattle and sheep on the hills in said district?

"Is it within the power of the Board of Supervisors to compel

the removal of the corrals to locations closer to the slaughter houses?

"The matters involved in question 2 will come up for consideration at the committee meeting to be held Wednesday, May 22, 1912, at 10:30 a. m. and it is desired that your answer to same be filed on or before that time.

"You also are respectfully asked to have a representative of your office present at the meeting of the Committee on Wednesday, May 15, 1912, at 10:00 a. m., when investigation will be made into complaint that Dr. K. O. Steers is conducting a dog hospital at Fifth avenue and Geary street without a permit. The presence of your representative is necessary as it is likely that legal questions will arise during the course of the investigation."

Opinion.

I will consider the questions propounded by you seriatum. First: As to the sufficiency of the present ordinance which requires the procuring of a permit from the Board of Supervisors by any one wishing to engage in the business of undertaking and embalming as a precedent thereto. The present ordinance on that subject is Ordinance No. 16 (New Series), approved June 12, 1906, entitled, "Prohibiting the establishment and maintenance of undertaking or embalming establishments, without first obtaining a permit therefor from the Board of Supervisors."

The first section of the ordinance material to this opinion is as follows:

Section 1. "No person, firm, association, company or corporation, shall establish, maintain or operate an undertaking or embalming establishment in the City and County of San Francisco, without first obtaining from the Board of Supervisors a permit to establish, maintain or operate the same."

I have been informed that this ordinance was declared invalid by Judge Cabaniss in Department No. 12 of our Superior Court in the latter part of the year 1909, in the matter of the application of one H. P. Peterson for a writ of habeas corpus.

The business of undertaking or embalming is a lawful occupation and is not of itself, irrespective of the manner in which

it is conducted, offensive or dangerous to the health of those living within its vicinity; more than that, it is a useful and necessary occupation and occupies the same plane with respect to the law as that of a dry goods merchant or grocer. It has been held by the courts that no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners or a Board of Supervisors. There is a wide difference and distinction between prohibition and regulation. The business of undertaking or embalming, while not within the power of the Board of Supervisors to prohibit entirely, is nevertheless subject to proper regulations and the Board may adopt an ordinance imposing reasonable regulations when deemed necessary for the public health and safety, as to the manner in which such a business shall be conducted, and for this purpose may, in the exercise of its police power, impose reasonable restrictions as to the kind of building that may be used for such purpose. Of the power of the municipality to exercise complete control of this business so far as is necessary for the protection of the public health and the promotion of public safety there is no question.

The right of a person to engage in the undertaking business has been passed upon by the Supreme Court of the State of Massachusetts, in the case of Wyeth vs. Board of Health of the City of Cambridge, 200 Mass. 474; 86 N. E. 925; 128 Am. St. Rep. 439, wherein the Court said:

"The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood. Substantially the same right is secured also by the constitution of the United States, which does not permit a state to deprive any person of life, liberty or property without due process of law. The nature of this right has been stated and illustrated in many cases: Commonwealth vs. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L. R. A., N. S. 968; Commonwealth vs. Perry, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E., 1126, 14, L. R. A. 325; Winthrop vs. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; Austin vs. Murray, 16 Pick. 121; Lochner vs. New York, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937; Allgeyer vs. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; Yick Wo vs. Hopkins, 118 U. S. 356,

6 Sup. Ct. Rep. 1064, 30 L. ed. 220; Minnesota vs. Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455.

"There is no doubt that the refusal to permit one to engage in the business of an undertaker is a violation of this right, unless there is some good reason for the refusal, and the refusal to permit one to bury the dead body of his relative or friend, except under an unreasonable limitation, is also an interference with a private right that is not allowable under the constitution of the commonwealth or the constitution of the United States.

"In the exercise of the police power, such kinds of business as require regulation in the interest of the public health, the public safety, or the public morals, and perhaps in a strict sense in the interest of the public welfare, may be regulated by the state, and no other interference of the public to the detriment of an individual is permissible.

"The burial of the dead has such relations to the public health that it well may be regulated by law. In possible aspects of it its regulation may be made in the interest of the public morals. For the detection of crimes which result in death there well may be regulation in the interest of the public safety. In the exercise of the police power the legislature of this state has made elaborate provisions and strict regulations covering these subjects: Revised Laws, c. 78, secs. 37 to 44 inclusive, c. 29, secs. 6-8, 10-12, 15."

In the case of State vs. Chicago & Mil. Ry. Co., 68 Minn. 381; 64 Am. St. Rep. 482, the Court in discussing a statute of the State of Minnesota entitled "An Act to license and regulate the business of storage companies and warehouse men (other than warehouse men of grain in bulk) and to provide a penalty for violation of the same," used this language on the proposition of the power of the legislature to regulate a lawful business:

"We have no doubt that the public storage and warehouse business is one that is subject to the police power of the state to adopt such reasonable regulations as the legislature may deem necessary for the protection of the public who entrust their property to those carrying on such a scheme. We may also admit that it is within the police power of the state to adopt any reasonable regulations for the preservation and protection of property which has been transported to the place of its consignment by a common carrier, and is abandoned, or not

claimed within a reasonable time, by the consignee or owner. It is also true that, where a business is a proper subject of police regulation, the legislature may, in the exercise of that power, adopt any measures they see fit, provided, only, that they adopt such as have some relation to and have some tendency to accomplish the desired end; and if the measures adopted have such relation or tendency, and do not violate some provision of the constitution, the courts will not assume to determine whether they are wise or the best that might have been adopted.

"But, while the police power of the state is a very extensive one, it is not without limits. A law enacted in the exercise of the police power must be a police regulation in fact. If it will not conduce to any legitimate police purpose, or if it amounts to an arbitrary and unwarranted interference with the rights of the citizen to pursue any lawful business, the courts have a right, and it is their duty, to declare the law unconstitutional. The business of a common carrier and the storage and warehouse business are both lawful without any license or authority from the state. Every one has a right to engage in them, subject only to such regulations and restrictions as are necessary to promote the general welfare. Neither of them is a business which the state has any right to prohibit altogether, or to limit to a favored few by giving them a monopoly of it. Therefore, the police power must, when exercised over them, be confined to such restrictions and burdens as are necessary to promote the public welfare, or, in other words, to prevent the infliction of a public injury.

On the question of the right of any one to engage in a lawful occupation, I quote from the case of Dent vs. State of West Virginia reported in 32 L. ed. (U. S. Sup. Ct. Records), at p. 625:

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to

continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency of difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his rights to pursue a lawful vocation."

Along the same lines I quote from the note to the case of State vs. Goodwill, 25 Am. St. Rep. p. 878, as follows:

"Restrictions on Pursuit of Lawful Business: One of the rights unquestionably secured to all persons within the jurisdiction of a state is that of following any lawful calling or pursuit, subject only to such conditions and restrictions as may be imposed for the public welfare, calculated to exclude from the calling persons incompetent to exercise it, or to guard the public from such frauds or impositions as might readily be employed but for some statutory safeguard; but whatever be the nature or object of the imposition or restriction, it must apply to all persons of the same class and condition, or it can be applied to none. While the power of the legislature to impose restrictions upon the exercise of certain trades and professions for the protection of

the public is unquestioned, it must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession, under the same circumstances. The constitutionality of a statute can not be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt. The imposition of special restrictions or burdens or the granting of special privileges to persons engaged in the same business, under the same circumstances, is in contravention of the equal rights which all can claim in the enforcement of the laws and in the enjoyment of liberty, and the right of acquiring and possessing property."

The case of Laurel Hill Cemetery vs. City and County of San Francisco, 152 Cal. p. 470, lays down the rules as follows:

"Under the charter of the City and County, read in connection with the state constitution (Art. XI, Sec. 11), the supervisors have power to pass ordinances placing restrictions upon the use of any property or the conduct of any business as may be necessary for the public health. * * * Such ordinances must, of course, bear a rational relation to the object sought to be obtained. They may not be arbitrary or unreasonable. The exercise of the police power can not be made a mere cloak for the arbitrary interference with or suppression of a lawful business. (Holden vs. Hardy, 169 Cal., 368, * * * In re Smith, 143 Cal., 368.) 'The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' (Lawton vs. Steele, 152, U. S. 133.)"

"But while the action of a legislative body in assuming to exercise the police power is always subject to review by the courts, the question of the expediency or necessity of a proposed restriction is primarily for the legislature, and the courts will not interfere with the exercise of the legislative discretion unless it clearly appears that such discretion has been arbitrarily or unreasonably exercised. (Ex Parte Whitwell, 98 Cal. 73, * * County of Plumas vs. Wheeler, 149 Cal 758; 87 Pac. 909.)"

In the case of Los Angeles vs. Hollywood Cemetery Association, 124 Cal. p. 349, the Court said:

"There is a wide difference between regulation and prohibition—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself depend upon the unrestrained will of the municipality. It would hardly be contended that an ordinance declaring it to be unlawful to engage in the business of farming or merchandising in the country without the permission of the supervisors would be a reasonable exercise of legislative power, or could reasonably be said to be exercising the power to regulate. The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupations; they may regulate the manner of conducting the business if it be of a character tending to be injurious; but if the business be lawful, and having no injurious tendency, they can not say who shall and who shall not exercise the right itself. Under the guise of regulating a business the municipality can not make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. We do not think it was ever intended by the people in ordaining the section of the constitution referred to, or of the legislature in the statutory enactment, to include, in the power to make and enforce regulations, a power purely personal and arbitrary. 'For,' as was said by Matthews, J., in Yick Wo vs. Hopkins, 118 U. S. 356, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery.'"

In the case of the California Reduction Company vs. Sanitary Reduction Works, 126 Fed. Rep. p. 34, the Court said:

"It must be admitted that the power of the Legislature or municipality under what is commonly designated as the 'police power of the state,' is not absolute. It does not necessarily follow that every statute that may be enacted by the Legislature, or order passed by a municipality, ostensibly for the purpose of preserving the public health, protecting the public morals, and guarding the public safety, is always to be accepted as a legitimate exercise of the police power of a state. Neither the legislature nor municipality can, under the guise of police regulations, arbitrarily invade private property, or personal rights, and when

such regulations are called in question the test should be whether they have some relation to the public health or public safety, and whether such is, in fact, the end sought to be obtained. The means used must be such as are reasonably necessary for the accomplishment of the purpose, and must not be unduly oppressive upon individuals or the public. Every act, order, or ordinance is subject to review by the courts, and, if the power granted by the Constitution is exceeded by the Legislature, or municipality, it is the duty of the courts to declare such act, order, or ordinance invalid. Under the guise of protecting the public interests, neither the Legislature nor the municipality can arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful business and occupations. The police power can not be used as a shield for all the ills that legislation is heir to, but it must be recognized that the power and purposes of law of this character are necessarily very broad and far-reaching, and, if the power granted does not exceed the limits of the Constitution, and clearly comes within the legitimate exercise of the police power, it should be sustained."

Enough has been said to demonstrate that while the Board of Supervisors may not prohibit the business of undertaking or embalming by the enactment of an ordinance making the exercise of the right to engage in such business dependent upon the will of the Supervisors, at the same time the Board possesses the right to adopt an ordinance imposing reasonable restrictions as to the manner in which such business shall be conducted in the City and County of San Francisco.

From your communication I gather that you desire me to frame an ordinance curing any possible defects in the present ordinance No. 16 (New Series), preserving, however, the necessity of any one desiring to engage in the business of undertaking or embalming to procure a permit from the Board of Supervisors for that purpose. It would be impossible, in view of the decisions, to frame such an ordinance. However, I have shown that the Board of Supervisors may adopt a regulatory ordinance as to the manner in which such business shall be conducted and I would be pleased to draw such an ordinance for your consideration in the event that your honorable Board sees fit to enact such a measure.

I will next take up your second query regarding the legal steps necessary on your part to abate the nuisance caused by

the moving of cattle from the corrals in Bay View District from the slaughter houses in Butchertown; also to prevent the grazing of cattle on the hills in that district. That your Honorable Board possesses the power to adopt an ordinance regulating the business of slaughter houses is beyond question. That power has been upheld by the Supreme Court of this State and that of the United States. In the regulation of that business, my opinion is that the Board of Supervisors may adopt an ordinance requiring corrals and stock yards to be maintained in close proximity to the slaughter houses and by this means abate the nuisance caused by moving cattle long distances from corrals and stock yards to the slaughter houses.

In the case of Amyx vs. Taber, reported in 23 Cal. p. 370, at page 372, the Court said:

"The power and authority of the Common Council of Stockton under their charter, to make a proper ordinance to prevent animals of the kind named from roaming at large over the city, and its streets and public places, is clear and undoubted. Such laws and ordinances are adopted in all well-governed cities and towns, and are clearly demanded by the public interests. Individuals have no right to use the streets and public grounds of a city as a place in which to keep such animals; and ordinances prohibiting them from so doing, and providing the proper means to prevent it, do not violate any constitutional or vested right or privilege. Ordinances of such a character have been fully sustained by the Courts. (Helber vs. Noe, 3 Ire. 493; Whitfield vs. Longest, 6 Id. 268; Commonwealth vs. Dow, 10 Met. 382; Commonwealth vs. Chase, 6 Cush. 248.)"

In the case of Ex Parte Shrader, 33 Cal. 280, the validity of an ordinance of the City and County of San Francisco prohibiting the keeping and maintaining of slaughter houses within certain limits was passed upon and upheld by the Court. The Court, in rendering its decision, cited with approval the case of Cooper et al. vs. Metropolitan Board of Health, 32 How. P. R. 107, which was an action brought to prevent the enforcement of an ordinance by the Board to the effect that no person should engage or continue in the business of a butcher or cattle dealer at or in any public or private market in the City of Brooklyn without a permit therefor from said Board and providing that no cattle should be driven in the generally built-up portions of said city except between the hours of nine in the evening and one hour

after sunrise the next morning; and that no cattle should be yarded in said built-up portions without a permit from the Board. Several reasons were advanced as to the unconstitutionality of the ordinance, but all of the objections were overruled by the Court and the constitutionality of the act affirmed. The Board might then act to the extent of entirely prohibiting the business of slaughtering animals within the City and County. A slaughter house, as held by the Courts, is a calling in the nature of a nuisance and recognized by the law as such and therefore may be interdicted by the City council, especially where the State statute gives the City council the power to declare what shall be a nuisance and to abate the same and to impose fines for the abatement thereof.

"Slaughter houses to some extent cause the atmosphere in their vicinity to become impure and noxious and where located in a populous part of a city are prima facie nuisances."

Richert vs. Green, 98 Ind., 95; 49 Am. Rep. 736;
Pruner vs. Pendleton, 40 Am. Rep. 738;
Brady vs. Weeks, 3 Barb. 159.

The Supreme Court of the United States in the "Slaughter House Cases," 21 L. ed. U. S. Supreme Court Rep. at p. 404, quoted from Chancellor Kent on the subject of the police power of cities as follows:

"Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the application of steam to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors; and that private interests must be subservient to the general interests of the community."

Of this power the Court says:

"It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; * * * and persons and property are subjected to all kinds of restraint and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. * * *

"The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power."

The Court further said:

"It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city and to locate them where the convenience, health and comfort of the people require they shall be located."

The keeping of cattle in corrals, stock pens and stock yards is, as the Supreme Court said in the Slaughter House Cases, "necessarily incident to the slaughtering business," and under the police power of the state, delegated by the Legislature to the City and County of San Francisco and contained in the Charter, the Board of Supervisors has power to regulate the slaughter house business, and as a concomitant thereto, has power also to regulate the keeping of cattle in corrals, stock-yards and stock-pens and may adopt an ordinance providing that all corrals, etc., should be maintained at places in close proximity to the slaughter houses.

In Holden vs. Hardy, 169 N. S. 366, 398, the Court said: "that in City ordinances, as distinguished from County ordinances, the interest and requirements of a thickly settled and growing community will often be widely different from those of sparsely settled and thinly inhabited rural districts. An ordinance limiting, regulating or even prohibiting, in a certain district within the corporate limits of a city may be perfectly reasonable where like limitations, restrictions and prohibitions as to some district within the county would be oppressive and unreasonable in the extreme. Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police powers in these respects; but as the same conditions do not exist in the country, county ordinances passed in the exercise of the same power may well be scanned with more critical eye."

This case was cited with approval in re Smith, 143 Cal. p. 272.

It follows, then, that an ordinance requiring that all stock-pens be maintained in close proximity to slaughter houses in this City and County would be looked upon with favor by the Courts, owing to the conditions existing locally, and would undoubtedly be upheld as a reasonable exercise of the police power; yet a similar ordinance adopted in a sparsely settled community would, as the Court said, be critically scanned and the Court would take into consideration the fact that conditions did not warrant such legislation.

The second portion of question number two, concerning your power to prevent the grazing of cattle and sheep on the hills in the Bay View District, Ordinance No. 115, approved July 17, 1900, entitled, "An Ordinance to provide a public pound and to make necessary rules and regulations in the matter of animals running at large, and for the custody and destruction of the same," provides ample means to prevent the grazing of animals in said district.

Under said ordinance it is the duty of the pound keeper to seize and hold in the public pound, subject to the provisions of the ordinance, all animals estray and running at large found "upon any public highway or street, or *upon any unfenced lot* within the City and County of San Francisco." The enforcement of this ordinance would accomplish the desired result and I can suggest no better ordinance to effect the end desired. You are therefore advised;

First: That the present ordinance requiring undertakers to obtain permits from the Board of Supervisors before engaging in business is invalid; and that the defects therein can not be cured;

Second: That an ordinance may be passed requiring that all stock-pens, corrals, etc., used in conjunction with slaughter houses, be maintained in close proximity to said slaughter houses;

Third: That Ordinance No. 115 is sufficient to prevent the annoyance caused by animals grazing on the unfenced lots in the Bay View District.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Defining the Scope of the Opinion of the City Attorney of July 26, 1912, Relating to Salary of Clerks of Department of Elections.

August 3, 1912.

Gentlemen: I am in receipt of your communication of August 1st, containing the following resolution:

"Whereas, various points have this day been discussed before this Board relating to the meaning of the opinion of the City Attorney of the City and County of San Francisco, dated July 26, 1912, which was received and filed by this Board on July 29, 1912.

"Resolved, That all such further questions be sent to the City Attorney forthwith, framed by Commissioner Thos. V. Cator, as will cover and obtain a direct response to the points discussed before this Board, this day, and as will cover all points that can arise upon this subject in this department, and the reply of the City Attorney to such questions is requested at his earliest convenience.

Questions.

"1. Upon July 29, 1912, at a regular meeting of the Board of Election Commissioners, it received and filed the opinion of the City Attorney dated July 26, 1912, interpreting Section 4 of Chapter I of Article XI of the Charter of the City and County of San Francisco. And thereupon the said Board adopted the following resolution, to-wit:

"Whereas, the City Attorney has delivered his opinion to this Board, that appointees in this Department under Sec. 4 of Chap I, Article XI, of the Charter, are to be paid compensation only upon the basis of the time they are actually employed at work in this Department,

"Resolved, That the Registrar of Voters is hereby directed to prepare all demands for the payment of compensation to such appointees from the time-book in which such employees enter their time of employment.

"There is a time book kept for many years at the office and desk of the Election Department, in which all employees are by rule of the Board, required daily, in person, to report for duty by personally entering their arrival and the time of

attendance and which book shows by the entry of each employee in his own handwriting the days he is actually employed or is ready to be employed in the Department of Elections.

"Was the above recited order made by the Board of Election Commissioners on July 29, 1912, with reference to placing the demands for payment to all persons appointed solely by virtue of the authority of said Sec. 4, based upon a correct understanding as to the requirements of said Section, and the advice as to its meaning as contained in your said opinion?

"2. Are not all the persons appointed to service in the Department of Elections, whose appointments are made solely by virtue of the authority of said Section equally subject to all the terms and provisions of said Section under which they derive their employment, regardless of the time or the extensions of time which may be fixed by the resolution designating the time for which they should be employed which must be adopted by the Board of Election Commissioners by virtue of said Section 4?

"3. Does said Section 4 intend any discrimination in the payment of compensation to persons appointed solely under the authority of said Section as between a person appointed for a month at a time and one who is appointed for a lesser period by the resolution required by said Section designating the time of employment, in such manner that the one who is appointed for the longer period may demand payment of compensation for a day or days when he is absent from work in said Department, while a person appointed for a lesser time is not entitled to compensation during a similar absence of a like nature?

"4. Are not all appointees under and by virtue of said Sec. 4 subject to the Civil Service?

"5. Does not the provision of said Section 4, that compensation shall be 'for the time actually employed,' apply to a person certified by the Civil Service equally as well as to a person not so certified but who is named and appointed by permission of the Civil Service Commission under its rules after requisition, where both appointments are solely by virtue of said Section 4?

"6. Does not the use of the word 'month' in said Section 4 as contained in the following language taken therefrom, to-wit: 'at a salary not to exceed $100 per month, each, for the time actually employed,' clearly indicate and state that where the

time of employment under said Section is by resolution designated at a month or more by successive extensions or renewals under the requirement of said Section, that the actual time basis provided applies to every order of appointment made under the authority of said Section 4 regardless of the time of employment designated by such resolution or any number of extensions thereof?

"7. Where a clerical assistant (name not necessary to give) has been appointed solely under authority of said Section 4 by resolution of this Board, as provided by said Section, designating the time for which he shall be employed as one month and such designation of time of employment is renewed successively, but only by authority of said Section 4, is the provision of said Section which declares that salary shall be 'for the time actually employed' repealed or rendered inoperative or inapplicable to such employee in such manner that if such employee is absent from his duties for a day or several days in a month, not reporting for or performing any work in said Department during such absence, that he is still entitled to demand and require that his demand for compensation shall be made up, certified and approved, including pay for the time of such absence?

"8. In your opinion of July 26, 1912, the following words occur: 'These provisions contemplate the employment of clerical assistants for broken periods and not by yearly or monthly service.' Are not these words 'yearly or monthly service' as used by you in said opinion there used to distinguish yearly or monthly salaries provided for in various places in said Charter, or by ordinance thereunder, where the salary provided is not coupled with any provision that it shall be 'for the time actually employed,' as distinguished from all salaries or compensation during any term of employment by resolution under said Section 4 in which the salary is coupled with the said words 'for the time actually employed'?

"9. Referring to the following language in your said opinion of July 26, 1912, to-wit: 'The undoubted intent of the Charter was to place such employment upon an actual time basis and it was not contemplated that compensation shall be had for any service except upon an actual time measurement, and you are so advised.' Was it not your intent and purpose and did you not thereby clearly advise this Department that said actual time basis

and actual time measurement should be applied to the payment of demands for compensation equally to all persons whose employment in this Department is by virtue of resolution under the authority of said Section 4, regardless of the time designated for employment in such a resolution?"

Opinion.

Answering query No. 1, you are advised that the resolution therein recited is in accordance with my views and the advice given by me to you in my opinion of July 26, 1912.

Query No. 2 is answered in the affirmative.

Query No. 3 is answered in the negative.

Queries Nos. 4, 5 and 6 are answered in the affirmative.

Query No. 7 is answered in the negative.

Queries Nos. 8 and 9 are answered in the affirmative.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Election Commissioners.

Advising Validity of Claim of John Galen Howard for Services—Residence Provision of Charter Not Applicable to Advisory Architect.

August 8, 1912.

Sir: I am in receipt of your communication as follows:

"I am in receipt of several demands for salary due John Galen Howard for services rendered as Consulting Architect at the rate of $25.00 per day.

"It has been called to my attention that Mr. Howard is not a resident of San Francisco, and I would like to have your opinion regarding the validity of said demands, which read as follows:

" 'Civic Center and City Hall Advisory Committee, Department of Public Works, wages $450.00, San Francisco, April 30, 1912. John Galen Howard presents this demand on the Treasurer of the City and County of San Francisco for the sum of $450.00,

being for services rendered as Consulting Architect, 18 days at $25.00 per day.'

"Also another demand for eight days at $25.00 per day, making a total of 26 days for the month of April.

"The demands bear the signature of Mr. Howard, are indorsed as correct by John Reid, Head of Department of Consulting Architects for the Board of Public Works, and bears the signature of R. Cline, Secretary of said Board; also has the approval of the Commissioners of the Board of Public Works, to-wit; Messrs. Fraser and Laumeister.

"I also hold demands for the months of May and June, 1912, which are similar to the ones noted above."

I respectfully refer you to my opinion sent to you under date of May 7, 1912, in which I advise that John Galen Howard, having been engaged by the City as an Advisory Architect in regard to the City Hall and the Civic Center problem, comes within the rule stated in my opinion of February 10. 1912, addressed to the Mayor, namely, that the City has the power to engage experts to advise as to certain matters or to bring to certain results and that such experts so engaged for such character of work do not come within the residence provision of the Charter.

The demands presented to you by Mr. Howard being regular and his services being of the character herein referred to, you are therefore advised that said demands are valid and that, in my opinion, they should be paid.

Respectfully,

PERCY V. LONG,
City Attorney.

Auditor.

Repaving Geary Street—The Proceeds of the Sale of Bonds for the Geary Street Railway Are Not Available for Repaving Geary Street, But Must Be Applied to "Railway Construction Fund."

August 26, 1912.

Gentlemen: I am in receipt of your communication of August 20, 1912, as follows:

"Will you please advise the Board of Supervisors as to the legality of the use of any portion of the Geary Street Bond Fund for the purpose of repaving Geary street or any part thereof.

"Some of the members of the Board believe that inasmuch as the street was disrupted and made unusable by the change of grade for the construction of the Municipal Railway that it would be proper to use a portion of the proceeds of the bonds for the restoration of this street."

Opinion.

In examining the proceedings with reference to the issuance of bonds for the construction of the Geary Street Railway, we find that Ordinance No. 964 (New Series), adopted by the Board of Supervisors on November 22, 1909, provided for a special election to be held for the purpose of submitting to the electors of the City and County of San Francisco two propositions, to-wit:

1. To incur a bonded indebtedness in the amount of $1,900,000 for the construction by the City and County of a street railway on Geary street and Point Lobos avenue and other streets to a convenient terminal near the ocean.

2. To incur a bonded indebtedness in the amount of $120,000 for the construction of a municipal railway on lower Market street.

This ordinance calling the election recited that "Whereas the Board of Supervisors did on the 25th day of October, 1909, finally pass Ordinance No. 923 (New Series) determining and declaring that the public interest and necessity demand the construction of street railways over and along" certain streets.

It was also recited in said ordinance that the Board of Public Works had on the 13th day of November, 1909, filed with the

Board of Supervisors plans and estimates of the cost of original construction and completion of the street railways named; and the ordinance recited that "the estimated cost of the acquisition, construction and completion of the street railway over the route described in proposition one is $1,900,000." It was further provided therein that the ballot to be used at such an election should have printed thereon (and there was therefore printed on said ballot) the following:

"Proposition 1. To incur a bonded indebtedness by the City and County of San Francisco to the amount of $1,900,000 for the purpose of the acquisition, construction and completion of a street railway over and along" certain streets named.

The later ordinance adopted by the Board of Supervisors December 6, 1909, No. 979 (New Series) gave notice of this special election and recited the proceedings as above. Also the special election notice published in this matter by the Board of Election Commissioners referred to Ordinance No. 964 (New Series), calling and providing for this election.

It will therefore be seen that the attention of the voters was specifically called to the construction of a street railway system on Geary street and they were referred to plans and specifications having been filed with the Board of Supervisors by the Board of Public Works and further to the fact that it was estimated that the cost of the construction of the Geary Street System would be $1,900,000. All of this procedure is in strict compliance with the provisions of the Charter providing the method of submitting to the people of the City the proposition of incurring a bonded indebtedness for the construction of a public utility. The underlying reason for such Charter requirements is that the voters may be fully informed as to exactly what is contemplated to be done, so that they may vote intelligently; and also to provide a means of calculating as accurately as possible what the cost is to be. It is apparent that there is nothing in any of the above notices given to the voters which would in any way indicate that any of the money which might be raised as the result of such a bond issue would be used for the purpose of repaving or regrading any of the streets upon which this municipal railway might be built. I understand from your communication and also upon inquiry at the City Engineer's office, that as an incident to the construction of this railway it will be necessary for certain street work to be done, which, had the

municipal railway not been built, would not have to be done. That is, for instance, it was found that in order to successfully construct the railway the crown of the street on certain blocks would have to be lowered and as a necessary result of this lowering of the crown of the street it may be found necessary to change the grade of and repave the whole street at these particular places. It is therefore suggested in your communication that the building of the road being responsible for this situation, the cost of repaving the street at these points might properly be chargeable to the fund provided by the sale of the Geary street railway bonds.

I am however of the opinion that this position can not be taken in view of the evident purposes of the Charter sections on the giving of notice to the voters for a special bond election. I am informed upon inquiry at the office of the City Engineer that the actual completion and operation of the railway is in no way dependent upon any such repaving or regrading of these portions of the street beyond the portion used by the railway tracks. Of course, it may be that public convenience and necessity will require that such work should be done. It may also be that this situation has been created as a direct consequence of the construction of the railway. I do not believe that this is of vital importance in determining the question of what fund is chargeable with the cost of such necessary street work. Several additional expenses might be necessary to our City as a result of its building a municipal street railway. Some condition might arise from the installing of an electric railway system which would result in electrolysis causing injury to municipally owned water and gas pipes if the City owned its water and gas plants. It might be that money would have to be spent in some reconstruction work in connection with such gas or water distributing system. However, it certainly could not be claimed that because these conditions arise from the fact that the City had embarked in a municipal railway scheme that such a cost would be chargeable to the Geary street railway bond fund. In the same way the mere fact that this street improvement work is made necessary by the construction of the railway is not the important feature. The first question to answer is: Is the construction, completion and operation of the road dependent upon certain street work being done? When we consider the space between the tracks we can see, of course, that the railway itself could not be completed unless that work was done and therefore it may properly be said

that certain work between the tracks was a part of the construction of the road.

This is but one of many new conditions that will doubtless arise as a result of the City's undertaking the management of a railway system. It must be assumed that the people realized that these problems would have to be met as they arose, and that they did not, at the time they voted for this bonded indebtedness, intend that the financial cost of settling such questions should be met from this bond fund, simply because the situation is brought about by the construction of the municipal railway. Their prime object, as expressed at the polls, was to have such a railway built and ready for operation, and when that purpose has been fulfilled the voters would certainly be justified in feeling that the money so raised can not be diverted to any other purposes, not properly included within this general municipal railway project, no matter of how much general importance these purposes may be.

Upon an examination of the estimates filed by the Board of Public Works with the Board of Supervisors which are referred to in the above notice given to the people, we find no reference therein to the repaving of any portions of the streets.

Further, the Charter outlines a complete scheme for the procedure in submitting to the people a proposition for the construction of such a municipal railway. It also outlines a complete scheme for the performance of any necessary street work in any part of our City, no matter what the causes may be requiring such street work to be done. In my opinion it certainly could not have been in the minds of any voters who considered the above notices of election, that it was contemplated to provide funds for the repaving or regrading or improvement of any of the streets along which this railway might be built. The intent of the people in expressing their desires at the polls is the real test in answering your inquiry; for the Charter, Article XII, Section 10, provides that:

"The proceeds of any sale of bonds shall be placed in the treasury to the credit of the proper fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished."

And Ordinance No. 1062 (New Series) providing for the issu-

ance of these bonds, adopted by the Board of Supervisors on February 7, 1910, provided, in Section 7 thereof, that:

"The proceeds arising from the sale of the Geary Street Railway Bonds shall be placed in the treasury to the credit of the 'Geary street railway construction fund' and shall be used exclusively for the purposes for which such bonds were issued."

The Charter also provides that there shall be raised by taxation extending over a number of years the money which must be necessarily expended to pay the interest on these bonds and to redeem such bonds as they fall due. Such taxes are in addition to all other taxes levied for municipal purposes. Inasmuch as the City must raise a certain amount of money by taxation for this purpose, and at the same time is authorized to raise other sums of money for street work, it would not be in conformity with the spirit of the Charter to use tax moneys specifically raised for one purpose to pay the cost of work for some other purpose, when the Charter outlines a distinct and separate scheme for the raising of such money for such other purpose. If this were done we would not be keeping in mind the separate and distinct purposes of the Charter framers in providing the means for meeting the varied and different needs of the City and County.

You are therefore advised that the cost of repaving Geary street can not be paid from the Geary Street Bond Fund.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Advising That the City Is Without Title to Certain Parcels of Land, in Fairmount Extension Homestead, Now Assessed to Private Owners.

August 27, 1912.

Gentlemen: Your communication enclosing the petition signed by F. B. Hanbridge, et al., regarding the ownership of certain property, with the request that I send you my opinion as to whether or not the City has any right, title or interest in said property, was received by me.

Opinion.

The property in question is as follows:

"Parcel 1. That portion of Blocks Nos. 1 and 2 of the Fairmount Extension Homestead which is included within the lines of Chenery street, if extended westerly in a straight line from the northwesterly line of Carrie street to the northwesterly boundary line of said Fairmount Extension Homestead Tract.

"Parcel 2. Commencing at a point on the southwesterly line of Wilder street distant thereon 77.79 feet southeasterly from the northwesterly boundary line of the Fairmount Extension Homestead Tract as same is laid down and delineated upon that certain map entitled 'Map of the Fairmount Extension Homestead,' which said Map was filed in the office of the Recorder of the City and County of San Francisco, State of California, on August 2, 1872, and recorded therein in Libers 'C' and 'D' of Maps, at page 93, running thence southeasterly and along said southwesterly line of Wilder street 50 feet, thence at a right angle southwesterly 100 feet, thence at a right angle northwesterly 50 feet and thence at a right angle northeasterly 100 feet to the southwesterly line of Wilder street and the point of commencement.

"Being Lots Nos. 4 and 5 in Block No. 4, of said Fairmount Extension Homestead."

In regard to Parcel No. 1, I fail to find any record of any offer of dedication of that property to the City and County of San Francisco for street purposes. A search of the title of said property discloses that the Map of the Fairmount Extension Homestead, as filed in the office of the Recorder of the City and County of San Francisco, offers for dedication as Chenery street, the strip of land 50 feet wide running parallel with and distant 200

feet northerly from Wilder street, which said portion of Chenery street forms a cul-de-sac.

The Humphrey's Map of the City and County of San Francisco shows Chenery street as extending in a straight line through the entire Parcel No. 1, while on the Tilton Map of the City and County it extends only to the easterly line of Diamond street in said Fairmount Extension Homestead Tract.

The title to said Parcel No. 1 now occupied and used by the United Railroads for street railroad purposes is in the Union Park Land Company, a corporation. Negotiations are now pending between this office and the legal representatives of the said Union Park Land Company whereby arrangements could be made for the closing up of Chenery street, which is located 200 feet northerly from Wilder street and which forms a cul-de-sac, by the Board of Supervisors in exchange for which the Union Park Land Company would give a deed to the City and County of San Francisco of the land embraced in that portion of Chenery street, so-called, which is now traversed by the tracks of the United Railroads. If that arrangement could be made the land would be deeded to the City and County of San Francisco, subject, of course, to the right of the United Railroads to use the street for street railroad purposes.

As to Parcel No. 2, a search of the title thereto disclosed that no portion of said real property, according to record, has been dedicated or offered for dedication to public use as a portion of Diamond street, nor is Diamond street shown on either of the above maps as extended through Parcel No. 2.

The United Railroads of San Francisco, a corporation, owns in fee a portion of the strip described as Parcel No. 1 and has a right of way for railway purposes over the remainder thereof. The same corporation owns in fee the whole of Parcel No. 2.

In addition to the above, a search of the said property disclosed that the United Railroads, by deed dated January 14, 1911, and recorded May 16, 1911, in Liber 139 of Deeds (New Series) page 113, granted to the City and County of San Francisco the right to construct, maintain, etc., sewers and their appurtenances over both of the above described parcels of land. No part of the property above described is shown upon the books of the Assessor of the City and County of San Francisco as being a public street, but the whole thereof is assessed to private owners.

In addition to the securing of a deed from the Union Park Land Company to its interests in Parcel No. 1 it was my intention to open negotiations with the United Railroads to the end that a deed covering their interest in said Parcel No. 1 might be given to the City and County of San Francisco conveying the property standing in its name to the said City and County for street purposes and to form a part of Chenery street.

In order to definitely fix the boundaries and location of Chenery street, if extended westerly from Carrie street, I conferred with the City Engineer's office, and had made arrangements with that office to have a survey made of said property for use in my negotiations with the representatives of the Union Park Land Company and with the United Railroads.

You are therefore advised as to Parcel No. 1, that there is of record no dedication or offer of dedication of Chenery street, if extended westerly from Carrie to Diamond street and that the Union Park Land Company and United Railroads own, in fee, Parcel No. 1, as described above, and that in order to settle once and for all the much disputed question of the ownership of said strip, the negotiations opened by this office with the representatives of the Union Park Land Company should be carried to a conclusion and I would respectfully suggest that Chenery street, situated 200 feet northerly from Wilder street, be closed in order that a deed might be made by the Union Park Land Company of the land embraced in what would be Chenery street if extended westerly from Carrie street and that negotiations should be entered into with the United Railroads for the purpose of receiving a deed to its interest in said property.

As to Parcel No. 2, you are advised that the title to said parcel is in the United Railroads.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Funds for the Erection of a Public Library Must Be on Hand Before Contract Let—The Present Library Block Cannot Be Sold or Exchanged for Another Block—The 3½% Bonds Cannot Be Sold at Less Than Par.

August 27, 1912.

Gentlemen: I am in receipt of a letter from the Secretary of your Board, reading as follows:

"The Trustees of the Public Library desire your advice upon the following questions, in connection with the erection of a Public Library building:

"First. Must all money be on hand before contracts can be signed for the erection of the building?

"Second. Can the present Library block be exchanged for another block in the Civic Center, or has the Board of Supervisors power to sell the present Library block; or must the people vote upon the question before it can be disposed of?

"Third. Would it be necessary to amend the Charter to sell the 3½% bonds below par? If so, would it require a majority or a two-thirds vote to carry an amendment?"

Opinion.

Replying to the above inquiries, permit me to advise you as follows:

First. It is provided in Article III, Chapter I, Section 10 of the Charter, as follows:

"Sec. 10. No contracts made, the expense of whose execution is not provided by law or ordinance to be paid by assessments upon the property benefited, shall be binding or of any force, unless the Auditor shall indorse thereon his certificate that there remains unexpended and unapplied as herein provided, a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract as certified by the Board or officer making the same. This provision shall not apply to work done, or supplies furnished, involving the expen-

diture of less than two hundred and fifty dollars, unless the same is required by law to be done by contract at public letting. The Auditor shall make such endorsement upon every such contract so presented to him, if there remains unapplied and unexpended such amount so specified by the officer making the contract, and thereafter shall hold and retain such sum to pay the expense incurred until the contract shall be fully performed. The Auditor shall furnish weekly to the head of each department a statement of the unexpended balances of the appropriation for his department."

Under the above provision a contract for the erection of a building would not be binding upon the City unless the funds were on hand for the payment of such contract and the Auditor should so certify. If the building referred to should be built under separate contracts, the above provision of the Charter would apply to each contract separately; the requirement being that the fund specified in each several contract must be on hand before such contract takes effect.

Second. The present library block (Western Addition Block No. 73) was acquired with the proceeds of bonds authorized at a special election called by Ordinance No. 946 of the Board of Supervisors, passed on August 3, 1903. At such election, propositions were submitted to incur a bonded indebtedness for several different propositions, one of which was the acquisition of a lot of land and the construction of a building thereon to be used as a public library and reading room. On January 25, 1904, the Board of Supervisors passed Ordinance No. 1114, which provided for the sale of a portion of the bonds authorized at the aforesaid election for the purpose of acquiring a library site and the erection of a public library and reading room. Thereafter, and on March 6, 1905, the Board of Supervisors adopted Resolution No. 5637, in and by which Western Addition Block No. 73 was selected as the site whereon the new public library should be erected. The purchase of the block referred to was thereafter made with the proceeds of the above referred to bonds, and in accordance with the ordinance and resolution above referred to.

There is no provision in the Charter authorizing your Board or the Board of Supervisors to exchange this block of land acquired for library purposes for other land within the City, nor has the Board of Supervisors any power under the present provisions of the Charter to sell the block referred to.

On November 5, 1907, a new section was added to the Charter (Article II, Chapter II, Section 9), in and by which the City is authorized to sell certain lands in the Mission Creek "and any and all lands that may be hereafter acquired, excepting lands for parks, squares and children's playgrounds."

As the block of land above referred to was acquired prior to the adoption of this amendment, it is not embraced within its provisions, and there is no other provision of the Charter authorizing the sale of such land. It will, therefore, be necessary for the Charter to be amended before the present library block can be exchanged for other property, or sold by the Board of Supervisors. The Charter, however, does confer power upon the Board of Supervisors "to appropriate and authorize the use, either in whole or in part, of any real estate belonging to the City and County for the purpose of erecting and maintaining a building or buildings thereon to be used for the Library and Reading Room, or branches thereof." (Article VII, Chapter VII, Section 7.) Under the above provision the Board of Supervisors has power to authorize the erection of a library building upon any real property owned by the City.

Third. Under the present provisions of the Charter, none of the bonds issued by the City can be sold below par. (Article XVI, Section 29, and Article XII, Section 10.) It is therefore necessary to amend the Charter in this regard before any bonds issued by the City may be sold below par. The Constitution provides that a City Charter may be amended by a vote of a majority of the electors voting at an election called for that purpose. (Article XI, Section 8.) I am of the opinion, however, that such an amendment of the Charter would not justify the sale at less than par of bonds authorized at an election held prior to the adoption of such an amendment. Article XI, Section 18, of the Constitution, provides:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the

payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same; * * * ."

It is generally held that a municipal bonded indebtedness is not incurred until the bonds are actually sold and delivered. (Dillon on Municipal Corporations, 5th Ed., Sec. 902.) When the present 3½% bonds were authorized by more than two-thirds of the electors voting at the special election, one of the conditions upon which such authority was given was that the bonds should not be sold at less than par. A change in this provision is, in my judgment, a change of the indebtedness or liability to be incurred, and such change cannot be made without the approval of two-thirds of the electors, as required by the Constitutional provision above cited.

You are therefore advised that the 3½% bonds to which you refer cannot be sold at less than par without the assent of two-thirds of the electors voting thereon, such assent to be in the form either of a Charter amendment having special reference to these bonds, or of a new proposition to incur such bonded indebtedness.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Library Trustees.

Ordinance Limiting Height of Fences Is Valid.

August 28, 1912.

Gentlemen: I am in receipt of a communication from the Judiciary Committee of your Board submitting the draft of a proposed ordinance giving the Supervisors control over the erection and maintenance of fences within the City and County and limiting their height, together with a request for an opinion as to the power of your Board to pass such an ordinance.

Opinion.

Article II, Chapter II, Section 1, paragraph 1, of the Charter grants the Board of Supervisors the power "to ordain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations."

The Supreme Court of the United States, in deciding a case involving the validity of a statute, giving an action of tort to any person injured in any way by a fence unnecessarily erected over six feet in height, held that "the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interest. * * * Although the fence was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit, beyond which it was not lawful to go."

(Canfield vs. United States, 167 U. S. 261.)

The case of Rideout vs. Knox, 148 Mass. 368 (2 L. R. A. 81) held such a law to be constitutional with reference to fences already in existence when the act was passed. The Court there said: "Police regulations may limit the use of property in ways which greatly diminish its value."

To the same effect are Aikens vs. Wisconsin, 195 U. S. 205, Karasek vs. Peier, 61 Pac. 33.

Although the cases quoted from above are not cases of an ordinance declaring such fences unlawful, they uniformly hold the passing of laws regulating the erection of unnecessarily high fences to be within the police powers of the State, and, therefore, such a law would be within the purview of the Charter section above quoted. Of course, the question of the reasonableness of any particular height limitation on fences is a question for your Board to consider, in view of the facts which may be before your Board.

In view of the foregoing you are advised that the Board of Supervisors is empowered to pass such an ordinance as that submitted.

I herewith submit a copy of your ordinance with such slight changes as I deem necessary to make clear the meaning of "interior lines":

"Regulating the erection and maintenance of partition and other fences.

"Be it ordained by the People of the City and County of San Francisco, as follows:

"Section 1. It shall be unlawful for any person, firm or corporation owning any real property in the City and County of San Francisco, or any lessee thereof, to erect or maintain within ten (10) feet of the interior lines of said property, any fence more than ten (10) feet in height above the surface of said property, without first obtaining a permit from the Board of Supervisors.

"Section 2. 'Interior lines' as used herein, shall be construed to mean such lines as do not constitute the lines of a public street.

"Section 3. Any person, firm or corporation violating any of the provisions of this Ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed five hundred (500) dollars, or by imprisonment in the County Jail for not more than six (6) months, or by both such fine and imprisonment.

"Section 4. This ordinance shall take effect and be in force immediately."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Ordinance 1958 (N. S.), Creating a Bureau of Efficiency Under the Civil Service Commission and Authorizing the Appointment of a Director Therefor, Is Invalid, Because Not Passed at Request of Mayor After Application of Civil Service Commission in Accordance With Art. XVI, Sec. 35, Charter—Bill No. 2198, Authorizing the Appointment of a Director of the Bureau of Efficiency, Is Valid, Since Sec. 35, Art. XVI, Has Been Complied With—Appropriation of Money to Carry Out Purpose of Ordinance Should Be Made by Resolution Rather Than in a Section of the Ordinance.

August 29, 1912.

Dear Sir: I have before me Bills Nos. 2197 and 2198, with your request that I render to you my opinion in writing as to the validity of these ordinances and specify, if any, what legal objections there may be thereto.

Opinion.

First we will consider Bill No. 2197. The title of this Bill recites that it repeals Sec. 7 of Ordinance No. 1958 (New Series), approved July 9, 1912, relating to a Bureau of Efficiency. In this particular I direct your attention to the fact that Ordinance No. 1958 (New Series), passed and approved July 9, 1912, creating a Bureau of Efficiency, was passed by the Board of Supervisors without any recommendation from the Mayor or without any written request of the Civil Service Commission under whose jurisdiction said Bureau of Efficiency was placed by the Ordinance. Section 35 of Article XVI of the Charter provides as follows:

"When an officer, board or department shall require additional deputies, clerks or employees, application shall be made to the Mayor therefor, and upon such application the Mayor shall make investigation as to the necessity for such additional assistance; and if he find the same necessary he may recommend to the Supervisors to authorize the appointment of such additional deputies, clerks or employees; and thereupon the Super-

visors, by an affirmative vote of *not less than fourteen members,* may authorize such appointments and provide for the compensation of such appointees, subject to the limitations contained in this Charter, and subject to the provisions of Article XIII thereof."

Sub. 1 of Sec. 4, Chap. I, Art. II, provides that the Board of Supervisors shall "appoint a clerk, sergeant-at-arms and, when authorized to do so by ordinance, such additional clerks and other assistants as may be deemed necessary."

It is obvious from the reading of the section last herein above quoted, that the Board of Supervisors of its own initiative can create only those positions relating to its own department. It follows therefore that without the recommendation of the Mayor made after request upon him by the board or official desiring additional employees, the Board of Supervisors could not create a Bureau of Efficiency under the Civil Service Department and authorize the appointment of a director therefor. The Board of Supervisors being without power in the premises, Ordinance No. 1958 (New Series) is void and of no more effect than if it had not been passed. There are other grounds for holding said ordinance invalid which are unnecessary to consider, owing to the fact that it is void for the reasons above stated. It would seem therefore that Bill No. 2197, which recites its purpose to be the repealing of Section 7 of Ordinance 1958 (New Series), is unnecessary in that it is repealing that which has no validity in law. It might be well, however, for the purpose of clearing the records of the Board of Supervisors, to pass an ordinance repealing Ordinance No. 1958 (New Series) in its entirety.

I will now pass to the consideration of Bill No. 2198, entitled "Authorizing the appointment of a director of the Bureau of Efficiency by the Civil Service Commission and providing for his compensation."

From an examination of the records in the clerk's office of the Board of Supervisors, I find that there is on file a communication dated August 9, 1912, from the Mayor of the City and County of San Francisco to the Board of Supervisors, reciting the fact that the Civil Service Commission had applied to the

Mayor for an additional assistant to be called a Director of the Bureau of Efficiency and that the Mayor had inquired into the necessity for such appointment, and has found the same to be essential to the proper conduct of the work of the Civil Service Commission and so recommended to the Board of Supervisors that they pass an ordinance authorizing the appointment of such additional employee. In conformity with said recommendation, the Board of Supervisors has passed Bill No. 2198, Ordinance No. 1971 (New Series), authorizing the appointment of a Director of the Bureau of Efficiency and fixing his compensation. The records of the Board show that this ordinance was passed by the necessary fourteen votes and I can find nothing reflecting upon its validity. I recommend, however, that matters appertaining merely to the appropriating of money to carry out the purposes of any ordinance be made by resolution rather than become the subject of a separate section of the ordinance. This suggestion applies to Section 3 of Bill No. 2198, the subject matter of which should be more properly incorporated in a separate resolution. The ordinance itself creating the position should do no more than authorize the appointment of such additional employees and provide for their compensation.

Respectfully,

PERCY V. LONG,

City Attorney.

The Mayor.

Supervisors May Include Changes of Grade of One or More Streets in Resolution of Intention—Any Subsequent Proceedings Must Be by Separate Resolution for Each Improvement.

August 29, 1912.

Gentlemen: I am in receipt of your communication of the 21st inst., in which you ask to be advised whether it is legal and possible under the Charter to include all changes of grade under one resolution, the form of which you enclose in your letter.

Opinion.

The power of the Board of Supervisors of the City and County of San Francisco to change or modify the grade of any public street, is contained in Section 1 of Chapter VI of Article VI of the Charter. Said section provides, among other things, that before any change of grade is attempted, the Board of Supervisors shall pass a resolution of intention to make such change or modification of grade and it shall, in the same resolution, when regrading, repaving, sidewalking, sewering, curbing or other improvement on such street or streets is contemplated in connection therewith, define and establish the district benefited and to be assessed for the payment of damages and for the expense of regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets so as to conform with such change or modified grade.

Said section provides also that one or more streets or blocks of streets may be embraced in the same resolution.

It appears to me that there can be no question of the power of the Board of Supervisors to include in one resolution the change or modification of the grade of one or more streets. The section quoted above specifically allows such to be done. As authority for such action on the part of the Board of Supervisors, I refer you to the case of Bates vs. Twist, reported in 138 Cal., page 52. This was a case that went to the Supreme Court from the City and County of San Francisco. One of the objections to the resolution of intention adopted by the Board of Supervisors of its intention to order the grading to the official line and grade of the street therein mentioned was that said resolution included street work of various kinds upon many other streets than the street in question.

The Supreme Court, in upholding the action of the Board in passing the resolution of intention in that form, after quoting Section 2, of the Street Improvement Act, uses the following language:

"Under the authority thus conferred, it is within the legislative power of the board of supervisors, after having acquired jurisdiction thereof, to order the improvement of the whole or of any

portion of one or more streets, whether connected or remote from each other, at the same time and in the same resolution. The statute does not limit the number of improvements which the board may order at the same time, or require that a separate resolution of intention shall be adopted for each of said improvements. As in the case of any other legislative body, in the absence of any restriction upon its mode of action, the board may include more than one item of legislation in a single ordinance or resolution. In Los Angeles Lighting Co. vs. Los Angeles, 106 Cal. 156, we said: 'The resolution of intention is only a proposition by the council, and frequently consists of distinct classes of improvements upon designated portions of the same street or of different streets; and in such case it is competent for the council to order only one or more of these classes to be done.' (See, also, Emery vs. San Francisco Gas Co., 28 Cal. 346; Mahoney vs. Braveman, 54 Cal. 565.) It may often happen, as in the present case, that the public interest requires the improvement of streets situate in widely separated parts of the city, and, if so, no reason is shown or can be suggested why the board may not cause such improvements to be included in the same resolution of intention, without requiring them to be contracted for by the same individual. The designation by it of a street or portion of a street which is to be improved, with a description of the work to be done thereon, becomes thereby a distinct and several improvement, whether it be the only improvement specified in the resolution of intention or in the resolution ordering the work, or whether other improvements are included with it. After the improvements have been ordered, their distinct and several character is to be observed in the subsequent proceedings."

The Superior Court in the later case of San Francisco Paving Company vs. Egan, 146 Cal. at page 639, affirmed the decision of the Court in the Bates case upon this particular point.

I desire to call your attention to the fact that while the Board of Supervisors may include in one resolution of intention the change or modification of grade upon one or more streets, it is necessary, as the Court points out in the Bates case, to observe the distinct and several character of the streets named in the resolution of intention in all subsequent proceedings and that

in all such subsequent proceedings the Board cannot order any work to be done on any of said streets except by separate and distinct orders or resolutions.

Proceedings for the improvement of streets being in invitum, the statute must be strictly followed in order to constitute a valid lien upon the property assessed. The Courts have adhered strictly to this rule in all cases involving the validity of street assessments. The section of the Charter quoted above confers authority upon the Board of Supervisors to include one or more streets or blocks of streets in the same resolution of intention and that power has been upheld in the cases cited. The power of the Board to include several changes of grade in one resolution is limited to the resolution of intention; any subsequent proceedings in relation to the improvement of any of the streets must be by separate resolution for each improvement.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Statute Providing for State Highway Commits Selection of Routes to State Department of Engineering.

August 30, 1912.

Gentlemen: I am in receipt of a communication from your Honorable Board requesting an opinion as to whether the City and County of San Francisco is legally entitled to a portion of the $18,000,000 to be expended for the construction and improvement of the State Highway; also whether the law provides that the portion of said highway passing through the corporate limits of cities and towns shall be constructed by the State Highway Commission out of funds derived from the sale of $18,000,000.

Opinion.

The Legislature of the State of California passed an act entitled "An Act authorizing the construction, acquisition, main-

tenance and control of a system of state highways in the State of California; specifying the work, fixing the payments to be made by counties for moneys expended therein; providing for the issuance and sale of state bonds to create a fund for the construction and acquisition of such system; creating a sinking fund for the payment of said bonds; and providing for the submission of this act to a vote of the people," approved March 22nd, 1909.

Said Act provides for the construction and acquisition of a system of State Highways in this State at a cost not to exceed $18,000,000, said sum, as provided in said Act, to be realized from the sale of bonds not to exceed said sum.

Section 4 of said Act provides, among other things, that the moneys placed in the State Highway Fund, pursuant to provisions of this section, shall be used exclusively for the acquisition of rights of way for and the acquisition and construction of said system of State Highways. The route or routes of said State Highway shall be selected by the Department of Engineering and said route shall be so selected and said highways so laid out and constructed or acquired as to constitute a continuous and connected State Highway system running North and South through the State, traversing the Sacramento and San Joaquin Valleys and along the Pacific Coast by the most direct and practical routes connecting the county seats of the several counties through which it passes and joining the centers of population, together with such branch roads as may be necessary to connect therewith the several county seats lying East and West of said State Highway.

It will be observed that the selection of the route or routes is left absolutely to the discretion of the Department of Engineering of the State of California and there is nothing in the statute directing or compelling the Department of Engineering to construct any portion of the highway authorized by the statute in or through the City and County of San Francisco or any other particular county seat in any of the counties of the State.

Subsequent to the receipt of your communication, I communicated with the California Highway Commission asking said

Commission whether or not any plans had been made by the Department of Engineering which included any road or roads for the City and County of San Francisco and if none were made at the present time, whether it was contemplated to construct any of said roads in this City and County. In answer to my communication, I received a reply from the State Highway Engineer which contained the following:

"I think it may be safely said that it is the policy of the California Highway Commission not to take over any streets in any incorporated city or town. This will doubtless be the policy of the Commission unless it shall develop later on that the bond issue of $18,000,000 is sufficient to construct the State Highways contemplated outside the limits of such municipalities."

You are therefore advised that the statute providing for the construction of the so-called State Highway commits to the discretionary power of the Department of Engineering of the State of California the selection of the route or routes of said State Highway and that the California Highway Commission created under and by the provisions of said statute does not at the present time, as evidenced by the communication referred to as received by me, intend to include any streets in any incorporated city or town in said system of State Highways.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Recorder Has No Authority to File Map or Plat Subdividing Into Blocks Land in City and County, Unless It Bears the Approval of the Board of Public Works as Provided in Sec. 28, Chap. II, Art. VI of the Charter.

August 31, 1912.

Sir: I am in receipt of your request for an opinion as follows:

"I respectfully request an opinion from you as to what course the Recorder should pursue when a map is presented for filing in his department under the following conditions:

"1. The said map or plat being clearly intended as a subdivision of lands within the city and county into lots, blocks and streets, for the purpose of sale, and thus coming under the provisions of the act of 1907.

"2. The said map or plat bearing the required statement of the owners, the acknowledgement of same, and the certificate of the Auditor as to taxes, but lacking the certificate of approval of the Board of Public Works.

"3. The said map or plat bearing, also, a specific statement to the effect that none of the land is dedicated to the city, and that all of the streets delineated thereon are intended solely for private and not for public use; the intent clearly being to avoid the necessity of securing the approval of the Board of Public Works, and thus being permitted to lay out streets without considering the convenience and welfare of the owners of property contiguous to the tract so platted."

Opinion.

When a property owner desires to subdivide lands in the State of California and such lands are to be laid out into lots for the purpose of sale, it is provided in an Act of the Legislature approved March 15, 1907, that "the owner or owners thereof shall cause to be made out and filed with the County Recorder of the county in which the same is situated, an accurate map or plat thereof on cloth, particularly setting forth and describing:" and then follow in great detail the legal requirements necessary to be observed by the person or persons desiring to sell such property and also a penalty for the violation of any of the provisions of the Act. (Stats. 1907, p. 290.)

In addition to the requirements of this Act, it is also necessary in the City and County of San Francisco for a property owner seeking to subdivide his land into lots, to follow the provisions of Section 28, Article VI, Chapter II, which reads as follows:

"In all cases where the lands in the City and County shall be hereafter sub-divided and laid out into blocks or plats, sub-lots, streets and alleys, or when new streets or public grounds shall be laid out, opened, donated or granted to the public by any proprietor, the map or plat thereof shall be submitted to the Board of Public Works for its approval, and if the Board approve the same, such approval shall be by it indorsed upon the said map or plat, and said map with said approval shall then be filed in the office of the Recorder; and without such approval indorsed thereon no such map or plat shall be filed in the office of the Recorder, or have any validity; nor shall any street, alley, or public ground hereafter opened and dedicated as such, become or be a public street or be subject to any public improvement or expense without such approval, indorsement and record. No street hereafter laid out shall be approved or become a public street unless the same shall be at least forty feet in width and two hundred feet distant from any parallel street."

The Charter of the City and County of San Francisco in all municipal matters is the guide to be followed. It is a statute of the State of California in and for the City and County of San Francisco and as a statute can make more stringent general laws which may apply to municipalities.

In the case of Sheehan vs. Scott, 145 Cal., at page 688, the Supreme Court in speaking of the Charter of the City and County of San Francisco, said:

"Its adoption by the city and approval by the legislature in the manner prescribed by said section is the mode prescribed by the constitution for its enactment, and has the same effect as that of a law which is passed by bill, under the provision of section 15 of article IV. It must be held, therefore, that the provisions of the charter of San Francisco in reference to qualifications for eligibility to the office of tax-collector have been established by the legislative authority of the state and are valid."

Again in Frick vs. Los Angeles, 115 Cal., page 515, the Supreme Court in discussing the provisions of the Civil Code as to the making of contracts, says:

"As to the provision of section 1622 of the Civil Code, that all contracts may be oral except when required by statute to be in writing, if we concede that it has relevancy to the controversy here, we are yet clearly of the opinion that the charter, to the extent of its purposes, as a scheme of municipal government, is a 'statute' within the meaning of that section; it is undoubtedly a law, though of local operation; the constitution declares it to be the organic law of the city (Const., art. XI, sec. 8); it is, of course, a written law, and for very many purposes the terms 'statute' and 'written law' are used indifferently."

In addition to the decisions of the Supreme Court, declaring a charter to be a statute for all municipal purposes, the Constitution of the State of California confers the following power:

"Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

A requirement that a map subdividing an area within the City and County of San Francisco into blocks and lots shall be approved by the Board of Public Works before it can be filed by the Recorder is a local regulation which the municipality is empowered to make.

I can not find any conflict between the provisions of the Statute of 1907 and Section 28 of Article VI, Chapter II, of the Charter and I can see many reasons why the Board of Public Works should exercise control over the mapping or platting of the subdivisions of land within the City and County, even though no attempt is made to dedicate or offer for dedication within the City and County any streets within the area to be subdivided. The City Engineer's office is bound to see that maps offered for filing should have accurate and definite ties to all adjacent tracts; that the beginning and ending of all curves and tangents should be clearly defined; that ties should be shown at all street intersections with block subdivisions and adjacent streets; that proper stone or iron street monuments should be placed to secure permanently on the ground the positions of streets or blocks; that street names should not be duplicated; that the tract boundary should not conflict with adjacent tracts; that the general scheme of subdivision should conform to the Charter and general public interest by not blocking other streets and that streets should not be deeded to public service or other cor-

porations before filing same and that the streets should always be under the control of the municipalities and open to the people of the State.

You are therefore advised, that you have no authority to file in your office any map or plat subdividing or laying out in blocks, lands within the City and County of San Francisco, unless it bears the approval of the Board of Public Works endorsed upon such map or plat.

Respectfully,

PERCY V. LONG,

City Attorney.

The Recorder.

Not Necessary to Advertise Finally Passed Matters of Board of Supervisors.

September 4, 1912.

Gentlemen: I am in receipt of your request under date of August 30th, as follows:

"Will you please advise me whether it is necessary to continue the practice of advertising finally passed matters of the Board of Supervisors. This has been the practice for many years.

"The Charter provides that before any legislative acts shall be consummated they shall be advertised for five days, but there is nothing about the publication of finally passed matters.

"I have been trying to save as much of this unnecessary advertising expense as possible, and if it be entirely legal I should suggest that finally passed matters be not advertised. If this supplemental advertising can be dispensed with it will result in the saving of approximately $6,000 a year."

Opinion.

There is nothing in the Charter which requires publication of matters finally passed by the Board of Supervisors. The custom of advertising matters after final passage has been due to a

desire to inform the public of the action of the Board of Supervisors. It has been thought advisable to do this so that the public could have notice, but there is no legal requirement that this be done.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Civil Service Commission Can Not Consolidate Positions of Captains With Battalion Chiefs in the Fire Department for Purpose of Promotion to Assistant Chief.

September 4, 1912.

Gentlemen: I am in receipt of a communication from your Board, requesting my opinion as to the legal power of the Civil Service Commission to pass the following resolution:

"Whereas, the position of Assistant Engineer of the Fire Department is one of great responsibility, in which the highest available talent for fighting fires should be secured; and

"Whereas, the rules and classification adopted by the Civil Service Commission limit the persons eligible to take an examination for Assistant Chief to those who have been appointed to the position of Battalion Chief; and

"Whereas, not more than thirteen persons are eligible to take such examination under the classification as heretofore existing, and whereas, it is the judgment of this Commission that the public advantage will be served by opening the examination to a larger number of men who have had experience in the Fire Department; and

"Whereas, there are now seventy-three men of experience holding the positions of Captains in the Fire Department; be it

"Resolved, That, under the powers conferred by Section 2 and Section 8 of Article XIII, this Commission does establish as the next lower rank for the purposes of such examinations, and for no other purpose, the list of members of the Fire Department holding the positions of Battalion Chiefs, and those holding the positions of Captains;

"Therefore be it resolved, That Section 2 of Division L, Part 2 (Old Series), of the Classification of the Classified Civil Service be amended, in accordance with notice given July 18, 1912, to read as follows:

"Section 2. Fire Department.

Lower Rank.		Next Higher Rank.
Class I. Fireman	to	Lieutenant
Class II. Lieutenant	to	Captain
Class III. Captain	to	Battalion Chief
Class IV. Captain and Battalion Chief	to	Assistant Chief Engineer."

The question resolves itself thus: Can the Civil Service rules for the Fire Department be so amended as to consolidate the class "Captains" with the next higher rank "Battalion Chiefs" for the purpose of promotion to the rank of "Assistant Chief?"

Art. XIII, Sec. 2 of the Charter provides:

"The Commissioners shall classify all the places of employment in or under the offices and departments of the City and County mentioned in Section 11 of this Article, with reference to the examinations hereinafter provided for. The places so classified by the Commissioners shall constitute the classified civil service of the City and County, and no appointment to any such place shall be made except according to the rules hereinafter mentioned."

Art. XIII, Sec. 8 provides:

"The Commissioners shall provide for promotion in the classified service on the basis of ascertained merit and seniority in service and standing upon examination, and shall provide, in all cases where practicable, that vacancies shall be filled by promotion. All examinations for promotions shall be competitive among such members of the next lower rank established by the Commissioners for each department as desire to submit themselves to such examinations. The Commissioners shall submit to the appointing power the names of not more than three applicants having the highest rating for each promotion. The method of examining, and the rules governing the same, and the method of certifying, shall be the same, as near as may be, as provided for applicants for original appointments."

Section 8 of Article XIII, thus expressly provides that "All examinations for appointment shall be competitive among such members of the *next lower rank established by the Commissioners for* each department as desire to submit themselves to such examinations."

As I stated to your Board in my communication of January 25, 1911, "this classification closely follows the classification made by the Charter, Section 1, Chapter VIII, of Article IX, which is apparently made on the basis of the salary to be paid to the members of the various classes."

In answer to your request of January 23, 1912, as to whether or not your Commission might consolidate existing eligible lists of various classes, I held that each class determined by examination was a distinct class as contemplated by the Charter, and none of these classes could be consolidated.

The classes of "Captains" and "Battalion Chiefs" have been separately established for the Fire Department, both by the Charter and by your Commission, and, I am of the opinion that, since you can neither place the class "Battalion Chiefs" below that of "Captains," nor consolidate these two classes, your Commission is without legal power to pass the resolution submitted.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Water Bonds of 1910 Can Only Be Used for Purpose for Which Voted—They May Be Used to Purchase or Construct Any Pipes, Etc., Necessary to the Complete System and Such Pipes Can Be Used Temporarily to Carry Water From Other Sources.

September 4, 1912.

Gentlemen: I am requested by the Public Utilities Committee of your Board to advise as to how the proceeds of the water bonds of 1910 might be used for the construction of extensions of the existing distributing system in this City as an integral part of the works to be constructed for the Tuolumne source of water supply; and also to define "what constitutes an integral part of the Sierra water supply system, for which the people voted bonds in 1910."

Opinion.

Two opinions were rendered by me to your Board on October 20, 1911, and June 4, 1912, referring to the above matter. In both of those opinions it was stated that the bonded indebtedness to which your letter refers, and which was authorized by special election held January 14, 1910, was so authorized "for the purpose of the acquisition, construction and completion of a public utility, to-wit, a water supply and works, to be owned and controlled by the City and County of San Francisco, to furnish to said City and County, and to the inhabitants thereof, a sufficient supply of water for all purposes, the sources of such supply to be Lake Eleanor, the waters of the Tuolumne River and its tributaries in Tuolumne County, California."

The money derived from the sale of the bonds referred to can be used for no purpose which is not included in the proposition upon which the electors voted, as above set forth. As stated in my former opinions, any distributing pipes which are laid in the streets of San Francisco, the expense of which is to be paid from the proceeds of said bonds, must be an integral part of the water supply system for which the people authorized such expenditure. This means that the laying of these pipes must be a part of the entire system of bringing water from the Tuolumne River and other sources named, and distributing it to the inhabitants of the City and County of San Francisco.

The word "integral" is defined by Webster as "essential to completeness, constituent, as a part;" and by the Standard Dictionary as "constituting an essential part of a whole, necessary to completeness."

The test in this matter is, therefore, whether any pipes which may be laid are a necessary part of the complete system for furnishing a water supply from the Tuolumne River and its tributaries to the inhabitants of San Francisco. Unless such pipes form a part of such system, and such part is necessary to the completeness of the whole, the moneys derived from the bonds voted for that purpose can not be expended therefor. If, however, such pipes are laid as a part of such water supply system, prior to the completion of other portions of the system, and are not immediately required for use in connection with such source of supply, there is no reason why they can not be temporarily used for furnishing water from other sources, if such water is obtainable.

The question as to whether or not any proposed distributing pipes will constitute a part of the system of water supply from the Tuolumne River and its tributaries, is one of engineering, and not within my province to determine.

Respectfully,

PERCY V. LONG,

City Attorney.

To Board of Supervisors.

In Bid for Furnishing Fire Hose, Total Amount Specified Must Control Over Price per Ft. Where There Is a Variance Between the Two.

September 10, 1912.

Gentlemen: I am in receipt of your communication requesting my opinion concerning two bids for 7500 feet of 1½" fire hose submitted by the Bowers Rubber Works and the American Rubber Manufacturing Company, the two lowest bidders.

In your communication you call my attention to the fact that in the bid of the American Rubber Manufacturing Company it is specified that the bidder will supply 7500 feet of 1½" fire hose to the City at the rate of 49 cents per foot, and that the aggregate price thereof would be $3675, and also that the specifications of the price per foot in the bid occurs but once therein, while the price for the total quantity of hose occurs therein three times, there being a variance between the price of $3525, which is the total amount of the bid submitted and the price of 49 cents per foot for said hose. The concluding paragraph of your request is as follows:

"This Board will be pleased to be advised by you as to whether or not it has the power of interpretation of the bid of the American Rubber Mfg. Co. contended for by that company, or whether the variance would not completely vitiate that bid so as to cause its rejection. The other bidder contends that this Board has no such power of interpretation and that the aggregate price should prevail or the bid rejected."

Opinion.

I find that the bids of the American Rubber Manufacturing Company and the Bowers Rubber Works are identical, so far as the total amount or cost of the fire hose bid upon is concerned, the only difference being that in the bid of the Bowers Rubber Works, said company specifies that the said hose will be furnished to the City at the price of 47 cents per foot, which multiplied by the total number of feet specified in the bid is $3525. The bid of the American Rubber Manufacturing Company specified that the hose will be delivered to the City for the sum of 49 cents per foot, which multiplied by the total number of feet required is $3675.

The Charter of the City and County of San Francisco provides in Section 4, Chapter II of Article IX, that the provisions of Article II, Chapter III of the Charter, in regard to the advertising for proposals, the affidavit and security accompanying the same, the presentation and opening of proposals, the awarding of contracts and the security for the performance thereof, shall, so far as the same can be made, be applicable, apply to all proposals and contracts made, awarded or entered into for furnishing supplies to the Fire Department. Any contract made in violation of any of the provisions of this Chapter shall be void.

Section 1 of Chapter III of Article II of the Charter, provides, among other things, that all proposals for bids shall be accompanied with a certificate of deposit or certified check on a solvent bank in said City and County of ten per centum of the amount of the bid, payable at sight to the order of the Clerk of the Board of Supervisors.

There is no requirement in the Charter compelling the bidder to specify the price per foot of fire hose to be furnished to the Fire Department, the requirement in that regard being simply a part of the specifications adopted by the Board of Fire Commissioners.

It is apparent from the reading of the entire bid of the American Rubber Manufacturing Company that it was intended that its bid was and is the sum of $3525 and no more. Those figures appear on the first page of the bid submitted by it, and that intention is further evidenced by the fact that the bond accompanying said bid is in the sum of $352 50, which is ten per cent of the amount of the bid, and so stated by said company in said bond. Also on the last page of said bid, I find that the aggregate of said bid is $3525.

It seems to me that the total amount of said bid is the controlling factor, and that the price per foot submitted by said company of 49 cents may be disregarded. The American Rubber Manufacturing Company upon the award being made to it under said bid, would be liable upon its bond for failure or neglect to pay the printing charges and execute the contract therefor within five days after the same may be awarded, and to execute an adequate bond within said time to the satisfaction of the Board of Fire Commissioners with two good and sufficient sureties, conditioned for the faithful performance of such contract, and

said company, in my opinion, could not raise the question that the total amount of their bid of $3525 was not correct, but that the same should have been $3675.

As was said in the case of Faist et al. vs. Mayor etc., of the City of Hoboken et al. 60 Alt. Rep. page 1120:

"Mere irregularity of a bid will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest bidder. The form of a bid, not being embodied in the statute, is a regulation prescribed by the city; and failure to technically comply with the form required will not defeat the right of the lowest bidder, to have the contract, if, after the bids are opened, it appears there has been a substantial compliance with the requirements, and he tenders himself ready to execute the requisite contract and furnish responsible bondsmen or good security, as was the fact in this case. The statute is intended to secure to the city the contracting of the work to the lowest responsible bidder, and mere irregularities in the form of the bid, or details of statement, which do not in any way mislead or injure, are not sufficient to justify the rejection of such a bid. It is in the interest of the public that the lowest bid, though it be irregular, be accepted, and, if necessary, that the bidder have opportunity to correct an irregularity, while not changing the substance of his bid. But we see no need for change or amendment of such a bid. The contract with the City is not the bid, but the written agreement executed after the bid is made; and if the irregular bidder executes this, with the proper sureties, in the form required by law, the city has secured all that the statute exacts for the protection of the officials making the contract, and at the same time secures the work to be done by the lowest responsible bidder, in the interests of the people. To secure this should be the aim of municipal officials, without regard to technicalities or immaterial formalities in bidding. Anything done short of this is not a compliance with a statute which requires that a contract for the specified work shall only be entered into 'with the lowest responsible bidder or bidders who shall give satisfactory bonds or security for the faithful performance of the work.'"

In my opinion, it appears there has been a substantial compliance with the requirements of the specifications adopted by the Fire Commissioners, and an irregularity such as is pointed out in your communication, which certainly can in no way mislead or

injure, is not sufficient to justify the rejection of such a bid. Moreover, the bid of the American Rubber Manufacturing Company contains this clause:

"These specifications are intended to be self-explanatory, and should any discrepancy appear, or misunderstanding arise, the interpretation of the Chief Engineer of this Department shall be final and binding on the contractor or contractors."

Under that clause the Chief Engineer of the Fire Department of the City and County of San Francisco is specifically empowered by the American Rubber Manufacturing Company to interpret the specifications in case of any misunderstanding, and it is in the interests of the City and the public that the bid of the American Rubber Manufacturing Company, although it be irregular in the particular specified, be accepted, and the situation is in no wise affected by reason of the fact that the bid of the Bowers Rubber Works is as low as that of the American Rubber Manufacturing Company.

You are advised that, in my opinion, the bid of the American Rubber Manufacturing Company in the sum of $3525 be accepted by your Honorable Board.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Temporary Appointments Can Only Be Made With the Consent of Civil Service Commission—Civil Service Commission's Power Extends No Further Than to Say Whether or Not a Temporary Appointment Shall Be Made and Commission Cannot Say Who Appointee Shall Be.

September 11, 1912.

Gentlemen: I am in receipt of your communication asking my opinion concerning the validity of the temporary appointments made by your Board to the positions of First Assistant Chief Engineer and Second Assistant Chief Engineer. You state in your request that there are no Civil Service eligible lists for the positions of First Assistant Chief Engineer and Second Assistant Chief Engineer and that the Civil Service Commission would not approve the selections made by your Board for the reason that they were not made in accordance with the rule of the Civil Service Commission which requires that temporary appointments be made from those having the highest standing in the next lower rank.

You ask me to advise your Board as to the power of the Civil Service Commission under the Charter to make such a rule as is laid down in Section 2 of Rule 26.

The only control exercised by the Civil Service Commission over temporary appointments is that provided for in Section 10 of Article XIII, which, after reciting how appointments on probation may be made, goes on to say:

"To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this Article, can be made."

The Civil Service Commission is given power to make rules providing for appointments to places in departments under Civil Service and to also classify the places of employment, but such powers contemplate solely permanent appointments and to my mind have no relation to temporary appointments made under the provisions of Section 10. No Board has power to make a temporary appointment without the consent of the Civil Service

Commission, the Charter making such consent absolutely necessary so that the Civil Service Commission can check up its eligible lists and see that no attempt is being made to violate the Charter by ignoring such lists. The authority of the Civil Service Commission extends no further than to say whether a temporary appointment shall be made and may not be exerted to the extent that the Civil Service Commission can say who the temporary appointee shall be, the intention of the Charter being to permit the commission or department head seeking to make temporary appointments to use some discretion in the matter of selections so that public business may not be stopped.

You are therefore advised that in my opinion the Civil Service Commission has no power to make such a rule as Section 2 of Civil Service Rule 26, but no temporary appointment made by your Board is valid unless consent be given by the Civil Service Commission to the making of temporary appointments in your service.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Gasoline Pumps Are Not Permitted To Be Maintained On or Under Sidewalks in City and County

September 17, 1912.

Gentlemen: I am in receipt of your communication of the 11th inst. as follows:

"Will you kindly advise Joseph L. Taaffe in re Ordinance No. 916?

"I understand that the Board of Supervisors, acting on the advice of the Fire Marshal and others, has refused to permit the installation of gasoline pumps on the street curbs for the reason that they are an obstruction to the streets and create an unnecessary hazard."

Opinion.

Ordinance No. 916 approved June 30, 1903, entitled "Regulating Obstructions Upon Public Streets and Sidewalks" is the only ordinance authorizing obstructions on the public streets in the

City and County of San Francisco. Under the provisions of Section 2 thereof, the ordinance shall not apply to

(a) Goods or merchandise in actual course of receipt, delivery or removal.

(b) Lamp posts or hydrants erected by permission of the Board of Public Works.

(c) Ornamental trees planted along the outer line of the sidewalk, within the curb line, or barriers for the protection of such trees.

(d) Watering troughs placed by permission of the Board of Public Works upon sidewalks for the accommodation of the public.

(e) Bicycle racks or motorcycle racks placed upon the sidewalks by permission of the Board of Public Works, and of the adjoining property owners, etc.

(f) Hitching posts placed by permission of the Board of Public Works upon sidewalks in accordance with pattern indicated in the design approved by and on file in the office of said Board.

This ordinance expressly permits the sidewalks and streets of this City and County to be occupied as therein indicated, and not otherwise. Gasoline pumps upon or under the sidewalks of any street in this City and County are not permitted to be maintained under said ordinance for the reason, following the familiar rule that:

"Express mention of one thing implies exclusion of another."

Duffy vs. Greenebaum, 72 Cal. 159.

You are therefore advised that Ordinance No. 916 does not give any person, firm or corporation the right to install or maintain gasoline pumps on the streets or sidewalks, and it follows that no officer or Board of this City and County has any power to permit the obstruction of any street or sidewalk, except in accordance with the provisions of Ordinance No. 916 as aforesaid.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

United Railroads Under Their Franchise Are Required to Keep Ninth Street From Market to Brannan in Good Order and Repair, but Not to Repave It.

September 17, 1912.

Gentlemen: I am in receipt of your communication as follows:

"I am directed by the Committee on Streets and Sewers to request you to furnish the Committee with an opinion as to whether or not the United Railroads are required, under the terms of their franchise, over Ninth Street, from Market to Brannan Streets, to repave the entire roadway of said street."

Opinion.

By Order No. 1907 of the Board of Supervisors, approved April the 14th, 1887, the Sutter Street Railroad Company, a corporation, was granted the right to construct, maintain and operate, for a period of forty-three years from and after the passage of said order, a single or double track street railroad within the City and County of San Francisco, over the following streets:

Commencing at the intersection of Polk Street and Pacific Avenue, with the right to curve into and connect with the tracks now laid on Polk Street; thence westerly and along and upon Pacific Avenue to First Avenue; also commencing at the intersection of the northerly line of Mission Street with Ninth Street, thence running southerly along and upon Ninth Street to the southerly line of Brannan Street.

The Sutter Street Railroad Company was also, under Order No. 1525 of the Board of Supervisors, approved November the 14th, 1879, granted a franchise to construct, maintain and operate a street railroad along and upon that portion of Ninth Street from Market to Mission Street.

Order No. 1525 is not concerned in this opinion, for the reason that there is no clause in said franchise requiring the Sutter Street Railroad Company to plank, pave or macadamize said portion of Ninth Street covered by the franchise, granted under and in pursuance of said order otherwise than as provided in the 49th section of the Civil Code of this State, which provides that the railroad company shall pave between said tracks and for two feet on each side of the outer rails thereof.

Section 3 of Order No. 1907, however, provides, interalia, that the said grantees (the Sutter Street Railroad Company, a corporation), their successors or assigns, were granted said franchise on condition that whenever any of the streets or portions of streets over which said railroad is operated thereunder, have been or shall be accepted by the City and County, the said grantees, their successors or assigns, from the period of expiration of any present existing franchise over said streets or portions of said streets shall thereafter, during the continuance of said franchise, keep the entire roadway of said streets, or portions of streets, in good order and repair, otherwise the franchise shall become and be null and void.

Section 8 of said Order No. 1907 provides that whenever it shall be necessary for said grantees, their successors or assigns to plank, pave or macadamize those portions of the street or streets on which their railroad tracks are laid, as provided in Section 498 of the Civil Code of California, that is to say, between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, for the entire length of the street used by their tracks, they shall use the same material which is or may be used by said City and County in respect to the remainder of the streets, unless otherwise directed or permitted by the Board of Supervisors of said City and County.

It might be said that the obligation which rested upon the Sutter Street Railroad Company, and which now rests upon the United Railroads of San Francisco, to keep the entire roadway of Ninth Street from its intersection with the northerly line of Mission Street to the southerly line of Brannan Street, in good order and repair, is, in the light of Section 8 of said Order, somewhat in doubt. All doubts, however, in any franchise granted by the municipality are to be resolved in favor of the municipality. This rule has been universally upheld by the courts, and it is only necessary to cite a few cases to that effect. The case of The Western Paving Company vs. The Citizens Street Railroad Company, reported in the 128th Indiana, 525; 25 Am. State Reports 462, holds that a charter granted by a City to a street railroad company is to be strictly construed against the company. It has no doubtful rights under said charter for where there are doubts they are to be construed against the grantee and in favor of the City. To the same effect are the cases of City of Philadelphia vs. 13th and 15th Streets Passenger Railway Com-

pany, 169 Pa. 269; 33 Atl. 126, and Columbus Street Ry. & Light Co. vs. Columbus, 86 N. E. 83.

On the 13th day of March, 1912, the Sutter Street Railroad Company granted and assigned to the United Railroads of San Francisco, a corporation, all of its right, title and interest in the franchise granted by Order No. 1907, and ever since said date the United Railroads, a corporation, has under said franchise, operated its street railroad upon and along Ninth Street, commencing at the intersection of the northerly line of Mission Street and thence running southerly upon and along Ninth Street to the southerly line of Brannan Street.

The Supreme Court of the State of California, in the case of Reynolds vs. The Pacific Electric Railway Company, et al., reported in the 146th Cal., at page 261, held that a grant or assignment of a street railroad franchise imposes upon the grantee or assignee all the duties and obligations which rested upon the original holder, using the following language:

"It is a well-settled rule that a grant, assignment, lease, or transfer of a franchise such as this carries with it and imposes upon the grantee or assignee all the duties and obligations which rested upon the original holder of the franchise. It is the simple proposition that he who enjoys the privileges shall suffer the burdens."

So that, therefore, the United Railroads of San Francisco is bound by all the terms and conditions and the duties and obligations which rested upon the Sutter Street Railroad Company under the franchise granted by Order No. 1907.

The franchise granted to the Sutter Street Railroad Company by Order No. 1907 and transferred and assigned to the United Railroads of San Francisco, a corporation, expires on the 14th day of April, 1930.

It follows, therefore, that the duties and obligations resting upon the United Railroads under said franchise to keep the entire roadway of Ninth Street, from its intersection with the northerly line of Mission Street to the southerly line of Brannan Street in good order and repair, are measured and controlled by Section 3 of Order No. 1907.

Section 497 of the Civil Code provides, in part, that "authority to lay railroad tracks through the streets and public highways of

an incorporated city, city and county, or town, may be obtained for a term of years not exceeding fifty, from the trustees, council, or other body to whom is entrusted the government of the city, city and county, or town under such restrictions and limitations, and upon such *terms* and payment of license taxes as the city, city and county, or town charter may provide."

Under the authority given to it by said section, the City and County of San Francisco granted to the Sutter Street Railroad Company, its successors or assigns, the franchise in question, and attached thereto, as one of the "terms" which, by said section it was authorized to impose, a condition that the Sutter Street Railroad Company, its successors, or assigns would keep in good order and repair the entire roadway of Ninth Street from its intersection with the northerly line of Mission Street to the southerly line of Brannan Street.

The acceptance by the Sutter Street Railroad Company of the said franchise under this condition was equivalent to an express agreement to do and perform said work. The Supreme Court of this State has held that the acceptance of a franchise by a street railroad company containing such a condition was a contract between the railroad company, its successors or assigns, and the municipality.

In the case of Schmidt vs. Market etc. Railroad Company, 90 Cal. page 37, the defendant was granted a charter by the City of San Jose, which provided that when any part of a street over which the road should be ordered improved or reimproved, the railroad should be held for the payment of its pro rata share of the cost thereof, the cost to be assessed and collected in the same manner as other street assessments, and to be a lien upon its roadbed, rolling stock and franchise. Plaintiff in said action entered into a contract with the Commissioner of Streets of San Jose, for certain improvements upon a portion of Market Street, over which the defendant had constructed its road, and after the completion of the work received an assessment for the expense incurred for said work, together with a warrant for its collection. By said assessment the defendant and the roadbed and space between the rails and two feet on each outer side of the railroad track upon said portion of Market Street, was assessed in the sum of Nine Hundred Fifty-seven Dollars and Fifty Cents ($957.50), as its proportion of the cost of the improvement of said street. Plaintiff brought suit to recover the amount of the assessment

and the railroad company defended upon the ground that by the Act of March 18, 1885, commonly called the Vrooman Act, no liability whatever could be created against the defendant for work done under its provisions. The Court, after observing that no mode was provided in the Act for collecting from a street railroad corporation whose road occupied a portion of the street any portion of the expense of improving the street, went on to say:

"When the common council of San Jose, under the authority given it by Section 497 of the Civil Code, granted the defendant its franchise, it attached thereto as one of the 'terms' which, by said section, it was authorized to impose, a condition that the defendant would bind itself to pay the cost of any improvement of that portion of the street occupied by it. The acceptance by the defendant of its franchise under this condition was equivalent to an express agreement for the payment by it of its proportion of the cost of whatever improvement of the street the City should at any time order. * * * By accepting this franchise with the terms and conditions which were made a part thereof, the defendant agreed that it would be 'held' for the payment of its proportion of the cost of this improvement, and that the amount of this assessment might be collected in the manner provided for the cost of other street assessments and shall become a lien upon the roadbed, rolling stock, and franchise of said road."

In the case of Reynolds vs. The Pacific Electric Railway Company, et al., 146 Cal. p. 261, the Court upheld the validity of a franchise granted by the City of Los Angeles for a street railroad containing many conditions and burdens, paving and macadamizing the roadbed between the tracks and for two feet on each side, establishing and maintaining grades, flumes and culverts, furnishing transportation to school children at half fare, carrying policemen, firemen and state officials free of charge, and providing for the issuance and receipt by the grantee of said franchise and his assigns of transfers to and from lines operated by said grantee or his assigns.

In the case of City of Detroit vs. The Detroit Street Railway Company, 37 Mich. 558, the Court said:

"A municipal ordinance allowed a street railway company to double its track throughout a certain street, but stipulated that it should thereafter bear all the expense of repaving so much of the street as was occupied by its tracks, and to relay its tracks in the middle of the street, held that the ordinance applied to the whole

street, and that if the company availed itself of the permission in part it accepted the condition in full and lost the benefit of former exemptions or privileges that were inconsistent with it."

It will be observed that the obligation upon the United Railroads, as the successor of the Sutter Street Railroad Company, to keep the entire roadway of the streets upon which said franchise was granted, commenced at the period of expiration of any franchise then existing over the said streets, or portions thereof, at the time of the passage of said Order No. 1907, and further, after the acceptance by the City and County of said streets or portions of streets

As far as the records available disclose, I have been unable to find that there existed at the time of the passage of said order, any franchise over that portion of Ninth Street from its intersection with the northerly line of Mission Street and the southerly line of Brannan Street.

It will be observed further that the duty of the United Railroads in respect to the pavement of said portion of Ninth Street extends only to keep the entire roadway of said streets, or portions of streets, in *good order and repair.*

The authorities are not all agreed upon the construction to be given to the language imposing the obligation upon the company, and I find that there is some conflict as to the definition of the term "good order and repair." In the case of Philadelphia vs. Thirteenth and Fifteenth Sts. Pass. R. Co., 169 Pa. 263; 33 Atl. 126, the Court held that the duty of a street railway company to keep in "good order and repair" the streets occupied by it, imposed by a provision in its charter, extends to a practical replacement with a different and improved pavement, but in Philadelphia vs. Hestonville M. & F. Pass. R. Co., 177 Pa. 371; 35 Atl. 718, the Court distinguished the ruling in that case.

In the case of Columbus St. Ry. & Light Co. vs. City of Columbus, 86 N. E. 83, the franchise of the company contained a clause which provided that the portion of the street between and adjacent to the tracks should "be kept in as good repair and condition, considering the nature of the use, as other parts of said streets are kept by said City." The Court held that those operating the railway must pay their portion when it becomes necessary to keep it in as good condition as the rest of the street is kept by the City.

To the same effect is the case of the State ex rel Jacksonville vs. Jacksonville Street Ry. Co., 29 Fla. 590, 10 S. O. 590; New York City vs. Harlem Bridge M. F. R. Co., 186 N. Y. 304.

A number of cases, however, hold to the contrary. In the case of Chicago vs. Sheldon, 9 Wal. (U. S.) 50; 19 Law Ed. 594, the Supreme Court of the United States held that a franchise which contained a provision obligating the railroad company to "keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway on all the streets where two tracks are constructed in *good repair and condition,* during all the time to which the privileges hereby granted to said company shall extend," did not compel the company to grade or pave the street. To the same effect is Binghampton vs. P. D. Railway Co., 16 N. Y. S. 225; In re Fulton Street, 29 How. Pr. 429; State vs. Railway Co., 85 Mo. 263; Mayor vs. Scharf, 54 Md. 429-525; Western Paving Co. vs. Citizens Street Ry. Co. (Ind. Sup.), 26 N. E. 188; Coast Line R. R. vs. Savannah, 30 Fed. Rep. 646; State ex rel Kansas vs. Corrigan Consol. St. Ry. Co., 85 Mo. 263; State ex rel Kansas vs. Corrigan Consol. St. Ry. Co., 86 Mo. 67; Hurley vs. Trenton, 66 N. J. L. 538; Williamsport vs. Williamsport Co., 203 Pa. 1; Williamsport vs. Williamsport Co., 206 Pa. 65.

In the case of City of Philadelphia vs. Hestonville M. & F. R. Co., 35 Atl. Rep. p. 718, the defendant company was incorporated by a special Act of the Assembly, said Act containing a clause requiring the company "to keep the said streets in perpetual good repair at its own expense." In construing this clause the Court proceeded to say:

"The phrase 'to keep the streets in good repair' means to uphold, maintain, or preserve them in good condition. It presupposes that they are in some fair degree of repair when the obligation to keep them so begins to operate. In this connection it should be noted that the requirement is not that the defendant shall put the streets in good repair, but that it shall 'keep them' in good repair. Whatever the style of paving might be at the time, the mode of repair must conform to it; and under the recent case of City of Philadelphia vs. Ridge Ave. Pass. Ry. Co., 143 Pa. St. 444, 22 Atl. 695, it may be said that, when the City repairs a street with a new and improved pavement, the duty to repair relates to the pavement so put in place, and requires that the repairs shall be adapted to the style of pavement which the city has placed, or causes to be

placed, upon the particular street upon which repairs are necessary. The duty to repair is a continuous one. It is for all time. It is not intended to perpetuate in each street of the city the style of pavement in use upon it when the railway company entered upon it with its tracks. On the contrary, the general supervisory control of the city over its streets is recognized, and its right to make such regulations in regard to paving, repairing, grading, culverting, and laying gas and water pipes along them, as may be desirable to facilitate its work, and to require obedience thereto by passenger railway companies, as well as the cartman and footman, is clearly written into the charter of this company. The right of the city is to determine what pavement shall be used, and, when it shall go down upon a given street, the duty to repair is upon the company wherever its tracks extend. * * * The extent of the liability of the defendant under its charter of incorporation, is for the cost of repairs, properly made, to such style of pavement as may have been upon the several streets along which its railways ran when the notice to repair was given. The duty to repave was not imposed by the Act of 1859."

The decision last quoted states the law as to the liability of the United Railroads Company to keep that portion of Ninth Street in good order and repair. According to it, the duty of that company attached at the time of the acceptance by the City and County of the basalt pavement on said street, and it was required under its franchise, to make said repairs conform to the said pavement. If the City and County should repave Ninth Street with a new and improved pavement, the duty to keep in good order and repair relates to said new and improved pavement and requires that the repairs shall be adapted to the style of pavement which the City and County has so placed upon said street.

The language of Section III of said Order No. 1907 confirms my opinion in that respect. Therein it provides that whenever any of the streets, or portions of streets, over which the grantee operates its railroad under said Order No. 1907, have been or shall be accepted by the City and County, that the said grantee, its successors or assigns, shall thereafter, during the continuance of said franchise, keep the entire roadway of said streets, or portions of streets, in good order and repair, etc. The railroad company was not compelled to pay the cost of the first pavement or improvement of said street; its duty and obligation attached only after the acceptance of said street, or portions of street, by the City.

As to the acceptance, I find that Ninth Street from Mission to Howard was accepted by the City on February 28, 1881, by Ordinance No. 15063 (New Series); Ninth Street from Howard to Folsom was accepted by the City on December 5, 1887, by Ordinance No. 19950 (New Series); Ninth Street from Folsom to Harrison was accepted by the City on April 22, 1889, by Ordinance No. 10796 (Third Series); Ninth Street from Bryant to Brannan was accepted by the City on April 26, 1880, by Ordinance No. 14610 (New Series). I find also that the crossing of Ninth and Mission Streets was accepted by the City on October 1, 1877, by Ordinance No. 11322 (New Series); that the crossing of Ninth and Howard Streets was accepted by the City on September 14, 1874, by Ordinance No. 6403 (New Series); that the crossing of Ninth and Folsom Streets was accepted by the City on June 19, 1896, by Ordinance No. 14556 (3rd Series); that the crossing of Ninth and Bryant Streets was accepted by the City on April 9, 1888, by Ordinance No. 510 (3rd Series); that the crossing of Ninth and Brannan Streets was accepted by the City on March 25, 1895, by Ordinance No. 11988 (3rd Series). The pavement accepted under said ordinances was basalt blocks.

I fail to find any record of the acceptance by the City of Ninth Street from Harrison to Bryant, and also fail to find any record of the acceptance by the City of the crossing of Ninth and Harrison Streets.

You are advised as follows:

That Section III of Order No. 1907 of the Board of Supervisors, approved April 14, 1887, granted a franchise to the Sutter Street Railroad Company along and upon certain streets, among which streets was Ninth Street, commencing at the intersection of the northerly line of Mission Street, and thence running southerly and along and upon Ninth Street to the southerly line of Brannan Street, contains a clause that the said Sutter Street Railroad Company, its successors or assigns, are granted said rights and privileges on condition that whenever any of the streets, or portion of streets, over which said railroad is operated hereunder, have been or shall be accepted by the City and County, that the said grantees, their successors or assigns, from the period of expiration of any present existing franchise over said streets, or portions of said streets, shall thereafter, during the continuance of this franchise, keep the entire roadway of said streets, or portions of streets, in

good order and repair; otherwise, the franchise shall become and be null and void.

That Section 497 of the Civil Code of the State of California, gave to the Board of Supervisors of the City and County of San Francisco at the time of the adoption of Order No. 1907, the power to grant said franchise under said restrictions and limitations, and upon such terms as the Board of Supervisors of the City and County of San Francisco might provide.

That the said franchise so granted by said Order No. 1907, was assigned to the United Railroads of San Francisco, a corporation; that the United Railroads of San Francisco is bound by the terms and conditions of said franchise to the same extent as was the Sutter Street Railroad Company; that said franchise constitutes a contract between the City and County of San Francisco and the United Railroads of San Francisco; that under Section III, the United Railroads is obligated to keep in good order and repair the entire roadway from curb to curb of Ninth Street from the intersection of the northerly line of Mission Street to the southerly line of Brannan Street; that the period of commencement of said obligation was contingent upon two things; namely, the expiration of any franchise over any streets, or portions of streets, mentioned in Order No. 1907, and the acceptance of said streets, or portions of streets, by the City and County of San Francisco; that the records do not disclose any franchise other than the one granted by Order No. 1907, over or along that portion of Ninth Street under consideration; that Ninth Street and the crossings thereon, from the intersection of the northerly line of Mission Street and the southerly line of Brannan Street, as far as the records disclose, exclusive of that portion of Ninth Street between Harrison and Bryant Streets, and the crossing of Harrison and Ninth Streets, were accepted by the City and County of San Francisco on the dates and by the ordinances hereinbefore mentioned.

That the United Railroads of San Francisco is not obliged to put down a new and improved pavement on said portion of Ninth Street, but the said company is obliged to keep in good order and repair the same from curb to curb; in other words, the records disclose that said portion of Ninth Street was paved with basalt blocks, and that said pavement was accepted by the City, and that while the United Railroads can be compelled to repair and keep in good order said basalt block pavement, it cannot be compelled.

under its contract with the City and County of San Francisco, to repave said portion of Ninth Street with, for instance, bitumen or asphalt. In the event, however, that the City and County should repave Ninth Street between the points mentioned with a new and improved pavement, the United Railroads Company would be required to keep said street in good order and repair, said repairs to conform to the new and improved style of pavement.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Regulations For Opening of Streets by Private Corporations.

September 19, 1912.

Gentlemen: In several opinions heretofore rendered your Board, discussing your right to prescribe the conditions under which the streets of the City might be opened by public service corporations for the purpose of laying pipes and conduits and making extensions to their systems, reference has been made to the case of Ex parte Russell then pending in the Supreme Court of this State. Permit me to advise you that a decision was rendered by the Supreme Court in the case above referred to on September 13, 1912. This decision fully confirms the correctness of the positions taken in an opinion rendered your Board by me on January 15, 1912. The two principal points decided are these:

(1) Under Section 19 of Article XI of the Constitution, as amended on October 10, 1911, public service corporations have no right to use the streets of California municipalities without the consent of the City. The amended section of the Constitution provides that "persons or corporations may establish and operate works for supplying the inhabitants with such service *upon such conditions and under such regulations as the municipality may prescribe under its organic law.*"

The Court has construed the use of the word "regulations" as implying a broader meaning than mere conditions of the manner of the use of a right, saying: "The conditions prescribed may, therefore, include every kind, condition precedent, as well as conditions subsequent, if they may be made under the City Charter." In this connection the Court further says:

"To give the city power to prescribe the conditions upon which persons and corporations may establish and operate such works, is to place the entire subject matter within the control of the city, and, in effect, to provide that no such person or corporation may do so without obtaining the privilege from the city by a grant specifying the conditions it chooses to prescribe. With respect to the mode of imposing and enforcing the conditions, the city is, of course, bound by the provisions of its charter. If conditions are found in the charter itself, the legislative authority of the city will be bound thereby and could not impose inconsistent conditions, nor abrogate those of the charter. In such a case the city would be imposing the conditions by its organic law and all grants by the city legislative body would be required to conform thereto."

(2) The second point of the decision is to the effect that public service corporations which used a portion of the streets of the city prior to the amendment of the constitutional provision, acquired no right by reason of such use in the remaining streets of the city. The vested rights acquired by such corporation, prior to the amendment of the Constitution, are held to be limited strictly to the particular streets which had been used.

This decision establishes the law in this State to the effect that the use of the streets of the city, either for extensions or existing public service systems, or for the establishment of new ones, and also the control of the manner of the opening of streets for service connections or any other purpose, are under the absolute control of the municipal authorities. It therefore becomes your duty to prescribe by ordinance some uniform rule of procedure for opening streets for the purposes named.

Ordinance No. 658 (New Series), approved January 20, 1909 (p. 320 General Ordinances), prescribes rules and regulations under which persons, firms and corporations, having the right under the Constitution as it then existed, to lay down pipes or conduits in the public streets or thoroughfares of the city, should exercise that right. The right recognized by this ordinance no longer exists and it is now within the power of your Board to add any additional conditions which, in your judgment, may seem wise, or to absolutely refuse permission for the further opening of the streets. In other words, the manner of the use of the streets by public service corporations is now entirely within your discretion. If, in your judgment, conditions additional to those prescribed in Ordinance No. 658 (New Series) above referred to should be prescribed,

you are now at liberty to enact a further ordinance for that purpose.

In this connection I call your attention to the necessity of the establishment of a uniform rule as to the digging up of streets for the purpose of making so-called service connections by existing systems. A great deal of uncertainty has existed during the past year as to just what connections should be allowed as service connections. A uniform rule should be established in this matter.

With regard to the privilege of establishing extensions to existing public service systems, the only limitation at present prescribed by the charter is found in Article II, Chapter II, Section 7, which provides:

"The Supervisors shall have no power to grant franchises or privileges to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway of the city and county, except upon all the conditions and in the manner, including competitive bidding and payment of a percentage of gross receipts, hereinbefore set out, and upon the further condition that the Board shall at all times have the right to regulate the charges of any person, company or corporation using, enjoying or possessing such franchise or privilege."

It will be noted that the above provision is limited to franchises or privileges to *erect poles or wires* and does not cover pipes or conduits.

It is now legally possible for an amendment to be adopted to the charter, including in this section all pipes and conduits which were formerly omitted therefrom. Until the charter is so amended there is no limitation upon the control by your Board of the manner of laying pipes and conduits in the public streets.

Under Article II, Chapter II, Section 1, Subdivisions 2 and 13, your Board is given power to regulate and control for any and every purpose the use of the streets, highways, public thoroughfares, etc., and also to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the City and County. Under these sections of the charter your Board now has power to prescribe all the conditions under which further use shall be made of the streets. If thought advisable your Board may also require a franchise for that purpose.

I am handing you herewith a copy of the decision of the Supreme Court referred to in this letter and also a printed copy of the application for writ of habeas corpus in this matter. In this latter document, commencing at page 24, are found copies of the two ordinances of the City of Los Angeles, the validity of which is sustained by the decision above referred to. These may be of considerable service in the preparation of ordinances for this City.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Santa Rosa Avenue—Acceptance of Deed From Southern Pacific Company to City.

September 24, 1912.

Gentlemen: I am in receipt of your communication of the 21st inst., enclosing a draft of ordinance and deed of easement of the Southern Pacific Company to the City and County of San Francisco of a right to construct, reconstruct, pave, maintain and use for highway purposes only that certain public street or highway, being an extension of Santa Rosa Avenue, formerly Jarnac Street, with the request that I advise your Honorable Board as to whether or not the deed is in proper form for acceptance and also whether the draft of ordinance for acceptance of said deed is sufficient.

Opinion.

I have examined a copy of the agreement furnished me by you and the same is in correct legal form. There are a number of conditions set forth therein binding upon the City in the event that said agreement is executed. As to the policy of the acceptance of these conditions by the City and County of San Francisco I express no opinion, as that is a matter for your Board, in its discretion, to determine.

I have also examined the form of resolution accompanying your communication and I would suggest that, as the agreement between the City and County of San Francisco and the Southern Pacific Company has not yet been signed and executed, the resolution to be adopted by your Honorable Board in this matter should be one authorizing the execution of the agreement by the Mayor

of this City and County and in said resolution providing that upon the execution of the said agreement by the Mayor and the proper officials of the Southern Pacific Company that the rights therein granted be accepted and approved by the City and County of San Francisco.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Under Section 8, Article XI of the Constitution, a Special Election for Charter Amendments Must Be Conducted by the Supervisors and Their Clerk—But Supervisors May Delegate to Election Commissioners All Ministerial and Clerical Work.

September 27, 1912.

Gentlemen: I am in receipt of a letter from the Clerk of your Board requesting advice as to whether the forthcoming election, which has been called for November 26th for the purpose of voting upon proposed amendments to the San Francisco Charter, should be conducted by the Clerk of your Board or by the Board of Election Commissioners.

Opinion.

The procedure for the amendment of city charters is provided for in Section 8 of Article XI of the Constitution, which was amended in 1911. The provisions of that section refer to the clerk of municipalities. The closing paragraph of that section is as follows:

"All the provisions of this section relating to the City Clerk shall, in any city and county, be deemed to relate to the Clerk of the legislative body thereof."

Said section further provides, with regard to elections held for amendments to city charters, as follows:

"Such election shall be held and conducted, the returns thereof canvassed, and the result thereof declared by the council, or other legislative body of such city in the manner that is now or may be hereafter provided by general law for such elections in the particulars wherein such provision is now or may hereafter be made

therefor, and in all other respects in the manner provided by law for general municipal elections, in so far as the same may be applicable thereto."

The San Francisco Charter, in Article XI, Chapter I, Section 1, provides as follows:

"The conduct, management and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in the City and County, shall be vested exclusively in and exercised by a Board of Election Commissioners."**

The provisions of the Constitution, with regard to the necessary procedure for amendments to charters, are paramount over those of the Charter. It is therefore necessary to follow the constitutional provisions as explicitly as possible.

Your Board has adopted a Resolution (No. 9702 New Series) authorizing and directing the Board of Election Commissioners to take all necessary steps required to be taken by the Board of Supervisors for the holding of the election referred to. I am of the opinion that it is entirely proper for your Board to delegate to the Board of Election Commissioners any administrative or clerical duties in connection with this election but that said Board, while acting under such delegated authority, will do so as the agent of your Board and not as an independent governmental body.

It is therefore necessary that all acts in connection with this election, including the canvassing of returns and the declaration of the result, should be performed by your Board and it is also necessary that any certificates required with regard to this election should be executed by the Clerk of your Board and not by the Board of Election Commissioners or the Registrar of Voters. Whatever acts are performed by the Registrar of Voters will be so performed on behalf of the Clerk of your Board, he being employed for that purpose similarly to a deputy or assistant of the Clerk. It is immaterial whether the Registrar is formally appointed as a deputy clerk or whether his assistants are designated as deputies, provided that whatever acts are performed in this capacity can be adopted by the Clerk of your Board as his acts and he can, therefore, certify the result.

The details of performing the necessary acts in connection with this election, including the examination of any petitions that may be filed by electors for the submission of charter amendments,

can be left to arrangement between the Clerk of your Board and the Registrar of Voters, but all such work must be performed under the direction of the Clerk of your Board and the result certified by him.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Old Building Cannot Be Moved Unless It Be Made to Comply With Present Building Law.

October 2, 1912.

Gentlemen: I am in receipt of your communication in which you request to be advised upon the following facts:

"You are respectfully requested to advise this Board as to whether a building that for many years past occupied its present site within the frame building district within the City and County, and which at the time of its construction conformed to the *then* existing building laws and regulations and since then maintained in accordance with such laws and regulations, can be removed to another site within such district and maintained there without being subject to the building laws and regulations *now* in force and effect.

"The question here presented arose out of an application made to this Board by one Angelo Garretti to remove a building from its present location on Franklin street, between Francisco and Bay streets, to a lot on Lombard street, between Buchanan and Webster streets."

Opinion.

The building law of San Francisco, Section 2, provides:

"This ordinance shall apply to all buildings hereafter to be erected, constructed, altered, repaired, raised, added to or built upon within the boundaries of the City and County of San Francisco, except buildings and construction for which permits have been issued by the Board of Public Works prior to the passage of this ordinance."

In my opinion the removal of a building from one location to another, as described in your communication, would come within

the term "altered," and therefore it would not be permissible for an old building not constructed according to the present building law to be removed from one location and installed in another unless it were made to conform to the present law.

It seems apparent that the exception noted in Section 2 is for the benefit of such buildings as were properly built and located at the time of the passage of the ordinance and that it was not within the contemplation of the framers of this ordinance that permission would be given to remove a building from one location to another and in that way subject owners of buildings properly constructed near the new location to the presence of an old building constructed contrary to the present building law.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Machinists Retained in Fire Department After Adoption of Charter Are in Good Standing in Department and Not Subject to Removal Without Cause.

October 3, 1912.

Gentlemen: I am in receipt of your communication, in which you request my opinion on the following question: Has a machinist employed in the Fire Department any standing at the present time because of the fact that he was so employed at the time the present Charter went into effect?

Opinion.

This matter has received a very careful consideration in the opinion of my predecessor, Mr. Franklin K. Lane, dated September 21, 1900 (Opinions of City Attorney Lane, p. 355), in which he held that certain mechanics employed in the corporation yard who were members of the relief companies and subject to call on the fifth alarm, but not uniformed, were entitled to be retained in the force of the Department when the same was reorganized under the present Charter. I understand that Brown and Moholy, the persons referred to in your communication, were such members of a relief company at the time of the adoption of the present Charter. City Attorney Lane there reached the conclusion, in which I concur, that the provision of Art. IX, Chap. II, Sec. 1, "is

in effect a direction to the Fire Commissioners that out of the personnel of the Department there should be constituted a reorganized force which should include all persons upon the old force except such as were temporarily discharged by reason of a reduction therein. If a distinction is attempted between 'members' and 'employees' upon the ground that the literal expression of the Charter is that 'such officers and members shall not be required to pass any Civil Service examination,' we meet with this difficulty that 'such officers and members' may come from any 'persons constituting the force in the service of the Fire Department at the time this Charter goes into effect,' and such force was certainly composed partly, as your communication states, of employees who were subject to fire calls.

"Inasmuch as such employees as you have referred to constitute relief companies and are at certain times subject to fire calls there may be some doubt indeed if they should not be classed as members of the Department. This distinction between members and employees is, at best, one that the Charter-makers did not observe with the slightest uniformity, and it is too delicate to be used as a basis of exclusion from benefits enjoyed by all others in the Department.

"Looking at the entire Charter it is to be noticed that in the three great departments of the municipal government in which there were employed a considerable force of men and women, namely, the Fire Department, the Police Department and the School Department, special care was taken to secure those employed in their positions. This was in keeping with the animating spirit of the whole instrument which was to remove from partisan struggle the minor places in the municipal government so far as possible and secure to employees permanency of tenure."

Since the two machinists, to whom your communication refers, occupy exactly the same positions as those discussed by Mr. Lane, I am of the opinion that they constituted a part of the force the Department at the time the Charter went into effect, and, since they were retained under the reorganization of the Department, they are in good standing in the Department, and are not subject to removal without cause.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commissioners.

Ocean Shore Ry. Co. Is Entitled to Haul Freight Over Its Lines —It May Lease to Other Railways the Whole Or Part of Its Railroads Or the Right to Use Its Tracks.

October 3, 1912.

Gentlemen: I am in receipt of your communication of the 1st inst., forwarding to me and calling my attention to Journal Resolution No. 396, as follows:

"Resolved, that the City Attorney is hereby requested to furnish to this Board his opinion upon the following matters, to-wit:

"1. Whether or not the Ocean Shore Railway Company has a legal right under the terms of its franchise (Ordinance No. 40, New Series, entitled 'An Ordinance amending Section 1 of Ordinance No. 1808'), to haul freight over its road.

"2. Whether or not the Ocean Shore Railway Company has a legal right to haul the cars of the Southern Pacific Company, Atchison, Topeka & Santa Fe Railway Company and the Western Pacific Company over its road."

Opinion.

In answer to your first question, you are advised that the Ocean Shore Railway Company, being a commercial road and not a street railroad, has the legal right, under the terms of its franchise and also Subdivision 8 of Section 465 of the Civil Code of this State, to haul freight over its road.

In answer to your second question, you are advised that under Section 473-a of the Civil Code, the Ocean Shore Railway Company has the legal right to enter into contracts with other railroad companies whereby it may lease to said companies the whole or any part of its railroads or may lease to other companies the right to the use of its tracks. Whether or not such leases have been made I am unable to advise you.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Islais Creek Lands in Private Ownership.

October 3, 1912.

Gentlemen: I am in receipt of your communication as follows:

"Will you please attend to the matter of the Southern Pacific Company claiming to own certain streets and for which they are attempting to secure the McEnerney title."

Opinion.

The question presented by the letter from the Assessor involves the title to the bed of Islais Creek from, approximately, Davidson avenue (formerly Fourth avenue south), to a point in said creek southwest of Kirkwood avenue (formerly Eleventh avenue south), and it requires an examination into the title of the Rancho Rincon de las Salinas y Potrero Viejo which included all of Islais Creek, insofar as the same is important in determining the rights or rather, the absence of rights of the City and County of San Francisco in the same.

On October 10, 1839, Jose Cornelio Bernal was granted the tract of land known as Rancho Rincon de las Salinas y Potrero Viejo, containing 4,344.83 acres more or less, situated in San Francisco and San Mateo Counties, through Manuel Timeno, then Governor of California. This grant was confirmed by the Government of the United States, through James Buchanan, President, by a patent issued on December 1, 1857, to Carmen Sibrian de Bernal, the widow, and Jose Jesus Bernal, only child of Jose Cornelio Bernal, deceased; said patent being recorded in the office of the County Recorder of the City and County of San Francisco on April 16, 1858, in Book 1 of Patents, at page 1.

On August 20th, 1855, Carmen Sibrian de Bernal and Jose Jesus Bernal made and executed a mortgage to J. Mora Moss, Jr., wherein they conveyed to said Moss, as security for the payment of $11,000, 1958 acres more or less, the same being a portion of said Rancho Rincon de las Salinas y Potrero Viejo, according to a survey by N. Schofield, Deputy United States Surveyor General, approved by the United States Surveyor General on September 23, 1853.

On June 4, 1857, Carmen Sibrian de Bernal and Jose Jesus Bernal, sole heirs at law of Jose Cornelio Bernal, deceased, conveyed to Harvey S. Brown, for the sum of $155,000, the Rancho Rincon de las Salinas y Potrero Viejo, bounded as follows:

All that certain tract or parcel of land situate, lying and being in the former County of San Francisco and in the present City and County of San Francisco and County of San Mateo and State of California and known by the name of the Rancho Rincon de las Salinas y Potrero Viejo, which said rancho was granted by the Mexican Government to Don Jose Cornelio Bernal in the year 1839 and confirmed by the Most Excellent Department Assembly in the year 1840, which said rancho contains one square league of land 4443 83-100 acres a little more or less; subject, however, to the payments, conditions and agreements specified and contained in a certain Indenture of Mortgage executed and delivered by the parties of the first part to J. Mora Moss on the 20th day of August A. D. 1855, to secure the payment of the sum of $11,000, at the time and in the manner therein specified and upon which there is now due and payable about the sum of $25,000. Also subject to the payments, agreements and conditions specified and contained in a certain other Indenture of Mortgage executed by the said parties of the first part to William Sherman on the 5th day of April, 1856, duly recorded and was given for the purpose of securing the payments of $2,698, and $1,600, at the times and in the manner therein specified and upon which there is now due about $4,500.

Also subject to the payments, conditions and agreements specified and contained in a certain other Indenture of Mortgage executed by said parties of the first part to Henry W. Halleck, Archibald C. Peachy and Frederick Billings on the 21st day of April A. D. 1856, which was duly recorded and was given to secure the payment of $11,981.27 at the time and in the manner therein specified and upon which there is now due and payable about $15,500.

On June 27, 1856, Joseph Mora Moss commenced suit against Carmen Sibrian de Bernal, Jose de Jesus Bernal, G. Pascal, Lacroute Reymond Bodie, Alexander Crochet, Henry W. Halleck, Archibald C. Peachy and Frederick Billings to foreclose the mortgage of August 20th, 1855.

On December 16, 1856, said Moss obtained a judgment and decree foreclosing said mortgage and on January 26th, 1857, an order of sale was issued covering the property in San Francisco County and on March 30th, 1857, an order of sale was issued covering the property in San Mateo County.

On April 15, 1871, said Moss received a deed from the Sheriff of San Mateo County for 1,958 acres, the same property as was

described in the deed from Scannel, Sheriff of San Francisco, to said Moss, dated August 21, 1857, and recorded in Liber 70 of Deeds, page 288. The deed of the Sheriff of the County of San Mateo to Moss was recorded in Liber 615 of Deeds at page 3.

On September 30, 1858, Harvey S. Brown made and executed a deed to Joseph M. Moss, which deed was recorded in Liber 82 of Deeds at page 199. The land conveyed in said deed being the same as described in the deed from Carmen Sibrian de Bernal and Jose de Jesus Bernal to Joslyn Hetchinson, dated September 10, 1853, which description is as follows:

Beginning at a pile of stones and a stake on the top of a prominent hill in an Easterly direction from the dwelling house of first parties and in the line of hills called Black Hills and on the Northwestern side of Visitacion Valley; thence running South 81° East 97 chains and 88 links to the Southwest corner of South San Francisco; thence North 19° 30′ East 68 chains 94 links; thence North 16° East 52 chains to the Southeast corner of Cap. J. C. De Vries land; thence along said J. C. De Vries line North 80° 15′ West 15 chains 92 links; thence North 2° West 19 chains to a stake marked D. V. thence East 22 chains 66 links to a point in the fence marked D. V. thence North 6° East 14 chains to the East side of a slough of the Bay, thence along the margin of the Bay South 87° 30′ West 7 chains 67 links North 45° 45′ West 27 chains, North 61° 31′ West 2 chains 80 links, North 90° 30′ West 11 chains to the mouth of the Creek, thence ascending said Creek North 81° West 5 chains, South 52° West 9 chains 40 links, South 66° West 20 chains, South 32° East 4 chains 50 links, South 87° East 10 chains, South 33° East 12 chains 50 links, South 49° 30′ West 25 chains, South 83° West 6 chains 24 links, South 55° 30′ West 7 chains 25 links, South 27° West 9 chains 50 links, South 71° West 6 chains 40 links, South 5° West 6 chains 50 links, South 62° West 25 chains 50 links, North 45° West 9 chains 50 links, crossing the Creek to the end of the old wall on North side of the Marsh, thence North 58° 30′ West 2 chains along the wall to a decayed willow, thence along the line of the Catholic Cemetery South 52° West 7 chains, South 86° 15′ West 31 chains 90 links to a stake, thence South 29° 30′ East 5 chains to a stake, thence South 61° 45′ West 14 links to a stake, thence North 85° West 2 chains to a stake, thence 60′ West 6 chains 50 links to a stake, thence West 12 chains to a stake, on the side of the Telegraph Post, thence South 50° 30′ West 1 chain 6 links along the line of Telegraph Posts to Creek, thence South 67° 30′ West 11

chains along Creek, thence South 83° 30′ West 9 chains along Creek, thence South 67° West 8 chains 50 links, along Creek, thence South 54° 30′ West 2 chains 25 links to the fence of one James Osborn, thence South 46° East 14 chains 20 links to a Telegraph Post marked L. thence along line of Telegraph Posts South 31° West 86 chains 82 links, South 34° 30′ West 5 chains, South 43° 15′ West 13 chains, South 51° 30′ West 3 chains, South 56° West 12 chains to a stake, thence North 70° 15′ East 104 chains to a high rock and stones on a low hill, thence North 61° 30′ East 11 chains 88 to a tall stake, thence North 72° East 13 chains 50 links to place of beginning. The same containing 1,958 acres according to a survey by W. Schofield, Deputy United States Surveyor General, the same land being a part of the rancho called Rincon de las Salinas y Potrero Viejo granted to Jose Cornelio Bernal October 10th, 1839, by Manuel Timeno, Governor of California, and confirmed by the United States Commissioners.

The mortgage from Carmen Sibrian de Bernal and Jose de Jesus Bernal, dated August 20, 1855, and the deed from the Bernals to Harvey S. Brown, of June 4, 1857, were involved in two actions, one entitled John R. Spring vs. John Hewston, Jr., H. F. Williams and R. C. Page, and the other A. C. Freeman vs. J. C. Belgarde. The Spring vs. Hewston case went to the Supreme Court and is reported in 52 Cal. at page 442. The facts in said case were as follows:

"On the 20th day of August, 1855, Carmen Sibrian de Bernal and Jose de Jesus Bernal were the owners of the Bernal Rancho, situated in what is now the City and County of San Francisco, and mortgaged to J. Mora Moss a portion thereof. On the 4th day of June, 1857, said Bernals conveyed the rancho to Harvey S. Brown, subject to the mortgage. This was an action of ejectment to recover possession of a portion of the rancho bordering on Islais Creek. The plaintiff deraigned title from Brown, and the defendants claimed under a foreclosure of the mortgage and Sheriff's deed. The defendants appealed from the judgment and from an order denying a new trial."

The decision of the Court in that case was as follows:

"One of the descriptive calls in the mortgage to Moss is 'north nineteen degrees, thirty minutes, west eleven chains, to the mouth of the creek (Islais Creek); thence ascending the said creek, north eighty-one degrees, west five chains,' etc., giving certain courses

and distances, until arriving at a certain point, and then 'crossing the creek to the end of old wall on the north side of the marsh.' If the courses and distances from the mouth of the creek be followed as the true line, there will be excluded from the mortgage a strip of land between this line and the creek, which includes the premises in controversy.

"On the contrary, if the creek is the true boundary, then the premises in controversy are included in the mortgage, under which the defendants claim through a foreclosure sale. The Court below held that the premises in dispute are not included in the mortgage; and on the assumption entered a judgment for the plaintiff. We are all of opinion that this ruling was erroneous, and that the creek is the true boundary, and consequently that the premises in controversy were included in the mortgage.

"The plaintiff, however, contends that the defendants are estopped by two surveys, one by Hoadley and the other by Potter, establishing, as is claimed, an agreed line. In respect to the Hoadley survey, as we understand the testimony, Hoadley was selected simply to ascertain the true line as fixed by the mortgage, and not as an arbitrator to establish such other line as he might consider equitable under all the circumstances. We have been referred to no adjudicated case which holds that such a survey, of itself, independently of other circumstances, creates an estoppel. The same remark applies to the Potter survey; and, moreover, the agreement for this survey was between the plaintiff and the defendant Williams only, and of course would not bind the other defendants.

"Judgment and order reversed, and cause remanded for a new trial."

In the case of Freeman vs. Belgarde, 108 Cal. 179, the Supreme Court held that the patent from the government of the United States, dated December 1, 1857, to the Bernals, covered the bed of Islais Creek and the land of both banks thereof and included all of the land described in the complaint in said action. The language of the Supreme Court in this last case covers the issues involved in this opinion so thoroughly that I can do no better than to here recite the said opinion in its entirety. The opinion of the Court was as follows:

"Action to quiet title to certain lands in San Francisco. The lands described in the complaint are a portion of the Bernal

Rancho, and the controverted question in the action is the title of the plaintiffs to that portion of the lands described in the complaint which lies between the south shore of Islais Creek and the thread of the stream. Islais Creek empties into the Bay of San Francisco, and the tidal waters of the bay ebb and flow in the creek for some distance above its mouth. At the line of the land claimed by the plaintiff nearest the bay the creek is, at ordinary high tides, three hundred feet wide, and the ground at that point that is covered and uncovered by the ebb and flow of the tides has a width of one hundred and fifty feet between the bank of the stream and the line of ordinary low-water mark. At high tide the water nearest the bay is about three feet deep, and at a point below the lands in controversy there is at low tide no water in the creek, thus rendering the creek a mere basin which is filled and emptied by the ebb and flow of the tide. The patent for the Bernal ranch covers the bed in Islais Creek and the land on both banks thereof, and includes all the lands described in the complaint. The title of the plaintiff to the land in controversy is derived through the foreclosure of a mortgage given by the Bernals to J. Mora Moss, and a subsequent conveyance from the grantees under the Moss foreclosure to John Hewston, and depends upon the construction to be given to the description in the mortgage and sheriff's deed thereunder and to the description in the conveyance from Moss' grantees to Hewston. The plaintiff had judgment in the court below, and the defendants have appealed therefrom and from an order denying a new trial.

"1. The description of the property in the mortgage to Moss, so far as the same affects the present action, is as follows: '* * * Thence along margin of the bay (giving four courses and distances) * * * 11 chains to mouth of creek; thence ascending said creek (giving thirteen courses, with their distances) * * * N. 45°, W. 9 chains 50 links, crossing the creek to the end of the old wall on N. side of marsh * * * containing area of 1,958 acres, more or less, according to a survey by N. Schofield, deputy U. S. Surveyor General.' This description in the mortgage was carried into the sheriff's deed issued upon the sale under the foreclosure, and the title to the land thus conveyed afterward became vested in Pioche and Robinson.

"In Spring vs. Hewston, 52 Cal. 442, the description in this mortgage was before the court, and it was held that the creek, rather than the line determined by the courses and distances, was

the true boundary of the land embraced in the mortgage. The call in the mortgage 'to mouth of creek' rendered the thread of the creek the boundary of the land mortgaged. In the absence of any qualifying term the designation in a conveyance of any physical object or monument as a boundary, implies the middle or central point of such boundary; as, for example, if the boundary be a road or highway, or a stream, the thread of the road or stream will be intended; if a rock, a heap of stones, or a tree be the boundary the central point of such tree or rock or heap of stones will be intended. A private grant is to be interpreted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, if the grantor of the land is the owner of the bed of such stream. 'When riparian estates are conveyed the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters.' (Gould on Waters, sec. 195.) The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high-water mark. (Long Beach Land, etc. Co. vs. Richardson, 70 Cal. 206.) A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands. It is unnecessary to determine whether the provisions of section 880 of the Civil Code, and of section 2077 of the Code of Civil Procedure, were intended to change the rules of construction then existing, inasmuch as the mortgage to Moss, and the conveyances by which the lands in question became vested in Pioche and Robinson, were executed prior to the enactment of the codes.

"The further call in the mortgage and subsequent conveyances, 'thence ascending said creek,' must prevail over the courses and distances. The creek is the boundary of the land conveyed, and the courses and distances, being only approximate estimates of the direction and length of the boundary, must yield to the actual line of the creek. When a meandering stream is a boundary it is im-

practicable for a surveyor to fix monuments in the channel of the water, or to define the actual line of its windings and courses; and in attempting to define its banks it would be impossible for two surveyors to give the courses and lengths of its several meanders alike. (Yates vs. Van de Bogert, 56 N. Y. 526; Angell on Watercourses, secs. 29, 30; Middleton vs. Pritchard, 3 Scam. 510; 38 Am. Dec. 112; Railroad Co. vs. Schurmeir, 7 Wall. 272.)

"This construction is not overcome by the fact that after 'ascending the creek' for several courses, the next course is given as 'crossing the creek to the end of the old wall.' This call is not inconsistent with holding that the previous call, 'ascending the creek,' follows the thread of the stream, but merely shows that in going from that point the next course is in a direction which crosses the creek from the thread of the stream toward the end of the wall. Nor is the construction to be given to these calls in the mortgage qualified by the subsequent reference therein to a survey by Schofield. The defendants offered in evidence a plat of a survey made by Schofield and approved by the United States Surveyor General September 23, 1853, and it was testified that this was a preliminary survey of the Bernal Rancho, made under instructions from the land commission. A comparison of this plat with the description in the mortgage shows, however, that this cannot have been the survey referred to in the mortgage. The plat is of the entire rancho, containing four thousand three hundred and forty-one acres, and has upon its face several subdivisions, no one of which corresponds with the tract of nineteen hundred and fifty-eight acres which is described in the mortgage. The plat, however, contains upwards of a hundred courses—more than double the number in the mortgage—and only eleven of these courses are the same as those in the mortgage.

"2. Pioche and Robinson conveyed, December 6, 1866, to John Hewston a tract of land, 'commencing at the intersection of a ditch (dividing land belonging to Haley and O'Neill) with the shore line, and running thence along said ditch * * * to E. line of Fifteenth avenue; thence along the easterly line of said Fifteenth avenue N. 45° 15′ W. 2 chains 60 links, to S. shore of Islais creek; thence along said shore as it winds and turns to commencement.' Whatever title passed by this deed was vested in the plaintiffs at the commencement of the action. By virtue of conveyances subsequently executed by Pioche and Robinson the defendants Luty and Thomas claimed title to the land, 'commencing at a point where the northwesterly line of Fourth avenue

intersects the southerly shore of Islais creek, and running thence in a northwesterly direction along the northwesterly line of said Fourth avenue extended, to the center of Islais creek, and thence ascending said Islais creek along the center line thereof to the northeasterly line of Fifteenth avenue, if extended in a northwesterly direction, as said avenue is delineated on said map; and thence in a southeasterly direction, and along the northeasterly line of Fifteenth avenue, if extended as aforesaid, to the southerly shore of Islais creek; and thence in a northeasterly direction along said southerly shore as it winds and turns to the point of commencement.' With reference to their title to this land the court finds, 'That the lands described in the conveyance to Hewston include all the property described in plaintiff's complaint, unless such deed is to be construed as including no part of the lands covered by the waters of Islais creek, in which event the said deed includes all the lands described in plaintiffs' complaint, except that lying in Islais creek;' and 'if Pioche and Robinson retained any title to any part of the lands described in plaintiffs' complaint, after the making of the conveyances hereinbefore set out, then such title thereafter and prior to the commencement of this action became vested in the defendants, Thomas and Luty, as to the lands described in their answer.' The conclusion of law that 'the plaintiffs are the owners of all the real property described in their complaint' must be regarded as a finding that Pioche and Robinson did not retain any title to any portion of the lands described in the complaint. The term 'shore,' in its ordinary use, signifies the land that is periodically covered and uncovered by the tide, but it is sometimes applied to a river or pond as synonymous with 'bank.' In the absence of any qualification a grant bounded by the 'shore' of a river, when the grantor is the owner of the river, conveys the land up to the lowest point of the shore at any time, in order that the grantee may at all times have access to the stream by which the land is bounded. It is competent, however, for the grantor to so designate the line on the shore which shall constitute the boundary, that there shall be no uncertainty in its location, and in such case the line of high or low water mark would be immaterial in determining the extent of the grant. In the present case, the starting point of the description in the grant to Hewston is 'the intersection of the ditch with the shore line.' This starting point may be susceptible of exact location, and from some of the evidence offered at the trial it would appear capable of ascertainment, although the court does not find its location.

The only land to which plaintiffs have title is that embraced within a line drawn from this starting point around the various courses to the 'south shore of Islais creek,' and 'thence along said shore as it winds and turns to commencement.' The point in the 'south shore,' from which the last course is to be drawn, must be the same point in the shore as is the starting point; that is, at whatever point between high and low water mark was the intersection of the ditch with the shore line, there must be the point in the 'shore line' to which the course along the easterly line of Fifteenth avenue is to be extended. The term 'shore' must be construed with the same meaning wherever it is used in the same conveyance, and its definite location in the first course requires the same location in the last. This is a fixed boundary or monument to which the distance 'two chains sixty links,' must yield. Whatever land lies between this boundary and the center of the creek is vested in the defendants Thomas and Luty, and the finding of the court that the plaintiffs were the owners of this portion of the demanded premises was erroneous.

"The defendants other than Thomas and Luty claim title under Harvey S. Brown to certain lots in gift map number four, under the theory that the Moss mortgage did not include any part of the bed of Islais creek. As Brown had conveyed to Moss all the lands described in the mortgage before he made the conveyance under which these defendants claim it is evident that the plaintiffs' title derived from Moss is superior to theirs.

"The judgment and order denying a new trial are reversed as to the appellants Thomas and Luty. As to the other appellants they are affirmed."

Patent to Pueblo Lands.

The patent from the United States Government to the City and County of San Francisco was dated June 20, 1884, and recorded in the General Land Office, Vol. 12, pages 297 to 340 inclusive, and recorded in the office of the Recorder of the City and County of San Francisco July 1, 1884, in Liber 1 of Patents, page 91. In said patent the City and County of San Francisco was granted four square leagues of land, according to a survey made by F. Von Leicht, United States Deputy Surveyor, in December, 1883, containing 17,754.36 acres of land. Said survey was made in accordance with the instructions of the Commissioners of the General

Land Office and was approved May 15, 1884, by N. C. McFarland, Commissioner of the General Land Office.

The said patent followed the decision made on December 21, 1854, by the Board of Land Commissioners and the decision on appeal to the Circuit Court of the United States on May 18, 1865, in re "The City of San Francisco vs. The United States," confirming to the City and County of San Francisco four square leagues of land, as described in the decision of Field, Circuit Judge, as follows:

"Final Decree Confirming the Claim of the City of San Francisco to Its Pueblo Lands, Entered May 18, 1865.

"The City of San Francisco
vs.
"The United States.

"The appeal in this case taken by the petitioner, the City of San Francisco, from the decree of the Board of Land Commissioners to ascertain and settle private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said Board, and the papers and evidence upon which said decision was founded, and further evidence taken in the District Court of the United States for the Northern District of California pending said appeal—the said case having been transferred to this court by order of the said District Court, under the provisions of section four of the Act entitled 'An Act to expedite the Settlement of Titles to Lands in the State of California,' approved July 1st, 1864—and counsel of the United States and for the petitioner having been heard and due deliberation had, it is ordered, adjudged and decreed, that the claim of the petitioner, the City of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed.

"The land of which confirmation is made, is a tract situated in the County of San Francisco, and embracing much of the extreme upper portion of the peninsular above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1864), on which the City of San Francisco is situated, as will contain an area of four square

leagues—said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the north by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: Such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included in the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust, for the benefit of the lot-holders, under grants from the Pueblo, Town, or City of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the City.

FIELD,
Circuit Judge.

San Francisco, May 8th, 1865.

The decree of the Circuit Court was followed by a grant of Congress contained in an act entitled "An Act to quiet the title to certain lands within the corporate limits of the City of San Francisco." (Approved March 8, 1866.) The said Act reads as follows:

Grant By Congress.

An Act to Quiet the Title to Certain Lands Within the Corporate Limits of the City of San Francisco.

(Approved March 8, 1866.)

"Be it enacted, by the Senate and House of Representatives of the United States, in Congress assembled, That all the right and title of the United States to the land situated within the corporate limits of the City of San Francisco, in the State of California, confirmed to the City of San Francisco by the decree of the Circuit Court of the United States for the Northern District of California entered on the eighteenth day of May, one thousand eight hundred and sixty-five, be, and the same are hereby relinquished and granted to the said City of San Francisco, and its successors, and the claim of the said City to the said land is hereby

confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: That all the said land, not heretofore, granted to said City, shall be disposed of and conveyed by said City to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this Act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said City for public uses; provided, however, that the relinquishments and grant by this Act shall not interfere with, or prejudice any valid adverse right or claim, if such exist, to said land, or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjudgment thereof."

The patent from the United States Government to the City and County of San Francisco expressly excepted such parcels of land as had, by grant from lawful authorities, vested in private proprietorship and had been finally confirmed to those parties claiming under said grants by the tribunals of the United States and exempted said lands from confirmation to the City, although the same were included within the area of four square leagues granted by said patent. The Von Leicht map discloses that the Rancho Rincon de las Salinas y Potrero Viejo comprised 4,915.70 acres situated within the limits of said map and was one of the 15 grants excluded from the pueblos patent, and it has been shown that the Rancho Rincon de las Salinas y Potrero Viejo was granted to Jose Cornelio Bernal by the Mexican Government on October 10, 1839, and that said grant was confirmed by the government of the United States by a patent issued on December 1, 1857, to Carmen Sibrian de Bernal and Jose Jesus Bernal about twenty-seven years before the patent from the United States to San Francisco was made and consequently the Rancho Rincon de las Salinas y Potrero Viejo is one of the grants specially excepted from the operation of the patent from the United States to San Francisco and the land included in said Rancho was never confirmed to the City and County of San Francisco and always remained in private ownership.

On June 27, 1860, Francis L. A. Pioche instituted proceedings against the City and County of San Francisco and William Hooper, John Middleton, William M. Lent, Samuel Knight and Charles M. Hitchcock, the Commissioners of the Funded Debt of

the City and County of San Francisco. This was an action to determine the claim by defendants adversely to the plaintiff in and to all of that certain tract of land, describing the Rancho Rincon de las Salinas y Potrero Viejo, of 1,958 acres, by metes and bounds, including Islais Creek, and to obtain a decree adjudging the pretended claim of defendants invalid, and to bar defendants and each of them and all persons claiming under them of all right, title, estate or interest in said premises, etc.; that the plaintiff be quieted in its said title and repossession and that the title of said plaintiff may be a good and valid title as against the said defendants and each of them.

In said action a lis pendens was filed and recorded on June 27, 1860. On July 9, 1860, the answer of the City and County of San Francisco was filed and on July 28, 1860, the answer of the Commissioners of the Funded Debt was filed. On March 1, 1862, the Court rendered judgment for plaintiff as prayed for in his complaint without cost or damages and on March 6, 1862, a decree in favor of plaintiff quieting his title was filed, entered and docketed and the judgment roll filed.

On June 27, 1860, John F. Cobb commenced suit against the City and County of San Francisco and the Commissioners of the Funded Debt to quiet title to the Bernal Ranch, excepting South San Francisco. On July 9, 1860, the answer of the City was filed and on July 27, 1860, the answer of the Commissioners of the Funded Debt was filed. On December 10, 1860, a stipulation and disclaimer of the defendants were filed and on March 1, 1862, judgment was ordered for the plaintiff.

It appears from the foregoing:

1. That the Rancho Rincon de las Salinas y Potrero Viejo was granted by the Mexican Government to Jose Cornelio Bernal on October 10, 1839.

2. That said grant was confirmed by a patent issued to Carmen Sibrian de Bernal and Jose Jesus Bernal by the United States Government on December 1, 1857.

3. That said Rancho was excepted from the patent of the pueblo lands issued by the United States Government to the City and County of San Francisco on June 20, 1884.

4. That the grant of said Rancho to the Bernals was confirmed

by two decisions of the Supreme Court, viz.: Spring vs. Hewston, 52 Cal. 442 and Freeman vs. Belgarde, 108 Cal. 179.

5. That said grant was upheld in the two decisions of our District Court, viz.: Pioche vs. San Francisco and Cobb vs. San Francisco, in which the title of the plaintiffs was quieted as against the City and County of San Francisco and the City of San Francisco was adjudged in those two suits as not having any title therein.

You are therefore advised that the lands embraced within the lines of Islais Creek Channel within the points designated, to-wit, beginning, approximately, at Davidson Avenue (formerly Fourth Avenue) south to a point distant southwesterly from Kirkwood Avenue (formerly Eleventh Avenue south), together with all of said Creek located within the boundaries of the Rancho Rincon de las Salinas y Potrero Viejo, is in private ownership and that the City and County of San Francisco has no right, title or claim thereto or therein.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Demand of M. M. O'Shaughnessy—Board of Public Works Has Power to Fix Salaries of Those in Its Employ, Including City Engineer, and Supervisors Can Only Limit Aggregate Amount to Be Spent in One Year for Salaries.

October 7, 1912.

Sir: I am in receipt of your request under date of September 30th, 1912, asking for advice concerning the auditing of the demand of M. M. O'Shaughnessy as City Engineer for the month of September, 1912.

You call my attention to the fact that the demand is for $1,250, indicating an annual salary of $15,000 a year, whereas, according to item 527 of the Budget adopted by the Board of Supervisors for the fiscal year 1912-13, the Board of Supervisors attempted to fix the salary of the City Engineer at $7,000 per annum.

You ask to be advised as to whether the budget limitation for the fixing of salaries for the Board of Public Works governs.

I have to advise you that the Board of Public Works has the power to fix salaries for those in its service and that the only limitation the Board of Supervisors can place upon that power is in fixing the aggregate amount to be spent in any one year for salaries, which cannot exceed in any one month one-twelfth of that aggregate amount.

On July 8th of this year I advised the Board of Health that the Board of Supervisors had no power to limit that body as to the individual salaries to be paid for services in that Department and you are also advised that the Board of Supervisors has no power to limit the Board of Public Works in that particular, and you are further advised that the demand of M. M. O'Shaughnessy as Engineer for the month of September, 1912, is a valid one and should be approved by you, providing, of course, that the Board of Public Works has already given its approval.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Paycheck System—Warrant Now Issued by Auditor Complies With Charter.

October 18, 1912.

Sir: I am in receipt of your communication asking me to advise you whether or not the paycheck that is now being issued by the Auditor complies with Section 5 of Chapter III of Article IV of the Charter, which reads as follows:

"No demand shall be paid by the Treasurer unless it specify each several item, date and amount composing it, and refer by title, date and section to the law, or ordinance or provision of this Charter authorizing the same; but the allowance or approval of the Auditor, or of the Supervisors, or of any department, board or officer, of any demand which is not authorized by law or this Charter, and which upon its face appears not to have been expressly made payable out of the funds to be charged therewith, shall afford no warrant to the Treasurer for paying the same."

Opinion.

That section merely requires that a proper demand must have the approval of certain officials which approval must appear on the face of the demand. As I understand it the demands which are now filed with the Auditor under the new system have this approval. The warrant issued by the Auditor is separate and distinct from the demand filed with the Auditor. Before the warrants are issued, however, the Auditor makes his approval upon the demand and the warrant is drawn in consequence of that approval. The requirements of Section 5, Chapter III, Article IV are complied with in substance and in form when a demand which is filed with the Auditor has upon its face the approvals of the officials referred to in that section and the approval of the Auditor. There is nothing in this section which would require that these approvals be also placed upon the warrant. The object of the Charter in requiring that a demand have these approvals is for the information of the Auditor and the Treasurer and to retain a complete record of the demand upon its face. I am of the opinion that the warrant as now issued by the Auditor complies with the section of the Charter referred to.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Petition From Newell-Murdoch Company for Permission to Deliver Water Service Into Forest Hill Through City Property—No Legal Objection.

October 18, 1912.

Gentlemen: I am in receipt of your communication of the 15th inst., as follows:

"I am directed by the Committee on Lands and Tunnels of the Board of Supervisors, to forward the enclosed petition from the Newell-Murdoch Company for permission to run a water main through City property to deliver water service into 'Forest Hill' properties from the pumping station of the Spring Valley Water Company, as per plan attached to communication; and to request that you furnish an opinion as to the right of the City to grant such privilege, and if so, to outline legal conditions that will in future protect the City's rights."

Opinion.

On June 13th of this year I rendered an opinion to the Board of Supervisors concerning the right of the Board to grant permission to the Noble Jones Company to install a pump in the pump house on the Relief Home Tract for the purpose of pumping water from Lake Honda to a tank to be installed on Twelfth Avenue and R Street, together with the privilege of extending pipes over the Relief Home Tract between the pump house and Twelfth Avenue and R Street, where necessary. In that opinion I advised that, as the tract of land now used by the Relief Home was owned by the City and County in its proprietary capacity and was not burdened with any restrictions as to its use, as it would be if dedicated for a particular purpose or use, there was no legal objection to the granting of said permission, with this proviso; that such permission be granted upon the condition that the pump installed in the pump house on the Relief Home Tract and the pipes leading therefrom on said tract be given to the City.

The petition from the Newell-Murdoch Company for permission to run a water main through the Relief Home Tract stands upon the same footing as the application of the Noble Jones Company, and therefore, I hold that there is no legal objection as to the right of the City to grant such privilege.

I conferred with the City Engineer on this matter and he stated to me, after examining the blue-print attached to your communication, that from an engineering standpoint there was no objection to the installation of the pipe as requested and that the said pipe as shown on said diagram was of sufficient size to answer all requirements for some years to come. I would suggest in this connection that an agreement be entered into between the owners of Forest Hill and the City and County to the effect that ownership of the pipe installed on the Relief Home Tract be given to the City and County and that the City and County of San Francisco be permitted to make connections therewith to supply that portion of the Relief Home Tract lying west of the road between Lake Honda and said portion of the Relief Home properties, together with the right to transfer such privilege.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Bonds Guaranteeing Maintenance of Street Work Cannot be Exacted From Contractors.

October 18, 1912.

Gentlemen: I am in receipt of your communication of the 9th inst., as follows:

"I am requested by Commissioner Laumeister to forward you enclosed copy of request from the Biturine Company of America, to furnish them with information concerning guarantee for the maintenance of a street during a period of years, where the same is not a direct assessment against abutting property."

Opinion.

I find that former City Attorney Franklin K. Lane had occasion to pass on a similar matter in an opinion rendered to the Board of Public Works on February 27, 1901, which opinion may be found on page 419 of the published opinions of Franklin K. Lane, 1899-1902. In that opinion Mr. Lane said, on page 421, speaking of the bond to be executed by a Surety Company and approved by the Mayor guaranteeing the maintenance of said work in good condition for a period of ten years, "there is no provision for such a bond in the charter or elsewhere and it is clearly unauthorized. This proposition has been squarely decided by our Supreme Court on at least three occasions (Brown vs. Jenks, 98 Cal. 10; Burnett vs. Llewelyn, 32 Pac. Rep. 702; Alameda M. Co. vs. Pringle, 130 Cal. 226)."

Since the rendition of that opinion by Mr. Lane the Supreme Court has cited with approval and confirmed the above cases in the cases of Blochman vs. Spreckels, 135 Cal. 665; Goldtree vs. Spreckels, 135 Cal. 666; True vs. Fox, 155 Cal. 534; Stansbury vs. Poindexter, 164 Cal. 710; Van Loenen vs. Gillespie, 152 Cal. 223; Woollacott vs. Meekin, 151 Cal. 703; Charters vs. Stansbury, 10 Cal. App. 193; Mulberry vs. O'Dea, 4 Cal. App. 389; Hatch vs. Nevills, 95 Pac. 44;

The reason given, as stated in the case of Blochman vs. Spreckels, supra, was—

"that the provision for the bond was not only unauthorized by the statute but that it changed and might increase the burden of the property owner, for the reason that the contractor could not afford to do the work in the one case or give the guarantee in

the other for nothing. 'The contractor,' it was said, 'would charge a higher price for the work when he was forced to contract also for repairs.' No one can say that a contractor would agree to stand behind the City to hold it harmless from damage arising out of the work he had undertaken to do, without some compensation additional to the necessary cost of the material and labor to him, plus a reasonable profit. In thus agreeing he might subject himself to liabilities much greater than the cost of protecting the work for one year 'from injury by ordinary use,' or greater even than the cost of keeping 'the street in repair for the period of five years.' It was said in Brown vs. Jenks, 98 Cal. 10: 'Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty.' The law does not authorize a municipality to escape its liability by shifting it to the shoulders of the contractor and in attempting to do so it imposes conditions that would naturally tend to increase the cost of the work."

An additional reason was given by the Court in the case of Stansbury vs. Poindexter, 154 Cal. 709, as follows:

"There is no merit in the appellant's point that he was denied opportunity of showing by all who presented bids to the City Council for work, that the specifications quoted had not operated to increase the amount of their bids. This objection leaves out of consideration the fact that some bidders may have been deterred from offering to do the work at all by reason of the unlawful restrictions contained in the proposed contract. Such persons may have concluded very properly that they could not afford to do the work, in view of the burdens imposed, and, without such burdens, they might have been prepared to present lower bids than those filed by their more daring competitors."

The fact that the work proposed to be done is to be performed on streets accepted by the City, the duty of repairing which, under the Charter, devolves upon the City and County, does not alter the situation. It is true that in all of the cases cited the cost of the work was assessed upon the property owners and the courts held, very properly, that the requirement of a bond for the maintenance of the work for any number of years would naturally tend to increase the amount of the bids submitted for the performance of the work and therefore necessarily increase the burden of the property owner.

The inclusion in any proposal for bids for work to be done upon accepted streets, the cost of which is to be payable out of the treasury of the City and County of the requirement for a bond from the contractor to keep the street in repair for a term of years is unauthorized and void for the reason as given in the case of Stansbury vs. Poindexter, supra, that some bidders for the work may be deterred from offering to do the work at all by reason of the unlawful restriction in relation to a bond contained in the proposal for bids.

As stated by Mr. Lane in his opinion, it may be that bonds of the character mentioned are in use in other cities and have been upheld in outside jurisdictions, but in view of the decisions of our courts, such decisions would have no binding force in this State.

You are therefore advised that a bond from the contractor guaranteeing the maintenance of a street for a number of years cannot be exacted and that it makes no difference whether the cost of the work is to be paid for by property owners abutting on the street or streets or from the treasury of the City and County.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

San Francisco Polyclinic Is Entitled to Visiting Privileges City and County Hospital.

November 1, 1912.

Gentlemen: I am requested by your Board to render an opinion as to the legal right of the San Francisco Polyclinic and Post Graduate College to enjoy the privileges granted to teaching institutions through the appointment of visiting staffs to the City and County Hospital.

Opinion.

Article X, Section 7 of the Charter provides that:

"The Board shall appoint for the City and County Hospital at least two visiting physicians and at least two visiting surgeons, who shall receive no compensation for their services, but who shall have the privilege of teaching students in their hospital wards. Any student who is actively engaged in the study of medicine

shall have the benefit of clinical instruction in any of the hospital wards."

Under the terms of this section the University of California Medical Department, the Leland Stanford Jr. University Medical Department, Hahnemann Medical College, the College of Physicians and Surgeons and the San Francisco Polyclinic have in the past been given the benefit of instruction at the City and County Hospital under the supervision of visiting surgical and medical staffs regularly appointed by your Board.

The question now arises as to whether the San Francisco Polyclinic is such an institution teaching "Students actively engaged in the study of medicine" as to fall within the privileges of Article X, Section 7 of the Charter.

The San Francisco Polyclinic and Post Graduate College was originally founded some twenty years ago as the post graduate school of the Medical Department of the University of California. Later it became an independent institution, its most recent Articles of Incorporation being filed March 4, 1907. These articles set forth its purposes as follows:

1. That of being organized under act of the Legislature, approved March 14, 1885, for the incorporation of colleges and seminaries of learning.

2. For the maintaining of a hospital or hospitals.

3. To give gratuitous medical and surgical treatment to the deserving poor.

By virtue of these Articles the San Francisco Polyclinic and Post Graduate College has established a free clinic in the City and County of San Francisco and is actively engaged in treating the poor at such clinic, in visiting and attending cases in the beds at present assigned to it at the City and County Hospital, and, in instructing its students, graduates of medicine from other colleges, aided by the material afforded it by the bed privileges of the City and County Hospital.

The term "post graduate" does not remove an institution from the class "college"; it merely presumes as a prerequisite for entrance a certificate of graduation from some college whose students are denominated "undergraduates." The name "post graduate" implies the further following up of lines of study previously

taught to students as undergraduates. As well deny that a University is not a "school" because it requires the completion of a certain course of study as a condition of admission to its classes.

You are therefore advised that the San Francisco Polyclinic and Post Graduate College is entitled under the said charter provisions to the same privileges in the City and County Hospital or the other colleges herein named.

Respectfully,

PERCY V. LONG,

City Attorney.

Department of Public Health.

Pensions, Fire Department.

November 1, 1912.

Dear Sir: I am in receipt of your communication under date of October 31, 1912, as follows:

"Would be pleased to have you advise me regarding the validity of the Fire Pension Demand of M. J. Dolan. As I understand the facts, they are as follows:

"Mr. Dolan held the rank of Battalion Chief; he was promoted to First Assistant Chief by the Board of Fire Commissioners on July 20, 1906. After six years' continuous service as First Assistant Chief, during which time he performed the duties and drew the salary as First Assistant Chief, he was retired as First Assistant Chief by the Fire Commission sitting as a Pension Board on July 31, 1912. Would like to have you advise me if he is entitled to draw a pension as First Assistant Chief."

Opinion.

The provisions of the Charter regarding pensions to the members of the Fire Department are to be found in Chapter VII, Article IX. In Section 3 the concluding paragraph is as follows:

"Such retired officer or member shall receive from the Firemen's Relief Fund a monthly pension equal to one-half the amount of the salary attached to the rank held by him for three years prior to the date of his retirement, and the same shall cease at his death."

In passing upon this precise question I held, on April 1, 1909, reported on page 319 of Opinions of City Attorney for 1908-09, that:

"If a member of the Department has actually held a particular rank for a period of more than three years prior to the date of his retirement, and during all of said time has performed the duties and drawn the salary attached to that rank, then his pension shall be fixed at one-half the amount of that salary."

You are therefore advised that M. J. Dolan is entitled to draw the pension which would attach to the rank of First Assistant Chief of the Fire Department.

Respectfully,

PERCY V. LONG,
City Attorney.

The Auditor.

Pensions, Fire Department—Probationary Member of Department Injured in Performance of Duty Entitled to Pension.

November 1, 1912.

Gentlemen: I am in receipt of your request to be advised whether your Board "has the power to grant a pension to a man who has been disabled during the performance of his duties as a member of the Fire Department by reason of injuries sustained by him while a candidate serving his probationary period, such injuries being sustained by him while in the discharge of his actual duties as such probationary officer."

Opinion.

Section 4 of Chapter VII of Article IX of the Charter provides:

"Any member of the Fire Department who shall become physically disabled by reason of any bodily injury received in the performance of his duty, upon his filing with the Commissioners a verified petition setting forth the facts constituting such disability and the cause thereof, accompanied by a certificate signed by the Chief of the Fire Department, the Captain of the Company to which he belongs, and by two regularly certified physicians of the City and County, recommending his retirement upon a pension on account of such disability, may be retired from the Department upon

an annual pension equal to one-half the amount of salary attached to the rank which he may have held three years prior to the date of such retirement, to be paid to him during his life and to cease at his death. In case his disability shall cease his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement."

The language of the Section being that *any member* of the Fire Department who shall become physically disabled by reason of any bodily injury received in the performance of his duty * * * may be retired, etc.

Your Board has already found that the individual was injured while in the performance of his duty, so the only question for us to determine is, was he a member of the Fire Department?

Section 10 of Article XIII of the Charter relating to appointments under the Civil Service says:

"The appointing officer shall notify the commissioners of each position to be filled separately and shall fill out such places by the appointment of one of the persons certified to him by the commissioners therefor. Such appointment shall be made on probation for a period to be fixed by the rules of the commissioners; but such rules shall not fix such period at exceeding six months. * * * At or before the period of probation the head of the department or office in which a candidate is employed may, by and with the consent of the commissioners discharge him upon assigning in writing his reason therefor to the commissioners. If he is not then discharged his appointment shall be deemed complete. * * * *"

The language of the above section seems clearly to indicate that vacancies are filled by the *appointment* of eligibles certified by the Civil Service Commissioners. The subsequent language of the section qualifies this appointment by making it subject to the probationary period fixed by the commissioners.

We are now led to the inquiry of what is the status of a candidate during his probationary period? What qualifications, if any, are there on his standing as a *member* of the Department? We find from the language of the section that the only limitation or qualification upon him as a *member* of the Department is that he can be dismissed at any time during said period of probation without trial. There is no restriction as to his standing as an employee or officer of the City as the case may be. His duties

are the same the second day after his appointment as they are at the end of a year. He is assigned to a fire company, given a designation such as truckman or hoseman and given his quarters in a house. He must furnish himself with a uniform, obey the orders of his superiors, attend drills, fires and generally do and perform whatever fireman's duties may be assigned to him; for which he is entitled to and does receive the same pay as one who has completed his probationary period during the first year of service. Members of the Police Department of this City are appointed to their positions subject to the same restrictions as to serving a probationary period as are members of the Fire Department, yet, no one would maintain that a police officer serving his probationary period does not possess every power, risk and responsibility attached to his office as is possessed by the oldest veteran member. So it is with candidates serving their probationary period in the Fire Department.

It is apparent, therefore, that the only limitation upon the rights and duties of such a probationer relates solely to his tenure, in all other respects he is a full fledged member of the Department and his legal standing as such member is fixed by the date of his first appointment. From that date his time of service in the Department begins to run for all purposes such as the fixing of his salary and for retirement on pension.

The duties of a probationary member being the same as those of a regular member of the Department it follows that his risks of life, limb and personal safety are likewise the same. To hold that the latter, for an injury received in the performance of his duty, will be granted a pension, but that the former will not be provided for, would be to place a premium upon cowardice and disregard for duty in probationary members. I cannot believe that such was the intent of the Charter framers.

Mr. Lane, in an opinion to your Board, dated August 17, 1900, has to say of the intention of the Charter framers on the subject of pensions in the Fire Department:

"The object of the Charter framers in making the amount of the pension depend upon the rank which the member may have held at a date three years prior to retirement was to protect the pension fund against the payment of exorbitant pensions by raising a member in rank just prior to his retirement. It was not the intention to make three years' service a condition precedent to the obtaining of a pension for disability received in the service. The

language of all other pension provisions relating either to the police or fire departments shows that whenever a pension was limited upon the length of service, it was so directly and positively expressed."

It follows that a probationary member of the Department injured while in the performance of his duty is entitled to a pension.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Pension Fund Commissioners.

Act of February 27, 1893 (Statutes 1893, p. 54), Limiting Hours of Labor, Does Not Apply to Members of the Police Department.

November 4, 1912.

Gentlemen: I am in receipt of your communication of the 11th ult., as follows:

"This Board is in receipt of a communication from John P. McLaughlin, Labor Commissioner of the State of California, stating that certain employees of this department are compelled to work more than eight hours a day and more than six days a week, and that the hours of labor of employees of this department shall be regulated in accordance with the State Law on the subject.

"We respectfully request an opinion from you as to whether or not the Statutes of the State of California providing for the hours of labor applies to employees of the Police Department of the City and County of San Francisco."

Opinion.

On the 26th day of October, 1912, Hon. U. S. Webb, Attorney General of the State of California, rendered an opinion to the Hon. John P. McLaughlin, Labor Commissioner of the State of California, a copy of which I enclose herewith, in which opinion he discussed the Act of February 27, 1893 (Stats. 1893 p. 54), providing for a weekly day of rest in certain classes of employment. In his opinion the Attorney General stated that the language of the Act cannot extend to the City and County of San Francisco nor does the language of that Act include the employees in the various departments of this City and County for the reason that they are employees of a municipal

corporation, basing his opinion solely on the ground that a municipal corporation cannot be imprisoned and that the imposition of a fine under the penal clause of the Act contained in Section 3 thereof would be a fruitless proceeding as, under the law, all fines collected are paid into the Treasury of the City and County for its use.

My examination of the Act leads me to the conclusion that the opinion of the Attorney General states the law of the case and that the status of the City and County of San Francisco in relation to the Act of 1893, is as is stated therein.

I may add, however, aside and apart from the basis of reasoning employed by the Attorney General in arriving at his conclusion, that members of the Police Department are not laborers or employees in the sense that those terms are used in the Statute under consideration. It has been held by the Courts that the relation of master and servant does not exist between municipal corporations and members of the Police Department and in the case of Farrell vs. Board of Police Commissioners, 1 Cal. App., p. 5, the Court held that a policeman was an officer and not an employee. It has been decided also that a municipal corporation, in the maintenance of a Police Department, performs a public or governmental duty and not a private or corporate function.

The Charter of the City and County of San Francisco also draws a distinction between laborers and members of the Police Department in Sub. 24 of Sec. 1, Chap. II and also in Sec. 1, Chap. III, Art. II, which provisions fix the hours of all laborers in the service of the City and County in any calendar day at eight hours and the minimum wages of labor at three dollars a day; these sections applying only to contracts on public work performed for the City and County of San Francisco.

You are therefore advised that the Act of February 27, 1893 (Stats. 1893, p. 54), does not extend to the City and County of San Francisco and consequently does not apply to the members of the Police Department of this municipality.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

Right of Sierra and San Francisco Power Company to Maintain Poles on Certain Streets.

November 7, 1912.

Gentlemen: I am requested to advise your Street Committee as to whether or not the Sierra & San Francisco Power Company has a legal right to maintain poles on the following streets, to-wit: Alameda street between Harrison and Bryant streets; Harrison street between 14th and 15th streets; 14th street between Harrison and Mission streets; Trainor street between 14th and Erie streets; Shotwell street between 14th and 15th streets; Howard street between 14th and Erie streets.

I understand that all of said poles were erected by said company subsequent to the amendment to the State Constitution in October, 1911, and that no permit was ever granted by the Board of Public Works for the erection of the same. The attorneys for the power company claim that the company distributes electricity for lighting purposes, and that the City has no legal right to cause the removal of these poles for the reason that no amendment to the Charter has been made subsequent to October, 1911, prescribing the conditions and regulations under which poles of this character may be erected.

It is further claimed that the provisions of the Charter requiring a franchise for the erection of such poles were invalid when passed, as being in conflict with Section 19 of Article XI of the State Constitution as it then stood and, that being invalid at the time they were passed, the amendment to the Constitution did not make these provisions valid; that therefore there is not at the present time any organic law of the City which prohibits the erection of such poles.

Opinion.

I am of the opinion that the poles referred to were erected by the power company without legal right and that that company has no legal right to maintain the same. This conclusion is based upon two separate lines of reasoning, viz.:

First: Under Article II, Chapter II, Section 1 of the Charter the Board of Supervisors is given the following power:

"2. Except as otherwise provided in this Charter, or in the Constitution of the State of California, to regulate and control

for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County."

"13. Except as otherwise provided in this Charter, to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the City and County, and to acquire, regulate and control any and all appliances for the sprinkling and cleaning of the streets of the City and County, and for flushing the sewers therein."

Under Article VI, Chapter I, Section 9 of the Charter the Board of Public Works is given "charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors" of all public streets, avenues, etc., and is also given exclusive authority to prescribe rules and grant permits in conformity with the ordinances of the Supervisors for the regulation of telegraph and telephone poles and poles for electric lighting, etc.

Ordinance No. 1564 (page 340 of Ordinance Book) provides in Section 2 as follows:

"It shall be unlawful to erect or maintain any pole on the streets or sidewalks of San Francisco at a point which is situated nearer than ten (10) feet to a pole on which is supported a lamp maintained by the City and County for lighting the public streets, and it shall be unlawful to erect any other pole in or on the streets or sidewalks of said City and County unless permission in writing is first given by the Board of Public Works."

This Ordinance enacted by the Board of Supervisors under the power contained in the Charter has the same effect as if its provisions were contained in the Charter itself.

Harrison vs. Horton, 5 Cal. App. 417;

Murphy vs. City of San Luis Obispo, 119 Cal. 625;

City of San Luis Obispo vs. Fitzgerald, 126 Cal. 279.

The Supreme Court of this State has recently decided that subsequent to the amendment of Section 19 of Article XI of the Constitution of October 10, 1911, lighting companies had

no right to the use of any streets of the City which had not been used by them prior to the amendment of the Constitution except by consent of municipal authorities. (In re Russell, 44 Cal., Dec. 352.)

In the case above referred to the Court says:

"To give the city power to prescribe the conditions upon which persons and corporations may establish and operate such works, is to place the entire subject matter within the control of the city and, in effect, to provide that no such person or corporation may do so without obtaining the privilege from the city by a grant specifying the conditions it chooses to prescribe. With respect to the mode of imposing and enforcing the conditions, the city is, of course, bound by the provisions of its charter. If conditions are found in the charter itself, the legislative authority of the city will be bound thereby and could not impose inconsistent conditions, nor abrogate those of the charter. In such a case the city would be imposing the conditions by its organic law and all grants by the city legislative body would be required to conform thereto. We need not here determine whether, in the absence of anything in the charter or city ordinances forbidding it, such persons or corporations, under their general powers, could go on to establish and operate such works without asking the consent of the city or whether such action would be unlawful without affirmative permission from the city. It is sufficient for the disposition of this case to say that where the city has prescribed conditions, they must be observed, or the construction and operation of such works will be unlawful."

Independently of the provisions of the Charter requiring the granting of a franchise for the erection of poles for electric lighting or power purposes the ordinance above referred to was, in my judgment, a valid provision of the organic law of the City and under its provisions no company could acquire any right to erect any poles after October 10, 1911, without permit first granted by the Board of Public Works. Inasmuch as such permit was not obtained, the erection of said poles was unauthorized and their maintenance is also unauthorized.

Second: Under Article II, Chapter II, Section 7 of the Charter the Board of Supervisors is given power to grant

franchises or privileges for the erection of poles or wires for transmitting electric power or for lighting purposes, and it is further provided that such franchises must be granted under all of the conditions specified under Article II, Chapter II, Section 6 of the Charter.

These latter provisions of the Charter so far as lighting franchises were concerned, were inoperative prior to the amendment of October 10, 1911, to Section 19, Article XI of the Constitution for the reason that the said constitutional provisions contained a grant of power which could not be denied or abridged by the requirements of a municipal franchise. If this section of the Charter was void when the Charter was adopted by reason of its conflict with the Constitution, the subsequent amendment to the Constitution would not revive or make effective such Charter provisions.

Banaz vs. Smith, 133 Cal. 102;

German S. & L. Soc. vs. Ramish, 138 Cal. 120;

Ex Parte Sweetman, 5 Cal. App. 577;

Fleming vs. Hance, 153 Cal. 162.

On the other hand, if the City of San Francisco had power under the Constitution to enact the provisions referred to in the Charter, and they were not void when originally adopted but were simply suspended as to their operation as against lighting corporations, until the constitutional section was amended, the above rule would not apply. In other words, if the provisions were valid when enacted, the removal of the privilege contained in Section 19, Article XI of the Constitution as it existed prior to the amendment, leaves the Charter provisions in full force and makes them applicable to all future applications for the use of the streets in the City of San Francisco.

Byrne vs. Drain, 127 Cal. 663;

Sunset T. & T. Co. vs. Pasadena, 42 Cal. Dec. 593, at pages 603-4.

In the case last cited the Supreme Court says:

"That the provisions of the charter purporting to give such full control as to the use of streets for pipes and conduits for the furnishing of water and light are not effective, in view of the direct grant for those purposes made by Section 19 of

Article XI of the Constitution (see in re Johnston, 137 Cal. 115), is not a sufficient warrant for holding that it was not intended to vest such control in the city. We think it impossible to reasonably construe these provisions as purporting to authorize on the part of the city only such regulations as come within the domain of the police power."

There can be no question but that the full control over the streets of the City is vested in the Board of Supervisors and in the Board of Public Works acting under authority of the Supervisors. The only question that can be raised in this connection is as to whether or not the provisions of Section 7, Article II, Chapter II of the Charter, requiring a franchise to be granted upon competitive bidding apply to the application of lighting corporations which may be made under the present constitutional provision. In my opinion the section above referred to does not purport to grant any power to the Board of Supervisors, but on the other hand is a limitation upon the exercise of power granted as to the control of the streets in other portions of the Charter. The purpose of said section is to restrict the manner of the use of the power of control of streets whenever such power may be used. It may well be that the framers of the Charter, having in mind the inability of the Board of Supervisors at that time to abridge the grant of power contained in the Constitution, were further mindful of the fact that such constitutional grant might, in the future, be withdrawn or modified, and therefore provided that if at any time in the future the privilege of using the streets for water and lighting appliances should be made dependent upon conditions or regulations prescribed by the Board of Supervisors, such privilege should be granted only on the conditions specified in the section above referred to.

From a careful study of the cases above referred to, as applied to this section of the Charter, I am of the opinion that the section was not void when enacted, but that its operation was simply suspended and that upon the amendment to the Constitution said section of the Charter applied with full force to all future applications for the use of streets for the erection of poles or wires for lighting purposes.

You are therefore advised that the poles above referred to are now maintained without legal authority, first, because they were erected without permit from the Board of Public Works,

and second, because such poles can be maintained only under a franchise granted in accordance with the provisions of Article II, Chapter II, Section 7 of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Supervisors May Limit Height of Bill Boards—They May Create Zone Areas in Which Legal Height May Vary—They May Impose a License Tax on the Business of Bill Posting—Power of Board of Supervisors to Regulate Bill Boards.

November 8, 1912.

Gentlemen: I am in receipt of your communication of recent date, desiring an opinion on the following points:

First: Can the Board of Supervisors legally limit the height of bill boards?

Second: Can the Board of Supervisors legally create zone areas in which the height of bill boards may vary?

Third: Can the Board of Supervisors legally limit the height of bill boards to 10 feet and at their discretion, under certain conditions, grant a revocable permit for a bill board or sign exceeding 10 feet in height?

Fourth: Can the Board of Supervisors legally levy a tax on bill boards, and if so to what extent?

Opinion.

I. By Art. II, Chap. II, Sec. 1, the Board of Supervisors are granted the power "To ordain, make and enforce within the limits of the City and County all necessary local police, sanitary and other laws and regulations."

This police power is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals and safety, and to conserve public peace, order and the general

welfare. (People vs. Murphy, 88 N. E. 17.) The question here involved is, whether an ordinance limiting the height of bill boards comes within the police power of the Board of Supervisors.

"Unless the ordinance in question is an unreasonable and unnecessary restriction of the right of the landowner to erect structures upon his land, it must be sustained as a proper exercise of the police power of the state. Aesthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the state may require the individual so to manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of natural right, and make them conform to the safety and welfare of established society, that the police power of the state is invoked. While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit, and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others.

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public; but a limitation which is unnecessary and unreasonable cannot be enforced. Although the police power is a broad one, it is not without its limitations, and a secure structure upon private property, and one which is not per se an infringement upon the public safety, and is not a nuisance, cannot be made one by legislature fiat and then prohibited."

State vs. Whitlock, 63 S. E. 123;
Commonwealth vs. Boston Adv. Co., 74 N. E. 601.

The right of a municipality to limit the height of bill boards on the ground of protection to citizens has been sustained in the recent case of Varney & Green vs. Williams, 155 Cal. 318. The Court there said:

"It is recognized that the legislature may, under the police power, prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the persons

or property of the public. Ordinances limiting the height of bill boards have been sustained as having a tendency to protect passers-by from physical injury." (City of Rochester vs. West, 164 N. Y. 510, 79 Am. St. Rep. 659, 58 N. E. 673; Gunning System vs. City of Buffalo, 75 App. Div. 31, 77 N. Y. Supp. 987; Whitmier etc. Co. vs. City of Buffalo, 118 Fed. 773; In re Wilshire, 103 Fed. 620.)

"The City authorities may also adopt regulations as to the manner of construction of bill boards, so as to insure safety to the passers-by."

State vs. Whitlock, 63 S. E. 123, decided Dec. 16, 1908.

"It is doubtless within the power of the City to prohibit the erection of insecure bill boards or other structures, require the owners to maintain them in a secure condition, and to provide for their removal at the expense of the owners in case they become dangerous * * * The regulation as to the erection and maintenance of such structures may be made sufficiently rigid to fully protect the public; but they must be reasonable, and when they pass beyond the bounds of reason and necessity, and impair private property rights they must be pronounced invalid."

Crawford vs. Topeka, 20 L. R. A. 691.

Thus, insofar as relates to the reasonable regulation of bill boards, the authorities are in accord that it lies within the police power of the municipality to make such limitations on the erection of bill boards as are necessary for the safety and welfare of the citizens.

Answering your first inquiry more specifically, an examination of the cases involving height limitations follows:

"When a statute obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be preserved * * * We are of the opinion that this ordinance (prohibiting the erecting, within city limits, of bill boards more than six feet in height, without the consent of the common council) is * * * not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private properties."

Rochester vs. West, 58 N. E. 673.

In the case of Kansas City Gunning Adv. Co. vs. Kansas City, decided Feb. 9, 1912, the Supreme Court of Missouri declared constitutional and valid an ordinance of the common council of Kansas City declaring it to be unlawful, among other things to erect or maintain a bill board or other board, fence, sign or structure erected for advertising purposes, or upon which any advertisement is shown, painted or displayed in any way, more than ten feet in height from the lower to the upper edge, the lower edge not being at any point higher than two feet above the surface of the ground.

The Court in its decision used the following language:

"This was an ordinance in pursuance of the police power of the city and enacted upon an adequate showing of public necessity. Such ordinances are enforceable, when otherwise valid, in praesenti as well as in futuro. They do not in a legal sense *take* the property of persons against whom they are directed. They simply *regulate* the use of such property by prohibiting its injurious or criminal use by the owner, and hence they do not offend any provision of the organic law protecting vested interests or inhibiting retrospective legislation. This is typified by the provisions of the ordinance under review. None of them either in words or by intendment deprived the plaintiff of the use of any of its property prior to the adoption of the ordinance. They merely require it and all others similarly situated to refrain from the use or maintenance of their property after the passage of the ordinance, in a manner which that enactment conclusively determines to be unlawful and injurious."

Kansas City etc. Co. vs. Kansas City, 144 S. W. 1099, 1103.

An ordinance was enacted by the City of Buffalo, forbidding the erection of any fence or bill board more than seven feet high without permission of the common council. In a suit for injunction to restrain the destruction of a bill board under this ordinance, the Appellate Division of New York held (July 8, 1902) that the obvious purpose of the legislature was to provide for the welfare and safety of the community in the municipality, and the ordinance was within such purpose. It was further held that such an ordinance was a reasonable police regulation in the interest of the general welfare and good government of the city and its inhabitants.

Gunning System vs. City of Buffalo et al.,
77 N. Y. Supp. 987.

Your Board is therefore advised, in answer to your first query, that it can legally limit the height of bill boards.

II. The second query of your Board raises the question as to whether or not the Board of Supervisors can legally create zone areas, in which the height of bill boards may vary.

The Legislature of Massachusetts by a statute passed in 1905, in the exercise of its police power, limited the height of buildings in Boston, and classified the city so that in some parts one height was prescribed as a maximum, and in other parts a different height.

After holding that the police power of the state was sufficiently broad to warrant the passing of a Statute regulating the height of buildings, the Court (79 N. E. 746) uses the following language:

"The next question is whether the General Court may establish different heights for different neighborhoods, according to their conditions and the uses to which the property in them is put. The statute should be adopted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable, not only in reference to the interests of the public, but also in reference to the rights of land owners. If these rights and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each should be made to yield reasonably to those upon the other side. The value of land and the demand for space, in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce, is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was, therefore, reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.

"The general subject is one that calls for a careful consideration of conditions existing in different places. In many cities there would be no danger of the erection of high buildings in such locations and of such a number as to affect materially the public health or safety, and no statutory restrictions are neces-

sary. Such restrictions in this country are of very recent origin, and they are still uncommon. Unless they place the limited height at an extreme point, beyond which hardly anyone would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed, and the manner in which the land is laid out, and the nature of the approaches to it. * * *

"The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely aesthetic objects; but if the primary and substantial purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary. We are of opinion that the provision of St. 1904, p. 283, c. 333, for dividing parts of the city into two classes, in each of which there is a prescribed limit for the height of buildings, was within the power of the Legislature, and in accordance with the constitutional principle applicable to the enactment."

On appeal to the Supreme Court of the United States this decision was sustained. Justice Peckham, in his opinion says:

"As to the condition adopted by the commission for permitting the erection, in either of the districts B, that is, the residential portion, of buildings of over 80 feet, but never more than 100, that the width on each and every public street on which the building stands shall be at least one half its height, the Court refuses to hold that such condition was entirely for aesthetic reasons. * * *

"We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power. * * *

"It would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable

interference with the rights of property of plaintiff in error, nor do the statutes deprive him of the equal protection of the laws. The reasons contained in the opinion of the state court are, in our view, sufficient to justify their enactment. The judgment is therefore affirmed."

Welch vs. Swasey, 214 U. S. 91.

By an ordinance of Los Angeles, approved March 8, 1911, it was made unlawful to establish or maintain certain industries within a certain residence district of the city. The validity of the ordinance thus classifying the city into industrial zones was affirmed in Ex Parte Quong Wo, decided by the Supreme Court in October, 1911. The defendant was charged with having maintained and carried on a public laundry within the above-mentioned residence district.

The Court held that the fact of the conducting of a public laundry being a lawful and necessary occupation "does not prevent the enactment of such regulations regarding it as may be reasonably found necessary for the safety, health and comfort of society at large * * * there can be no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz.: to protect the public health, morals, safety and comfort. It is, of course, primarily for the legislative body clothed with this power to determine when such regulations are essential, and its determination in this regard * * * will not be disturbed in the courts, unless it can plainly be seen that the regulation has no relation to the ends above stated."

Ex parte Quong Wo, 161 Cal. 220.

"It is well settled that it is entirely within the police power to limit the conduct of the liquor or other business coming within its regulatory scope, or to exclude such businesses from specified districts."

Grumbach vs. Lelande, 154 Cal. 679;
City of Newton vs. Joyce, 44 N. E. 116.

"Under a grant of police power to regulate, the right of the municipal authorities to determine where and within what limits a certain kind of business may be conducted has often been

sustained * * * The power is of the same nature as the power of a municipality to prevent the erection of wooden buildings within certain limits in a city."

Shea vs. City of Muncie, 46 N. E. 138;
In re Wilson, 19 N. W. 723.

In view of the foregoing authorities, you are advised that your Board has the legal power to create zone areas in which the height of bill boards may vary.

III. The answer to your first question embraces within it the authorities in support of the validity of such an ordinance as that suggested in your third query.

IV. Your fourth query is as to the power of your Board to "levy a tax on bill boards, and if so, to what extent."

Art II, Chap. II, Sec. 15 grants the Board of Supervisors the power:

"To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business in the City and County, sells or manufactures goods, wares or merchandise, except such as require permits from the Board of Police Commissioners as provided in this Charter."

Under this section your Board is empowered to impose a license tax on the business of bill-posting, computing the tax according to the number of square feet utilized or controlled by the person, company, firm or corporation conducting the business.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Civil Service Commission—No Power to Cancel Certification of Policemen.

November 14, 1912.

Gentlemen: I am in receipt of your recent communication requesting an opinion as to whether or not your Commission has legal power to cancel the certification of one Edward McAvoy, and remove his name from the eligible register of policemen. You further state that:

"On October 14th McAvoy was certified for appointment, and on October 15th his certification was returned to the Civil Service Commission with the request that a definite decision be rendered as to whether or not the Police Commission be required to appoint him regardless of the question concerning his moral character."

Opinion.

It is the general rule that officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them.

People vs. Wemple, 39 N. E. 397;
People vs. Cobb, 43 N. Y. S. 123.

An examination was held in New York for special liquor tax agents. One Van Petten passed the examination, filed a certificate of health, good character, etc., and was placed on the eligible list. Some weeks later he was removed from the list by the New York Civil Service Commission on the ground that he was disqualified. The Appellate Court of New York in granting a writ of mandamus, held as follows:

"We are unable to find any provision in the civil service act or elsewhere, conferring power on the defendant to arbitrarily deprive one that it had duly and regularly examined, and placed on the list of those eligible for appointment, of the right acquired by such determination. If the commissioners make a mistake of placing on the eligible list one not qualified, the act in question affords a remedy. Section 2, subd. 3, provides that 'there shall be a period of probation before any absolute appointment or employment aforesaid,' and section 2, subd. 8, that 'notice shall be given in writing by the appointing power to said commission * * * of the rejection of such person after probation.'

Hence the statute apparently contemplates a probationary appointment as a remedy in case of an error or mistake of the commissioners, arising from an insufficient examination or otherwise, and not to an arbitrary rescission by them of their former determination. We are of the opinion that the relator, after he had appeared before the commissioners and submitted to the examination required, and after he had been placed by them second on the list, by their determination as to his eligibility, was, under the provisions of the constitution and statute above quoted, and the civil service act of 1883, legally entitled to a preference for appointment, of which he could not be arbitrarily deprived. And this is so, although the commissioners did not give relator a physical examination. They had the right to do so. Van Petten was properly before them, and submitted to the examination they required. He was legally entitled to an examination, and to the decision of the commissioners after such examination as to his eligibility. They chose to rely on the certificate of his physician as evidence of his physical condition. Although they placed him on the list without a proper examination as to his physical fitness, their action in the matter and their determination could not be vacated by them, at least without notice to him and an opportunity to be re-examined and heard.

"It is not necessary to determine whether or not the commissioners, on receiving the communication from the state commissioner of excise, referred to in the papers, could have required Van Petten to appear before them again, and submit to a further examination as to his physical condition."

People vs. Cobb, 43 N. Y. S. p. 122.

The view here expressed has been reiterated and supported in the case of Burke v. Holtzmann, 97 N. Y. S. 218, decided in January, 1906. The Court there said:

"But whether or not this applicant had passed the examination which the law requires, he had conformed to the requirements of the civil service commission, and had been actually accepted by them and placed upon the list. The defendant himself made appointments from that list, and it does not lie with him now to say that the list was improperly made up to excuse him from conforming to the requirement of the law that he give the preferences which are indicated to him upon the list furnished. * * *

"Moreover, it would hardly be just to this plaintiff to deny him the right given him by the law because of the failure of the commission to exact from him more evidence as to his qualifications. If the civil service commission had refused to put his name upon the list, he might then have required the commission to proceed according to law and make up a list upon which his name should appear. With his name already upon the list, however, no court would listen to a complaint from him that the list was improperly made up. In our judgment, therefore, this plaintiff was entitled to his employment, whether or not the commission adhered strictly to the law in making up the list of those eligible for labor service."

The attention of your Board, and of the Board of Police Commissioners, is called, however, to the reference in the Cobb case, supra, in the matter of the power of the Police Commission to rectify the act of your commission during the period of such a person's probationary appointment, and to the following language used in the same connection in "Opinions of the City Attorney, 1908-9," at page 359, in a communication to the Board of Police Commissioners:

"During the probationary period the appointee may be removed by your Board without trial, for any cause which your Board may see fit to urge, with the consent of the Civil Service Commission. For this purpose any investigation involving the fitness and standing of the applicant may be made by your Board."

You are advised, therefore, that your Board has no legal power to cancel the certification of the said McAvoy nor to remove his name from the eligible register of policemen.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commissioners.

Certain Delays in Completing Construction of Municipal Railway on Geary Street Caused by Strikes, Rain, and Removing Service Pipes, Etc., Held Unavoidable and Mahoney Bros. Allowed Bonus Therefor—Delay Due to Cessation of Work on Labor Day Held Avoidable—Definition of Avoidable and Unavoidable Delays.

November 21, 1912.

Gentlemen: On September 12, 1912, I received the following communication from your Honorable Board:

"The Contractors (Mahoney Bros.) for the construction of the Municipal Street Railroad, on Geary Street, have from time to time, as will appear from the correspondence herewith transmitted to you, directed the attention of this Board to delays, in connection with the progress of such construction, which delays, it is claimed by them, were unavoidable and therefore should not be charged up to them, as time expended on said construction within the meaning and intention of the terms and conditions of their contract therefor. There is some conflict as to the facts attaching to the delays occasioned, and such correspondence as this Board is in possession of relating to the controversy, is forwarded to you in order that you may pass upon the same with a view towards adjusting the matters involved. Such other data as may be required by you to further the solution of the problems presented will be furnished by this Board, if it be available.

"Counsel for Mahoney Bros. desires the privilege of appearing before you, to present his views upon the questions involved in the matter."

Opinion.

Mahoney Bros., the contractors, were awarded a contract for the construction of the Municipal Street Railway on Geary Street from Kearny Street westerly to a point near the westerly line of Fifth Avenue. In said contract it was provided that the contractors would receive from the City and County of San Francisco a bonus of Two Hundred and Fifty Dollars for each and every day (not exceeding sixty calendar days) less than one hundred and eighty days which they might require to complete the work in said contract contemplated. On the other hand, it was provided in said contract that for each and every

day over one hundred and eighty days necessary to complete the contract the contractors should pay the City a like sum of two hundred and fifty dollars per day.

Mahoney Bros., the contractors, completed said work one hundred and thirty-nine days after the date of the signing of the contract, which under the terms thereof entitles the said contractor to a bonus of two hundred and fifty dollars per day for forty-one days, the difference between one hundred and thirty-nine days and one hundred and eighty days, the time limit in said contract for the completion thereof. The contractors have filed a claim for sixty-two days additional which they claim should be allowed to them by reason of the fact that the sixty-two days as specified in their claim were unavoidable delays and they make the claim, predicated upon such statement, that they are entitled to the entire bonus as specified in the contract.

"No. 1	May 16th, 1912, strike by Labor Union	1 Day
"No. 2	May 21 and 22, strike by Labor Union	2 Days
"No. 3	June 26th to July 11th, on account of the Olympic Club's Salt Water Pipes being in the way between Buchanan and Laguna Sts., on the North Track	14 "
"No. 4	July 10th to July 18th on account of the Olympic Club's Salt Water Pipes being in the way, also the Pacific Gas & Electric Company's pipes and the Pacific Telephone and Telegraph Company's, at Geary and Presidio	8 "
"No. 5	July 12th to July 22nd, on account of the conduit belonging to the City Electric Company being in the way, Crusher and track laying delayed on North Track	9 "
"No. 6	July 30th to Aug. 5th, on account of the Olympic Club's Salt Water Pipes being in the way of track laying South Track	7 "
"No. 7	Aug. 6th to Aug. 9th, on account of the Olympic Club's Salt Water Pipes being in the way, also the Pacific Gas & Electric Company's Service Pipes between Fillmore and Buchanan Sts., delaying track laying on South Track	3 "

"No. 8	The paving was delayed at Van Ness Ave. and Geary St., on account of the Ditch for High Pressure Water Pipes being open	10 Days
"No. 9	Paving also delayed between Mason and Kearny Sts., where manholes belonging to the City Electric Company, also the Pacific Gas & Electric Company having been cut down and not covered	6 "
"No. 10	Sept. 6th. The paving of Geary St., was delayed on account of rain	1 "
"No. 11	Sept. 2nd. The paving of Geary St. was delayed on account of Labor Day	1 "
Total		62 Days

Your Honorable Board, in your communication, requested me to pass upon the merits of the claim of Mahoney Bros. in regard to the matter of delays in the construction of said municipal railway on Geary Street and determine the fact whether the delays specified were avoidable or unavoidable delays within the meaning of the contract. With that end in view two hearings were had in my office, one on Thursday, October 17, 1912, and the other on Monday, November 11, 1912, at which times Mahoney Bros. were represented by counsel and appeared in person with their witnesses. A great deal of testimony was taken and preserved in short-hand for future reference and for my guidance in determining the questions involved. The causes of delay as specified by Mahoney Bros. in their claim may be divided into four heads:

1st. Delays caused by strikes.

2nd. Delays caused by public service corporations in removing pipes, conduits, etc., encountered during the course of construction.

3rd. Delays caused by rain.

4th. Delay caused by the fact that no work was done on Labor Day.

The question now arises as to what constitutes avoidable and unavoidable delays in the prosecution and completion of the work contemplated in the contract. The contract defines unavoidable and avoidable delays.

Unavoidable delays are defined to mean "all delays which may result through causes beyond the control of the contractor which the contractor could not have provided against by the exercise of care, prudence, foresight or diligence. Orders issued by the Board of Public Works changing the amount of work to be done, the quantity of material to be furnished or the manner in which the work is to be prosecuted necessitating delays in the completion of the work of all contractors, acts of Providence, unusual storms, fires (not the result of negligence on the part of the contractor) and fortuitous delays will be considered unavoidable delays.

Avoidable delays in the prosecution or completion of the work shall include all delays which might have been avoided by the exercise of care, prudence, foresight or diligence.

In arriving at the amount of bonus which the contractors would be entitled to under the contract, we must be guided by that clause in the contract which provides the method of estimating the amount. The clause referred to is as follows:

"In making a final estimate of the amount of bonus which may be earned by the Contractor by completing all of the herein contemplated work within less than one hundred and eighty (180) calendar days set in the Contract, the City Engineer will deduct from the total number of days which may expire between the date of signing the contract and the date upon which all of the herein contemplated work shall be completed, the number of days of unavoidable delay which may occur in the prosecution and completion of the work herein contemplated, and the result shall be taken as the actual number of days required by the Contractor for the contemplated work. Should such actual number of days be less than one hundred and eighty (180) calendar days, the sum of Two Hundred and Fifty (250) Dollars will be added to the price named in the contract for completing all of the herein contemplated work for each and every day which the actual number of days required shall be less than one hundred and eighty (180) calendar days."

I shall take up the causes for delay seriatum.

Strikes.

Mahoney Bros. in computing the number of days necessary to complete the work contemplated by the contract for the construction of the Geary Street Municipal Railway, could not have

provided against strikes by their employees even if they exercised the highest degree of care, prudence, foresight and diligence. Strikes have been held by the Courts to afford an excuse for delay in transporting freight. (S. O. vs. Johnson, 15 S. W., 21; Greismer vs. Lake Shore etc. R. Co. (N. Y.) 7 N. E. 828). And by analogy it would appear to me that the delay caused by the strikes on the 16th, 21st and 22nd days of May, 1912, were unavoidable delays within the meaning of the contract.

Delays Occasioned by Public Service Corporations in Removing Pipes, Conduits, Etc.

It developed at the hearings that Mahoney Bros., prior to the submission of their bid, used all possible diligence to ascertain what conduits and pipes of public service corporations would interfere with the prosecution of the work contemplated in said contract in Geary Street. It is a matter of common knowledge that the fire of April, 1905, destroyed all records in the municipal offices which would show or tend to show the location of the pipes and conduits maintained by public service corporations or others in Geary Street among others, so that one avenue of information was closed against Mahoney Bros. in the investigation as to where the pipes and conduits were laid. It appeared from the testimony that Mahoney Bros. made inquiries as far as they were able to ascertain the location of said pipes and conduits and that they used all reasonable means to ascertain the location of the same. It might be said that the presence of pipes or conduits might be reasonably expected on Geary Street along the line of said work. On the other hand, the fact that the conduit of the old Geary Street Cable Company was laid many years ago and that whatever pipes or conduits placed in said street were so placed after the construction of said conduit would reasonably lead to the conclusion that said pipes and conduits could in no way interfere with the construction of the roadbed and the laying of rails for the municipal railway on Geary Street.

Mahoney Bros. had absolutely no control of the various pipe service corporations and others who maintained pipes and conduits in Geary Street and the most that could be expected of said contractors was that they would, on the discovery of any pipe or conduit interfering with the prosecution of the work, notify the corporation maintaining the same. It is in evidence that Mahoney Bros. did, without loss of time, notify

the various companies having pipes or conduits in Geary Street to remove them. I have come to the conclusion that delay occasioned for the removal of said pipes and conduits to allow the prosecution of the said work to go on was and is an unavoidable delay within the meaning of the contract. Having arrived at said conclusion there remains the question of the extent of said delays. Mahoney Bros. in their specifications Nos. 3, 4, 5, 6, 7 and 8 claimed an unavoidable delay for fifty-seven days. It seems to me and also to the representatives of the City Engineer's office that a delay of, for instance, one day, in the prosecution of said work at any particular place on Geary Street would not thereby occasion a delay of one day in the final completion of the work; therefore, my investigation was directed to the ascertainment of the actual number of days delay occasioned by any one particular specification of delay. In other words, the cessation of work caused by any of the reasons specified would and did not prevent the contractors from proceeding with the work on other parts of the road. The contractors, as the testimony disclosed, notwithstanding the occurrence of the delays as specified by them, did not, for that reason, stop work at all points of the line and consequently the number of days claimed by them under each particular specification did not delay the final completion of the entire contract to the extent claimed by them. I therefore allowed them the number of days which in my opinion could fairly and reasonably be said to have delayed the completion of the entire contract, and after mature consideration I have come to the conclusion that the claim of Mahoney Bros. of fifty-seven days for unavoidable delays under this heading should be reduced from fifty-seven days as claimed by them to eighteen days. This allowance is made under specifications Nos. 3, 4, 5, 6, 7, 8 and 9.

Delay Caused by Rain.

The delay from this cause occurred on the 6th day of September, 1912. Rain at that season of the year was not an ordinary event and could not have been reasonably anticipated. As said in the cases of Gleeson vs. Virginia Railway Co., 140 U. S. 435, and Kansas City P. & G. R. Co. vs. Williams, 58 S. W., 571, "An unprecedented storm, not reasonably to be anticipated, is an act of God and therefore an unavoidable delay within the meaning of the contract and the loss of time

occasioned thereby should be allowed the contractor." I have therefore come to the conclusion that the loss of time occasioned by rain on the 6th day of Septetmber, 1912, is an unavoidable delay and should be allowed Mahoney Bros.

Delay Occasioned by Cessation of Work on Labor Day.

This item will have to be disallowed for the reason that the contractors with the exercise of diligence could and should have informed themselves of the fact that there is a general cessation of work by laborers and others on Labor Day which is the annual holiday set apart for observance by labor organizations throughout the State of California.

I therefore find that Mahoney Bros. are entitled to twenty-two days unavoidable delays out of the sixty-two days claimed by them.

Under the terms of the contract the bonus of Two Hundred and Fifty Dollars per day to be paid the contractors shall not exceed sixty days. They have brought themselves within said contract to the extent that they are at the outset entitled to a bonus of Two Hundred and Fifty Dollars per day for forty-one days. It was necessary on their part to show that they were entitled to nineteen days unavoidable delay to entitle them to receive the bonus of Two Hundred and Fifty Dollars for the entire sixty days. My investigation, as already indicated, has led me to the conclusion that they are entitled to twenty-two days unavoidable delay, which entitles them to the full bonus of Fifteen Thousand Dollars for sixty days with three days to spare.

I herewith return to your Honorable Board all of the papers and documents received by me from you and used in the investigation.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Board of Public Works Can Accept Any Number of Completed Cars From Holman Company Without Binding Themselves to Grant Extension of Time—Holman Company May Be Permitted to Deliver Partially Completed Cars at Geary Street Car Barn and Complete Them There Without Affecting Contract—City Should Not Make Arrangements or Incur Liability for Delivery of Uncompleted Cars.

November 26, 1912.

Gentlemen: I am in receipt of your communication of November 23, 1912, relative to the contract between the City and County of San Francisco and the W. L. Holman Company to furnish and deliver forty-three cars and four additional trucks for the Geary Street Municipal Railway. You desire the opinion of this office on the following questions:

1. In the event of the W. L. Holman Company being able to deliver 2 cars completed on November 25th and 2 on November 26th to the car barn of the Geary Street Municipal Railway at Presidio Avenue and Geary Street, can the Board of Public Works accept these cars without binding themselves or the City to grant the W. L. Holman Company an extension of time in which to complete their contract or otherwise affecting the contract between the Board of Public Works and the W. L. Holman Company?

2. If the W. L. Holman Company desires to deliver partially completed cars at the Geary Street car barn with the understanding that the Board of Public Works is to assume no responsibility for the safety of these cars until they shall be entirely completed in accordance with the specifications and inspected by the City Engineer, can the Board of Public Works permit the W. L. Holman Company to do so without in any way affecting the contract existing between the Board of Public Works and the W. L. Holman Company?

3. In the event that you find that the Board of Public Works can permit the W. L. Holman Company to deliver partially completed cars at the Geary Street car barn and complete them there, will the fact of the Board of Public Works making arrangements with the United Railroads to haul these partially completed cars from Fourth and Kentucky Streets to the car barn over the tracks of the United Railroads and the Geary

Street road in any way affect the contract between the Board of Public Works and the W. L. Holman Company?

Opinion.

In answer to the first question, I am of the opinion that the Board of Public Works can accept any number of completed cars less than the total number of cars contracted for prior to the expiration of the time limited in the contract for the furnishing of all the cars, or prior to the expiration of an extension of the contract, without binding the Board of Public Works of the City and County to grant to Holman Company a further extension of time, or without otherwise affecting the contract between the City and County of San Francisco and the Holman Company. The contract does not require nor does it contemplate that the total number of cars shall be delivered at one time. On the contrary the contract expressly contemplates that the cars shall be delivered at different times. On page 55 of the specifications provision is found for progressive payments on the contract. Such payments are to be made as the motor cars and extra trucks contemplated in the contract are completed and shipped to San Francisco upon an estimate of the value of the labor and materials incorporated in the motor cars and extra trucks by the contractor. The first estimate is to be made "upon the receipt of bills of lading covering the shipment of the first motor car or cars or extra truck or trucks which shall be completed and shipped." On page 6 of the specifications it is provided that all the cars required "shall be delivered in accordance with the specifications at San Francisco, California, within 180 calendar days from the date of the signing the contract."

It is seen by these provisions of the contract that it was not contemplated or required that the Holman Company should deliver all the cars at one time. The City could not refuse to accept delivery of the cars when completed and offered for delivery and the acceptance under the contract of the delivery of part of the cars cannot be construed or taken as a waiver by the City of any provision of the contract. The Holman Company would still be required, under the contract, to build and deliver the total number of cars and trucks within the time mentioned in the contract, unless an extension of time is granted to the company.

The acceptance being made under the terms of the contract cannot, therefore, be construed as an agreement to extend the time nor is the Holman Company entitled to an extension because of that acceptance. By the term "acceptance" as used herein I do not intend to imply the usual legal meaning to the word. There is not a final and complete acceptance until the entire contract is completed and fulfilled; in other words, when the forty-three cars and four additional trucks are delivered to the City and County of San Francisco within the time specified in the contract or an extension thereof. All that is being done now is a delivery to the City of a certain number of cars less than the total number under the provisions of the Holman contract. The time for delivery of the total number of cars has not yet expired, although it now appears that the Holman Company will not be able to finish the cars within the time specified and that, in order to complete their contract the Holman Company will require an extension of time. Notwithstanding that fact, the Holman Company is not at the present time in default, the contract is binding upon both parties and the City must comply with all the provisions of the contract. Upon the expiration of the time for the completion of the contract, or prior to that time the question must necessarily be considered whether an extension of time will be granted and nothing done under the contract at the present time which is done in accordance with the terms of the contract can legally influence or affect that question.

In answer to the second question, in my opinion the Holman Company can be given permission to complete cars now in process of building in the car barn of the Geary Street road. This has nothing to do with any terms of the contract but is merely a favor granted to the Holman Company. It is not an acceptance of the uncompleted cars or a waiver of any conditions of the contract. However, I think it advisable that the surety company join in the request of the Holman Company and that the surety company should consent to the City granting the privilege sought by the Holman Company.

In answer to the third question, I do not believe that it is advisable for the Board of Public Works to undertake to make the arrangements with the United Railroads for the hauling of the uncompleted cars to the Geary Street barn. As pointed out in answer to the second question, the granting of the

privilege sought by the Holman Company is merely a favor shown to the company, the Holman Company having all responsibility as to those cars until they are finally completed and delivered to the City. Inasmuch, however, as the Holman Company has the right to make delivery at their shop it would not be improper for the City to reimburse the Holman Company for the cost of transporting the cars over the tracks of the United Railroads to the Geary Street barn when the cars have been finally completed and turned over to the City. The legal objections that I have at the present time to the City making those arrangements with the United Railroads is that until the cars are completed and turned over to the City they remain the property of the Holman Company. Should the Holman Company not complete the cars the City would be out the money paid for the transportation of the cars and without redress against the surety of the company.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Continuance of Laundry Permit—New Permit Required Where Old Building Demolished and New One Built Under Ordinance No. 144.

November 27, 1912.

Gentlemen: I am in receipt of your request for an opinion as follows:

"The Fire Committee of the Board of Supervisors respectfully requests that you furnish it with a ruling on the following matter:

" 'The petitioner, F. C. Tamura, is enjoying a laundry business at No. 1545 Bush Street, granted by permission of the Board of Health, March 25, 1908, in full accordance with existing ordinances at that time;

" 'That said F. C. Tamura now desires to replace his present premises (above number) at said Bush St., which is a shack building, with a new and more substantial building. This, of course, requires a permit from the Board of Public Works to

construct said new building, but desires to be safe in the knowledge that such permit is issued in harmony with the disposition of your Committee by ruling that the said petitioner has the right to continue in the proposed new premises when completed, undisturbed as his authority rests in the present premises.' Under these circumstances is it necessary for Tamura to apply for and secure a new permit to erect laundry, from Fire Committee or can he operate under old permit?"

Opinion.

I have examined the ordinances existing at the date mentioned in your communication and find that Ordinance No. 144, approved September 15, 1900, provides, in Section 2, for the issuance of certificates by the Health Officer and also by the Fire Wardens of the City and County of San Francisco to any person, firm or corporation conducting or maintaining a public laundry or wash-house within the City and County of San Francisco. Said certificates go only to the extent that the premises are properly and sufficiently drained and that all proper arrangements for carrying on the business without injury to the sanitary condition of the neighborhood have been complied with and particularly that the provisions of all orders and ordinances pertaining thereto have been complied with and that all stoves, chimneys, washing and drying apparatus, appliances for heating, smoothing and heating irons are in good condition and that their use is not dangerous to the surrounding property from fire and that the proper precautions have been taken to provide for the provisions of the order defining the fire limits of the City and County of San Francisco regulating the erection and use of buildings in said City and County and of the General Orders and Ordinances.

It will be seen that the certificates required by the above mentioned Ordinance relate only to the condition of the premises in which the business of a public laundry and wash-house is conducted. The certificates, when issued, were evidence of the fact that all of the matters and things set forth in the Ordinance were complied with and that the building measured up to all the requirements of the law and the Ordinances in respect thereto.

Upon the demolition of the building for which the certificates were issued it necessarily follows that the certificates have no

longer any force or effect and do not give to the person conducting the business the right to carry on such business in any building he erects to take the place of the building for which the certificates were issued. In my opinion it is necessary that the applicant mentioned in your communication make an application under the existing Ordinance to your Honorable Board for a permit to carry on the laundry business in the event that such old building is demolished and a new building erected to take the place thereof.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Journal Resolution Instructing Company to Install Lights at Certain Places Is Sufficient to Authorize Board of Public Works to Permit Erection of Poles and Department of Electricity to Permit Wiring—Such Resolution Grants Company No Right in Streets—Company Acquires No Right to Use Such Poles for Commercial Purposes.

November 27, 1912.

Gentlemen: I am in receipt of your communication of November 25th, 1912, in which you state that the City and County of San Francisco on the 12th day of June, 1912, entered into a contract with the Pacific Gas & Electric Company to furnish light and power to the streets and buildings controlled by said City and County for one year from July 1st, 1912, and that the methods used by the Board of Supervisors to secure the installation of additional street lights is to pass a journal resolution instructing the company to install lights at designated places. You propound three legal questions which you desire this office to answer.

1. Does such resolution grant to the Company any rights in the streets beyond the right to install a particular light for use of the City and County?

2. Is the Company, after the installation of poles and apparatus for street lighting only, permitted to use them for commercial purposes?

3. Has the Board of Public Works the right to permit the opening of streets for the erection of poles, and the Department of Electricity the right to permit the installation of electrical apparatus, upon a journal resolution order of the Board of Supervisors for the installation of street lights, regardless of the existence or non-existence of a franchise by the Company?

In reply to the first question I advise you that the resolution of itself does not grant to the Company any right in the streets beyond the right to install and maintain a particular light for the use of the City and County. The direction to install a street light is in conformity with the contract entered into with the Company for the year beginning July 1st, 1912. That contract is merely for the furnishing of a service to the City and County, to-wit, lighting service. The City could either furnish that service itself or contract with some one else to furnish it and in so contracting the City does not confer any rights upon the Company with which it has contracted other than the contractual rights of the contract and those rights are only rights to use the streets for a particular purpose, namely, the furnishing of lighting to the City. No right to use the street other than for the furnishing of the particular service to the City could be granted by a journal resolution. A right to use the street for other purposes could only be granted in conformity with the provisions of the charter relating to the grant of such rights.

Answering the second question, I am of the opinion that compliance with the instructions or request to install street lights would not of itself permit the Company to use the poles and apparatus for commercial purposes. As pointed out in answer to question one, the Board of Supervisors, by a journal resolution, could not grant any right to use a street other than the use necessary to comply with the terms and provisions of the contract and for the purposes only of the contract. However, if the Company has, by virtue of a constitutional or other franchise, the right to use those portions of the street to furnish lighting to private consumers on which the poles and apparatus for street lighting are constructed, the Company could use the poles and apparatus installed for street lighting purposes for commercial purposes. As already stated, however, the direction of the Board of Supervisors to install poles and apparatus for street lighting does not of itself confer such rights—such right must come from a legal and existing franchise.

Answering your third question, it is my opinion that the Board of Public Works and the Department of Electricity have such right. It is not necessary that a company should have a franchise to furnish the city itself with electric lighting. As pointed out in answer to question one, the city could either supply itself with necessary lights or contract with some one else to render that service. The city would not require a franchise to furnish itself with lights and it is not necessary that the city should grant to some one else a franchise to furnish the city a service that the City itself could furnish. The person furnishing that service is somewhat in the position of an agent performing a service to the city. While it is not necessary that a company should have a franchise to furnish the city with this service, there is the corollary of that proposition that no franchise rights whatsoever are conferred upon the company furnishing that service by the contract entered into by the city with the company and the rights to use the streets, so far as the contract is concerned, is confined solely to the furnishing of the service and those rights expire when the contract expires.

It therefore follows that the Board of Public Works and the Department of Electricity should grant the permit to open the streets to the company having the contract with the city to furnish electric lighting whenever the Board of Supervisors directs the company to perform a particular service and it is necessary for the company to open the streets to do so.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Fireman Is Employee, Not Officer, and His Employment May Be Severed by a Refusal to Serve or Voluntary Abandonment of Service—Fire Commission Has No Power Thereafter to Reinstate Him or Entertain a So-Called "Withdrawal of Resignation."

December 6, 1912.

Gentlemen: I am in receipt of your communication of recent date enclosing a copy of the application of Mr. W. E. Hardenedy for the withdrawal by him of his resignation as a member of the

Fire Department, and requesting an opinion as to your legal power to entertain such an application.

You set forth the following statement of facts, in connection with his withdrawal from the Department:

"On the date that Hardenedy filed his resignation at the office of this Board, viz.: March 27, 1912, he also went to the quarters of his company and delivered his official badge of office to the Captain of his company, stating that he had filed his resignation as a member of the department, and had severed his connection therewith. After delivering his badge to the Captain, Hardenedy performed no further service in the department."

Opinion.

A member of a Fire Department is an employee and not an officer.

Wright vs. City of Hartford, 50 Conn. 546-7;
Moll vs. Sbisa, 25 Southern, 141;
People vs. Pinckney, 32 N. Y. 277.

The Supreme Court of Ohio, in *State ex rel Jennings* et al., 57 O. St., 514, held of firemen, that—

"They have no control of the fire department, nor of any of its property for any purpose, other than to use it in the extinguishment of fires whenever the occasion requires. They are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of the chief of the department. * * * * Hence they are simply persons in the employ of the fire department, and are not public officers of any kind."

Where an employee refuses to serve, or voluntarily abandons the service, the contract of employment is terminated.

26 Cyc., 986;
Wiley vs. Calif. Hosiery Co., 32 Pac., 522;
Kind vs. W. U. T. Co., 65 S. E., 944.

The case of Phelps vs. Fuchs etc. Co., 81 Atl., 728, decided November 20, 1911, is especially in point. There the Court held:

"He (the plaintiff) then informed Mr. Ford that he would quit the service of the company, apparently for the reason that he

was denied authority to direct the services of the shipping clerk. He followed his statement that he would quit, by turning over to another clerk his key to the cash drawer and leaving the factory, taking with him his notarial seal and certificate. * * * All that Ford did was to insist that the plaintiff had quit, and if such insistence was justified by plaintiff's words and conduct, and we conclude it was, no illegal discharge could be implied from facts which conclusively demonstrated that the plaintiff had abandoned the service. * * * His subsequent repentance, if he did repent, would not destroy the effect of his previous notice to the defendant that he would quit its service, following it by acts indicating the execution of such purpose."

You are therefore advised that the surrender of his badge, by Hardenedy, together with his ceasing to perform any service in the department constitutes a complete severance of all connections therewith, and your Board has no legal power to entertain any application for a withdrawal of his so-called "resignation."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Form of Notice of Sale of Property Delinquent for Tunnel Assessment.

December 7, 1912.

Sir: I am in receipt of your communication of December 4, 1912, in which you state that in Section 15 of Ordinance 1651 (New Series—Tunnel Procedure Ordinance) appear the words "notice of sale shall be in conformity with the general laws of the State of California providing for notice of sale of real estate upon execution."

You desire to be informed as to these general laws and the method of procedure. You also ask that this office aid in the preparation of the proper form for the notice of sale. You also ask that this office frame an original and duplicate certificate of sale which the Tax Collector is required, by the Tunnel Ordinance, to issue to the person to whom delinquent property is sold.

The provisions of the general law relating to the sale of real property upon execution are found in Section 692 of the Code of Civil Procedure of the State of California. That section reads as follows:

"Before the sale of property on execution, notice thereof must be given as follows:

"1. In case of perishable property: By posting notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

"2. In case of other personal property: By posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five days nor more than ten days.

"3. In case of real property: By posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper of general circulation, printed and published in the city or township, in which the property is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation, printed and published in the county.

"4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment."

By this section of the Code you are required to post a written notice, describing the property, for twenty days in three public places of the city and county and also where the property is to be sold and to publish a copy thereof once a week for the same period in a newspaper of general circulation printed and published in the City and County of San Francisco.

Section 15 of Ordinance 1651 (New Series) however, provides that a description of the various parcels which are to be sold need not be set out at length but only by the respective numbers of the same as they appear upon the assessment and map as

confirmed and adopted by the Board of Supervisors, which shall be referred to in said notice.

Enclosed herewith is a form of a notice of sale which you request. At an early date this office will prepare and send to you a proper form for the original and duplicate certificate of sale requested by you.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Disposition of Material of Razed Buildings.

December 9, 1912.

Gentlemen: I have yours of October 16th requesting an opinion as to "whether or not the City is responsible for the care or storage of the old materials of unlawfully constructed buildings razed by the Board of Public Works and inquiring if it is sufficient in law to leave such material on the site from which the same is razed, at the owner's risk, thereby exempting the City from further liability for the care of such material?" And further inquiring if the owner can be compelled to remove this debris from the site within a reasonable time and under what legal and proper procedure.

Opinion.

Answering your inquiry as to what should be done with the materials of buildings razed by the Board of Public Works, I beg to advise that if the materials themselves with which the building was constructed are germ infected or a menace to public health they should be destroyed as the mere demolition of a building would not, under such circumstances, remove the menace to public health. If, on the contrary, the materials of the building which has been razed are not dangerous to public health, but merely constitute the elements used in the erection of the unlawful building, such materials are the property of the owner and cannot be destroyed without making the responsible officials liable for damages to the owner for the loss. Should the existence of such materials upon the ground within the fire limits, constitute a fire hazard, they might be removed to a place outside the fire limits and stored in the owner's name and notice given to him of the time and place of such storage. Should the owner refuse or

neglect to remove such materials within a reasonable time thereafter the same might be sold. Care should be exercised in following this procedure to see that the owner is notified in writing of every step contemplated or taken, as it is only upon his failure to act, after notice given, that the City is justified in acting summarily.

The second part of your inquiry in which you ask if the owner can be compelled to remove this debris within a reasonable time from the site, and requesting the legal and proper procedure therefor is answered in the above.

Unless the presence of the materials on the ground is a menace to the safety or health of the community there is no reason for removing them and they should be stored on the owner's property and notice served upon him of such fact so that he could take the necessary steps to protect his property against loss or theft.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Abandonment of Portion of Franchise by United Railroads.

December 9, 1912.

Gentlemen: I am in receipt of your communication of October 18th which reads as follows:

"I hand you herewith communication this day received from the United Railroads in reference to abandonment of certain portion of franchise No. 2086 along East and Folsom streets.

"This is respectfully referred to you by the Public Utilities Committee with the request that you investigate the reasons therefor and the legal rights of the City and the Company in this abandonment, and the proposed routing of the United Railroad cars over Steuart and Howard streets."

Opinion.

The reason for the abandonment is contained in the petition of the United Railroads. Whether there are other reasons than those set forth in the petition should be determined by your Board as your Board has the power of official investigation into the matter contained in the petition. I assume that the legal reason for the request that the City sanction the abandonment is to avoid a possible contention that without the consent of the City the United Railroads would commit a breach of their franchise in abandoning a portion of the franchise. I know of no legal reason why the request of the United Railroads could not be granted. The form of the resolution sent to me is proper. It merely permits the United Railroads to abandon a portion of the franchise granted by Order No. 2086. No rights could be gained under such a resolution other than the right of the United Railroads to abandon a portion of that franchise. As to the routing of the United Railroads cars over Steuart and Howard streets, that right is not sanctioned by the passage of the resolution and the right to route cars over Steuart and Howard streets must necessarily come from other rights than those recognized or acknowledged by the resolution. If the Board desires my opinion as to the right of the United Railroads to route cars over Steuart and Howard streets the facts should be presented to me. As already stated that question does not arise out of the resolution, the resolution not recognizing or confirming the right of the United Railroads to route cars over Steuart and Howard streets.

Respectfully,

PERCY V. LONG.
City Attorney.

Board of Supervisors.

Map of Fairmount Tract Filed March 12, 1864, Is the Only Correct One on Which to Base Tax Assessment.

December 13, 1912.

Sir: I am in receipt of your communication as follows:

"Enclosed find tracing of blocks 23 and 24, as per the original Map of Fairmount Tract, filed March 12, 1854. Also a tracing of the same blocks as filed by the Mission and 30th Street Homestead Union, filed July 26th, 1871. Also blue print of a map made by Charles H. Holcomb, Assistant City Engineer in 1911 of this same property.

"You will note the frontage of block 23 on the Fairmount Tract map between Noe and Laidley streets is 295 feet; on the Mission and 30th street map it scales 330 feet 6 inches; on Mr. Holcomb's map it is 300 feet 6 inches.

"Our assessments since 1871 have been by the Mission and 30th Street Homestead Union. Sub. 21, Block 23, in 1906 was assessed to Jane McWilliams and sold to the State for delinquent taxes. In 1912 the State received a tax deed for same, and now wishes to sell it at auction.

"I am told that in 1891, Noe street was supposed to be 30 feet East of the present E. line of Noe St. and was to be graded on that line; the owner of the N. W. corner of block 24 brought suit and the decree of the Court was that the proposed grading line of the street was on this man's ground, and the E. line of Noe street was 30 feet W. of proposed line of grading. This would contract the length of block 23 on Grove street 30 feet which would reduce the length of the block from 330 feet 6 inches, as per Mission and 30th Street Homestead Union Map, filed in 1871, to 300 feet 6 inches, the length as laid down in Holcomb's Survey—and 295 feet, in the original map of the Fairmount Tract, filed in 1864.

"Mary Malloy has obtained a McEnerney Title to Sub. 20, which reads 'commencing 40 feet W. of the West line of Noe Street'—This would eliminate Sub. 21, Block 23, assessed to Jane McWilliams, and sold to the State for taxes as herein mentioned.

"Mary Malloy, owner of Sub. 20, Block 23, whose McEnerney Title has been established, wishes the tax deed for Sub. 21,

Block 23 cancelled, on the ground that Sub. 21, Block 23, assessed to Jane McWilliams does not exist, and is an erroneous assessment, and if sold by the State will cloud her title, as the assessed description in State deed would cover her lot. Does Sec. 3804a give the power to cancel this tax deed? It is evident that the 30 feet in Sub. 21 in Block 23 has been assessed erroneously, as it does not exist. If it was caused by adjusting the lines of Noe street by moving the same 30 feet Westward, I do not know why it should be taken off Sub. 21 instead of the corner lot Sub. 1, unless a priority of deed had already conveyed all the property existing in Block 23, and the first deed to Sub. 21 attempted to convey property already conveyed by previous deeds.

"If I correct our Map to agree with Mr. Holcomb's Survey, I will have to shorten the depth of Subs. 2, 3, 4 and 5, thirty (30) feet, which were originally sold as being 100 feet deep, and have been assessed as 100 feet deep.

"I realize the proper thing for the owners of the Block would be to bring a friendly suit between themselves to quiet title and establish correct boundaries to their holdings as determined by priority of original deeds. Am I justified in correcting Map to agree with the Survey of Mr. Holcomb?"

Opinion.

Before entering into an investigation of the matters contained in your communication I consulted with Mr. Charles H. Holcomb, Assistant City Engineer, of this City and County, and I also examined the available records in the case of John Norton vs. City and County of San Francisco, No. 33,744, which was an action filed in the Superior Court of the City and County of San Francisco. That was a suit brought to quiet title to land situate at the corner of 30th Street and Merced (now Noe) Street.

On the 30th day of July, 1891, the summons and complaint was received by the officials of the City and County of San Francisco; on September 30, 1891, an answer was filed on behalf of the City, and on February 6, 1892, judgment was rendered for plaintiff. No appeal was taken from said judgment and the same became and now is final and conclusive as to the rights of the parties therein named and the property therein concerned.

Mr. Holcomb informed me that the property involved in that case is the lot situated on the southeast corner of 30th Street and Noe (formerly Merced) Street, having a frontage of 57 feet 6 inches on 30th Street with a depth of 125 feet on Noe Street. Mr. Holcomb also informed me that said action arose out of attempted proceedings to improve Merced Street as delineated on the Mission and 30th Street Homestead Union Map filed July 26, 1871. The Court in that case held that the map of the Fairmount Tract, filed March 12, 1864, controlled and that the location of Noe Street (formerly Merced Street) was as delineated upon said map and that the map of the Mission and 30th Street Homestead Union did not change the location of said street. According to that decision the easterly line of Noe Street commences at a point on the southerly line of 30th Street, 230 feet westerly from the westerly line of Harper Street with a uniform width of 30 feet.

As I have figured out the location of Noe Street as above, Sub. 21, Block 23 assessed to Jane McWilliams in 1906 and sold to the State for delinquent taxes for that year, would not encroach on Noe Street and consequently the City and County of San Francisco is not interested in the disposition of said Sub. 21 in Block 23. If the State desires at this time to sell the same there is no objection to that proceeding on the part of the City and County.

You state that Mary Malloy obtained a McEnerney title to Sub. 20, described in your communication above. I think that you are in error when you state that the description as contained in the decree of Mary Malloy would eliminate Sub. 21, Block 23, assessed to Jane McWilliams and sold to the State for taxes, as mentioned, for the reason that Mary Malloy's McEnerney decree states that her lot commences 40 feet West of the westerly line of Noe Street, leaving sufficient space for Sub. 21 in the same block, assessed to Jane McWilliams, according to the map of the Fairmount Tract. You state, however, that your assessments since 1871 have been made according to the map of the Mission and 30th Street Homestead Union and therefore the description of the lot of Jane McWilliams sold to the State would be, according to that map, the same as the description of Sub. 20 upon which Mary Malloy has obtained a McEnerney decree describing said lot as commencing 40 feet West of the westerly line of Noe street.

As I view the law, and taking into consideration the maps of the Fairmount Tract and the Mission and 30th Street Homestead Union, it appears to me that Sub. 21 in Block 23 does exist, but I do not here decide the ownership of the same.

Section 3809 of the Political Code provides that if the Tax Collector discovers before the same that on account of irregular assessments or of any other error any land ought not to be sold, he must not offer the same for sale; and the Board of Supervisors must cause the Assessor to enter the uncollected taxes upon the assessment book of the next succeeding year to be collected as other taxes entered thereon.

It is too late, of course, in this case, for the Tax Collector to comply with the provisions of said section as the sale has already been made to the State. As I am of the opinion that Section 3804a does not apply to this case, as that Section is merely applicable to property that is exempt from taxation and that has been erroneously assessed, the only relief that can be had is by virtue of the provisions of Section 3805-b of the Political Code which states generally that when real property has been correctly assessed and sold to the State for delinquent state and county taxes any mis-statement of facts or clerical errors occurring in the certificate of sale or in the deed issued thereon may be corrected by the Tax Collector upon an order of the Board of Supervisors.

I will not attempt in this opinion to decide questions of ownership of any of the property in Blocks 23 and 24. That should be done, as you have suggested in your communication, by a friendly or other suit between the owners to quiet the title and establish the correct boundaries as to their holdings as determined by priority of original deeds or as per the original map of the Fairmount Tract, filed March 12, 1865, which, as I have already indicated, has been judicially determined to be the correct map and takes precedence over the map of the Mission and 30th Street Homestead Union, filed July 26, 1871.

The map of the Fairmount Tract was recorded about nine years prior to the filing of the map of the Mission and 30th Street Homestead Union and the streets delineated upon said Fairmount Tract were offered for dedication and said offer of dedication was accepted by the City and County of San Francisco by virtue of Order No. 966, approved October 25, 1870. Said

Order adopted the map made by William P. Humphreys, City and County Surveyor of the City and County of San Francisco and declared the same to be the valid, legal and official map of the City and County of San Francisco. Merced or Noe Street, south of 30th Street, appears upon said map. The map of the Mission and 30th Street Homestead Union not having been filed until July 26, 1871, the only map showing Merced Street, in existence at the time the Humphreys map was made, was the map of the Fairmount Tract. An examination of the Humphreys map discloses the fact that Mr. Humphreys, in the preparation of his map, used the map of the Fairmount Tract and it so appears thereon.

Therefore, the City and County of San Francisco having accepted the offer of dedication of Merced or Noe Street, together with other streets as delineated upon the map of the Fairmount Tract, by the approval of the Humphreys Map of 1871, by Order No. 966, the location of Noe Street has been officially recognized to be as delineated on said Fairmount Tract and the fact that a map was subsequently filed cannot and does not change the location of Noe Street. You are not only justified in correcting your assessment map to agree with the map of the Fairmount Tract as filed March 12, 1864, and approved and declared official by Order No. 966, but it is your duty under the law to accept such map as the only correct one upon which to base assessments in the future.

Respectfully,

PERCY V. LONG,
City Attorney.

Assessor.

Franchise Rights of the Sierra and San Francisco Power Company.

December 16, 1912.

Gentlemen: You have transmitted to me, under date of November 25th, a copy of communication to your Board from the Sierra and San Francisco Power Company, in which it is stated that that Company claims no franchises from the City and County of San Francisco, and ask my opinion in regard to the same.

It appears from the communication that the only rights claimed by the said Sierra and San Francisco Power Company are in connection with certain poles and wires and underground conduits which were installed prior to October 10, 1911, for lighting purposes under the provisions of Section 19 of Article XI of the State Constitution as it stood prior to that date.

Public Service corporations have the right to maintain all such poles, wires and conduits which were installed prior to October 10, 1911, and also have the right to the use of such portions of the street as were occupied by them prior to that date. This right does not extend, however, to any portion of the street not occupied prior to the date above mentioned.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Narrowing Sidewalks on Montgomery Street From Post Street to Columbus Avenue—Street Only Accepted From Curb to Curb So Property Owners Liable for Narrowing Sidewalk.

December 18, 1912.

Gentlemen: I am in receipt of your communication as follows:

"I am directed by George E. Gallagher, Chairman of the Committee on Streets and Sewers, to transmit to you copy of Bill No. ——, amending Ordinance No. 1061 (New Series), entitled 'regulating the widths of sidewalks, approved December 18, 1903, by adding thereto a new section to be numbered Section ——, widths of sidewalks on Montgomery street between Market street and Columbus avenue to be fixed at twelve feet, introduced by Supervisor Adolf Koshland and referred to the Committee on Streets and Sewers.

"Request is made that you furnish the Committee with your opinion upon the following question:

"1. Provided that the proposed Bill reducing the width of sidewalks on Montgomery street from Market street to Columbus avenue, from 15 feet to 12 feet, is passed by the Board of Super-

visors without any request or petition of the property owners, is the City liable for the cost of moving back the curbs and paving the additional roadway of said street; or can the property owners be compelled to pay the cost of moving back the curbs and for the paving of the additional three feet of roadway of said street?"

Opinion.

Montgomery street from Post street to Sutter street was accepted by the City and County of San Francisco by Resolution No. 6654 (New Series) on November 2, 1874; from Sutter street to Bush street by Resolution or Ordinance No. 1842 (New Series), February 6, 1871; from Bush street to Pine street by Resolution or Ordinance No. 6896 (New Series), January 11, 1875; from Pine street to California street by Resolution or Ordinance No. 6164 (New Series), June 23, 1874; from California street to Sacramento street (conditionally) by Resolution or Ordinance No. 6896 (New Series), January 11, 1875; from Clay street to the junction of Washington street and Columbus avenue (conditionally) by Resolution or Ordinance No. 7197 (New Series), April 19, 1875.

The above blocks on Montgomery street were accepted by the City under and pursuant to the provisions of acts amendatory to the Consolidation Act and supplementary thereof, which provided, generally, that the Board of Supervisors should accept any street or portion thereof constructed to the satisfaction of the Committee on Streets, Wharves, Grades and Public Squares of the Board of Supervisors and the Superintendent of Public Streets, Highways and Squares and the said acts contained a proviso that the Board of Supervisors should not accept any portion of a street less than the entire width of the roadway including the curbing and one block in length or one entire crossing.

It has been the invariable rule that only the roadway of any street, including the curbs, should be accepted by the Board of Supervisors and there is nothing to indicate, as far as the records available disclose, that the rule was departed from in the acceptance by the City of that portion of Montgomery street from Post street to Washington street.

The City and County of San Francisco, under the provisions of the Consolidation Act and the Acts amendatory thereof and supplementary thereto, under which Montgomery street between the points indicated was accepted, is only obliged to keep in repair the width of the roadway of Montgomery street as the same is at present established, including the curbs thereon, and unless it can be shown that the Board of Supervisors accepted the entire width of Montgomery street between the points indicated, including the sidewalks, the obligation of moving back the curbing and paving the additional roadway of said portion of Montgomery street rests upon the property owners fronting on Montgomery street between Post street and the junction of Washington street and Columbus avenue.

Therefore any additional paving on Montgomery street between said points made necessary by reducing the width of the sidewalks on said street from fifteen feet to twelve feet and the cost of re-setting the curbs thereon will in the absence of any showing that the said street for its entire width was accepted, have to be paid for by the owners of the property on said street.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Passage to Print of Resolutions of Extension of Time to Contractors.

December 26, 1912.

Gentlemen: I am in receipt of your communication of the 23rd inst. as follows:

"Confirming discussion with the Finance Committe last Friday, will you please advise the Board of Supervisors in writing as to whether it is necessary to pass to print and advertise five times, extension of time to contractors, or whether an adopted resolution is legally sufficient to validate contracts and payments thereon."

Opinion.

The Charter, Section 13, Chapter I, Article II, requires that "every bill or resolution providing for any specific improvement, or the granting of any franchise or privilege or involving the lease, appropriation or disposition of public property, or the expenditure of public money, except sums less than two hundred dollars, or levying any tax or assessment and every ordinance providing for the imposition of a new duty or penalty shall * * * * be published * * * for at least five successive days."

Resolutions of the Board of Supervisors, granting extensions of time to contractors, do not come within the category of any of the above specified resolutions.

Section 21, Chapter II, Article VI of the Charter (3rd paragraph) empowers the Board of Supervisors, upon the recommendation of the Board of Public Works, to extend the time of completion of contracts, but nothing is therein specified as to the proceedings to be taken by your Honorable Board in granting said extensions.

In the absence of any mandatory provision in the Charter respecting the same, I am of the opinion that an adopted resolution is legally sufficient in the premises and that said resolution need not be passed to print or advertised.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Bid for Street Work Which Does Not Comply With Notice in That It Contemplates Doing Less Work Than Specified in Resolution of Intentions Is Invalid.

January 2, 1913.

Gentlemen: I am in receipt of your communication of the 30th ult.. as follows:

"On December 18, 1912, this board after proceedings duly had and taken received sealed proposals for the improvement of

Arguello Boulevard in the manner particularly described as follows:

"That the easterly one-half of Arguello Boulevard, between the southerly line of Geary street and the northerly line of Turk street, including the intersection of Edward street, and the westerly one-half of Arguello Boulevard, from the southerly line of Geary street to the southerly line of Balboa street, including the intersection of Anza and Balboa streets, be improved by the construction of granite curbs, where not already constructed by resetting the existing granite curbs and brick catch-basins to official line and grade that are not already at official line and grade, by paving the roadway and the intersections thereof with an asphalt pavement, consisting of a 6-inch concrete foundation and a 2-inch asphaltic wearing surface, by constructing artificial stone sidewalks on the angular corners of the intersections, where not already constructed, and by constructing brick catch-basins with cast-iron frames, gratings and traps and 10-inch vitrified, salt-glazed, iron-stone pipe culverts on the northeasterly and southeasterly angular corners of the intersection of Edward street, where not already constructed.

"But one proposal was submitted, that of the City Street Improvement Company, and this proposal was on a form furnished by the Board of Public Works and referred to in the advertisement. The specification and the notice inviting proposals called, among other improvements, for the construction of artificial stone sidewalks, but through inadvertence the matter of artificial stone sidewalks was omitted from the proposal blank. The City Street Improvement Company request that for this reason their bid be rejected and their check returned.

"For your further information there is herewith enclosed a communication from Hoefler, Cook, Harwood & Morris, attorneys for the City Street Improvement Company, relating thereto. It is requested that you furnish this board with an opinion as to whether or not this proposal is valid, prior to January 3, 1913."

Opinion.

It appears from your communication that the bid of the City Street Improvement Company was the only one submitted and that the bid so submitted by said Company did not comply with the notice calling for sealed proposals for the doing of the

work specified in your communication in that it did not include all of the work therein specified, in that it omitted the matter of constructing artificial stone sidewalks on the angular corners of the intersections.

The Supreme Court of this State in an unbroken line of decisions has decided that contracts entered into by the Superintendent of Public Streets, Highways and Squares under circumstances similar to these, were invalid and said decisions apply with equal force to contracts entered into by the Board of Public Works of this City and County, which Board performs the duties formerly performed by the Superintendent of Public Streets, Highways and Squares.

In the case of Dougherty vs. Hitchcock, 35 Cal., at page 523 the Court held that a contract for the grading of Clay street from Jones to Leavenworth was invalid because the work mentioned in the resolution of intention was the grading of Clay street from Taylor to Jones street and from Jones to Leavenworth street, and the crossing of Clay and Jones streets, saying:

"It is very apparent from this statement that the contract was wholly unauthorized by the resolution of the Board. The resolution of intention and its publication confer upon the Board jurisdiction to proceed in the prescribed mode to order the proposed work to be done and in the exercise of the jurisdiction thus acquired the Board has no power to act upon any other or different work. The proposed work is a distinct and entire subject-matter. There is a manifest propriety in confining the Board to the specific improvement mentioned in their resolution. The owners of the adjoining lots may be quite willing that the proposed improvement should be made, but they may have well grounded objections to a work either of a *greater or less extent.*"

In the case of Treanor vs. Houghton, 103 Cal. at page 58 the Court said:

"It is further objected that it does not appear that any contract was let for doing the work as a whole, as proposed by the resolution and notice of intention, but, on the contrary, the street was divided into six sections numbered from one to six inclusive, and each section let separately. Dougherty vs. Hitchcock, 35 Cal. 512; City of Stockton vs. Whitmore, 50 Cal. 554;

Richardson vs. Heydenfeldt, 46 Cal. 68; and People vs. Clark, 47 Cal. 456, are cited in support of the contention that the method adopted by the city council was invalid. The record clearly sustains the allegation that the resolution of intention was for the improvement as a unit, and that six several contracts were entered into for the performance of as many sections or portions of the work."

The Court in this case decided that the Board had no power to let separate contracts for the doing of the work specified and mentioned in the resolution of intention.

In the matter under consideration here the City Street Improvement Company having bid for only a portion of the work mentioned it would be necessary, in order to complete the entire work, for a separate contract to be entered into for the construction of artificial stone sidewalks on the angular corners of the intersections.

The case last cited is determinative of this question; however, the Supreme Court in later decisions has reiterated the doctrine enunciated in the Treanor case.

In the case of Warren vs. Chandos, 115 Cal., page 382, a contract was let for grading Kansas street for several blocks to the original line and grade. After the contractor had commenced the work an order was passed by the Board of Supervisors changing the grade of that portion of Kansas street embraced in the contract by which the same was lowered several feet. The grading to be done was a fill, so that by the change of grade the cost for doing the work and the assessment therefor were lessened. The Court said on page 385:

"Before the contract can be awarded, notice, 'with specifications' inviting proposals for doing the work ordered must also be posted and published, and the contract therefor is to be awarded to the lowest responsible bidder. * * * But if, after the contract has been awarded and entered into with the successful bidder, the character of the improvement can be changed, or the amount of work necessary for its completion increased or diminished, they (the owners) are not only deprived of the benefit of a competition between bidders before the award, but they are also deprived of an opportunity to determine whether it would be to their advantage to enter into the contract themselves."

In the case of Kutchen vs. Engelbret, 129 Cal., at page 637, the Court said:

"In preparing and executing the formal contract the superintendent of streets acts ministerially. The bid, then, is to do the work ordered, and the contract is for such work. The superintendent of streets can only enter into the formal contract already agreed upon. It seems, therefore, that all subsequent proceedings are, in a sense, dependent upon the resolution of intention. If work is ordered in excess of the resolution of intention, the latter order may be void only as to the excess, if severable. (Gafney vs. San Francisco, 72 Cal., 146). But if the contract is for less work than was proposed in the resolution of intention it is void. (Dougherty vs. Hitchcock, supra; Stockton vs. Whitmore, 50 Cal. 554; McBean vs. Redick, 96 Cal. 191; Warren vs. Chandos, 115 Cal. 382.)"

The decisions above quoted relate in the main to contracts for street work but the reasoning therein employed applies to bids submitted under the circumstances of this matter.

There exists also another reason which invalidates the bid of the City Street Improvement Company herein. Notices inviting sealed proposals are published for the purpose of having the work done at the lowest possible price through competitive bidding. It would be destructive of the principle of competitive bidding to accept a bid submitted which contemplates the doing of less work than is specified in the resolution of intention and the notices inviting sealed proposals. The proceedings herein contemplated being in invitum it is due to the property owners affected by the proposed work that said work be done at the lowest possible price and it cannot be assumed that the portion of the work omitted from the bid of the City Street Improvement Company will be done in the future at a price less than the City Street Improvement Company would charge for the same. The Courts jealously guard the interests of the property owners in matters of this kind and have no hesitancy in declaring void proceedings which do not strictly follow the law.

In my opinion a contract made, based upon the bid submitted by the City Street Improvement Company could not

be enforced and the bid submitted by said Company is not a valid one.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Eddy Street, Hyde to Larkin Streets, Wooden Building Within Fire Limits May Be Torn Down.

January 3, 1913.

Gentlemen: I am in receipt of your request for an opinion of the 31st ult. on the subject of the abatement of the nuisance caused by the maintenance of certain buildings located on the north side of Eddy street between Hyde and Larkin streets, known and designated as numbers 500 to 520 Eddy street, used as a stable and wood and coal yard, placed in said location subsequent to the fire of April 18, 1906, and which location is within the so-called fire limits of the City and County, and also with reference to the legal sufficiency of Ordinance No. 1139 (New Series), approved April 12, 1910, to warrant your action in summarily tearing down and destroying said buildings.

Opinion.

That a municipality has the right, acting under its police power, to summarily tear down and destroy buildings erected in violation and defiance of an ordinance establishing fire limits within said municipality, without resort to a court has been upheld on every occasion in which the matter has been presented to a judicial tribunal. In the case of Miller vs. Sergeant, 37 N. E. Rep., p. 418, the Court in discussing this matter, said:

"The undisputed evidence shows that the ordinance establishing the 'fire limits' was enacted long before the building was placed on said lot. It was within the exclusive province of the municipality to define the limits, and determine the kind of buildings which might be erected therein. In placing the building thereon the appellants violated the municipal law, and the erection and maintenance of the building thereon was a nuisance per se

under such circumstances. The fact that the appellees served any notice whatever upon the appellants was a matter of favor and not a matter of right. At common law any one might abate a public nuisance without notice, and, in order to accomplish that end, might destroy the thing which created it. Baumgartner vs. Hasty, 100 Ind. 575. The abatement of the nuisance by the city was an exercise of the police power. Such power may often be exercised in a summary manner. Every community has the right of self-preservation. When a public nuisance creates an imminent danger, a necessity for immediate action arises. If the public authorities were compelled to give notice and await the action of courts or other bodies, the delay might result in public calamity. The right of self-preservation is one of the first laws of nature, and applies to organized societies as well as individuals."

In the case of Lemmon vs. Guthrie Center, 86 Am. St. Rep. 361, the Court said, at page 362, et seq.:

"A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceedings whatever: Eichenlaub vs. City of St. Joseph, 113 Mo. 395, 21 S. W. 8; Hine vs. City of New Haven, 40 Conn. 478; Kind vs. Davenport, 98 Ill. 305, 38 Am. Rep. 89; Baumgartner vs. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Klingler vs. Bickel, 117 Pa. St. 328, 11 Atl. 556; McKibben vs. Ft. Smith, 35 Ark. 352. Delays of that character might endanger the public safety, and ought not to be tolerated."

Baumgartner vs. Hasty, 100 Ind., 575; 50 Am. Rep. 830, is a very well considered case in which the Court goes thoroughly into the question of nuisances and the abatement thereof and cites many authorities to sustain the conclusion of the Court which was that a city may summarily tear down a wooden structure erected within fire limits and dangerous on account of fires. It is not necessary at this time to repeat the reasoning of the Court and reference to the volume cited will supply any additional information.

I have examined Ordinance No. 1139 (New Series) approved April 12, 1910, contained on page 749 of the Ordinance Book of that year, and it appears to me that the same is a sufficient legal authorization and warrant to justify summary action by your Honorable Board in tearing down and destroying the

buildings mentioned in your communication. Under the law and authorities cited, no liability would or could attach to your Honorable Board or to any of the members thereof in following out the provisions of the said Ordinance and you are advised accordingly.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Depository Bond.

January 3, 1913.

Gentlemen: I am in receipt of your recent communication, requesting my opinion as to the necessity of the depository bond from the Crocker National Bank to the City Treasurer, as provided in Resolution No. 2752 (New Series).

Opinion.

Resolution No. 2752 (New Series) provides for the payment in New York of the interest on certain coupons of the bonds of the City and County of the issue of July 1, 1908, through the Crocker National Bank as its fiscal agent. Section 2 of the said resolution provides further

"That if a bond should be exacted by the Treasurer of the City and County of San Francisco upon making any deposit with the Crocker National Bank of San Francisco, the premium on such bond shall be paid by the City and County of San Francisco."

Taking advantage of this section, and evidently seeking protection for himself in case of default of the Crocker National Bank, the Treasurer has exacted a bond from the Bank, entailing a cost to the City of $1,000 as its premium, the sureties being the Massachusetts Bonding and Insurance Company; the National Surety Company and the Guardian Casualty and Guarantee Company.

If the Bank were an irresponsible or financially weak institution, this bond would be necessary.

The financial condition of these companies, from figures furnished by the State Insurance Commissioner are as follows:

Massachusetts Bonding and Insurance Company—Total admitted assets, $2,209,050.27; total liabilities, $629,482.41; capital, $1,000,000.00; surplus, $579,567.86.

National Surety Company—Total admitted assets, $5,988,581.05; total liabilities, $2,980,899.88; capital, $1,500,000.00; surplus, $1,507,681.17.

Guardian Casualty and Guarantee Company—Total admitted assets, $502,930.21; total liabilities, $116,880.10; capital, $214,000.00; surplus, $172,050.11.

The capital of the Crocker National Bank is $2,000,000, and its resources are $28,706,770.78, with a surplus of $2,780,420.33, according to its official statement of its condition on November 26, 1912.

Considering these contrasted financial statements, it is manifestly absurd to demand a bond from such a Bank, which is financially responsible to several times the amount of its sureties.

As this is a matter entirely between the Treasurer and the Bank, you are advised that these facts and figures be placed before the Treasurer, and that he be requested to waive the necessity of a bond from the Bank hereafter in this transaction.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Issuing a New Deed to Replace Lost Tax Deed.

January 6, 1913.

Sir: I am in receipt of your communication of the 3rd inst., as follows:

"The following is a copy of letter received by me from H. M. Anthony, dated November 23rd, 1912:

" 'In regard to my application to you herein for a deed running from you as the Tax Collector, to G. L. Fitz, for lots Nos. 4 and 5, in Block No. 2, as per map of Garden Tract Homestead Association, I beg to state that the original deed issued to G. L. Fitz has been lost and destroyed, and that the deed you may issue will take the place of such lost and destroyed deed. The certified copy of the deed to the State of California shows the subsequent disposition of the property by the State, from which it appears that Fitz was the purchaser; I have the deed which I hand you for comparison running in favor of A. W. Nuckles for sale of property on the same day as the sale to Fitz, gives all the particulars as to the sale made by the Tax Collector.'

"Thanking you for your favor in this matter I am, etc."

Opinion.

I have examined all of the statutes concerning the execution of deeds of property sold for delinquent taxes and I have not found any giving the power to the Tax Collector to issue a second deed to property once sold and for which a deed was duly and regularly executed, and in the absence of a direct authorization by statute the Tax Collector would have and has no power or authority to comply with the request of the writer of the letter, a copy of which is contained in your communication.

It seems to me that the person applying to you for a second deed of the property mentioned in your communication possibly would obtain all the relief necessary to establish his title to the property involved by a suit to quiet title of said property. At all events, you are advised that you have no power or authority to comply with the request of the petitioner herein.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Bonds of Municipal Railway Employees Must Be Filed With Auditor.

January 10, 1913.

Sir: I am in receipt of your communication of the 9th inst., as follows:

"Bill No. 2299, Ordinance No. 2070 (New Series), passed by the Board of Supervisors, November 4, 1912, and approved by his Honor, the Mayor, November 8, 1912, fixed the bonds to be furnished by the Superintendent, Conductors and Motormen of Municipal Railways, the bond of the Superintendent to be $10,000 and that of Conductors and Motormen to be $300.00.

"Would be pleased to have you advise me as to whether the bonds of these employees should be filed with the Auditor in the same manner as provided for in Section 2, Article XV of the Charter."

Opinion.

I have examined Section 2, Article XV of the Charter, to which you refer in your communication, and find that said section merely fixes the bonds of various City officials required to give bonds and also provides for the payment of the premiums thereon.

Section 1, Article XV, however, declares that officers of the City and County before entering upon the discharge of their official duties shall give and execute to the City and County such official bonds as may be required by law, ordinance or the Charter and also provides that the bonds of certain of the officers therein named shall be filed and kept in the office of the Auditor.

Section 4, Chapter I, Article VI of the Charter provides generally that the Board of Public Works shall establish rules and regulations for said department and shall require adequate bonds from its officers and employees, except laborers, for the faithful performance of their duties, in such sums as may be fixed by the Supervisors. It also provides that such bonds shall be approved by the Mayor and shall be filed in the office of the Auditor.

You are therefore advised that Section 4, Chapter I, Article VI, controls in the matter of the filing of the bonds of the employees

of the Municipal Railway and that according to the terms of said Section 4 all such bonds shall be filed in the office of the Auditor of this City and County.

Respectfully,

PERCY V. LONG,
City Attorney.

Auditor.

City and County Has Right to Construct Railway on Van Ness Avenue.

January 13, 1913.

Gentlemen: I am in receipt of your request for an opinion as follows:

"Will you please inform this office, for the Street Committee, whether it is necessary or not to amend Ordinance 752 (New Series) in order to construct a Municipal Railway over Van Ness Avenue?

"I send you herewith copy of an ordinance amending Ordinance 752 (New Series), which is designed to facilitate the construction of an extension of the Geary Street Railway over Van Ness Avenue boulevard. If this Ordinance is unnecessary please so advise. If an amendatory Ordinance is necessary, and this Ordinance is in proper legal form, please O. K. it."

Opinion.

Section 6 of Chapter II of Article II of the Charter provides "that the Board of Supervisors shall have power to grant authority for a term not exceeding twenty-five years to construct and operate street railways upon, or over, or under, the streets or parts of streets of the City and County not reserved for boulevards or carriage driveways, * * * * * *." This provision of the Charter is paramount and limits the power of the Board of Supervisors in the matter of granting street railroad franchises. Van Ness Avenue, from Market Street to the Bay is a boulevard, made so by Ordinance No. 752 (New Series), approved April 16, 1909, and in the absence of Section 2 of said Ordinance no street railroad franchise could be granted upon,

over or under the same as long as it remains a boulevard. Section 2 merely reiterates the Charter provision referred to above and adds nothing to the powers of the Board of Supervisors nor does it make stronger the limitations of the powers of the Board as set forth in the Charter.

The Charter provision and Section 2 of Ordinance No. 752 (New Series), however, refers to and affects only franchises granted by the Board of Supervisors and municipal street railways do not come within the terms thereof. No franchise is necessary for a railroad operated by the municipality and the Charter does not prohibit the construction of a municipal railway on boulevards. The end sought to be attained by the proposed amendment to Section 2, is to allow the construction of a municipal railway on Van Ness Avenue. There is nothing, in the Charter, as I have stated, to prevent the City from doing that, and therefore it is not necessary on the part of the Board to adopt any ordinance which is merely declaratory of the power which is inherent in it. There exists no more reason for that action than there would be to declare by ordinance that the Board of Supervisors has the power, subject to the provisions, limitations and restrictions in the Charter—"to ordain, make and enforce within the limits of the City and County all necessary, local, police, sanitary and other laws and regulations" which is a part of the Charter itself and contained in Sub. 1, Sec. 1, Chap. II, Art. II, thereof.

Judge Dillon makes use of the following language in Section 587, 5th Edition of his work on Municipal Corporations which expresses, in a trite manner, the consensus of judicial opinion on the subject:

"Since all the powers of a corporation are derived from the law and its Charter, it is evident that no ordinance or by-law of a corporation can enlarge, diminish or vary its powers."

The Board of Supervisors in the adoption of Ordinance No. 752 (New Series) acted within its powers in declaring certain streets to be boulevards, and the moment that was done, said streets became immune and no franchise could be granted for street railways upon, over or under the same, and Section 2 of said ordinance could have been omitted and the Charter provision would have and did become immediately operative as far

as those streets declared to be boulevards therein were concerned.

While I believe it to be unnecessary to have inserted Section 2 in said ordinance and that it is unnecessary to amend the same in order to allow the construction of a municipal railway on Van Ness Avenue, no possible harm could result therefrom. The most that could be said against such action on the part of the Board, would be, as I have said, that it is unnecessary and that the Charter provision prevails, and the question of the advisability of amending Section 2 is a matter for your Honorable Board to determine.

It is my opinion that the City and County of San Francisco possesses the inherent right, without a declaratory ordinance, to construct a railway over and along Van Ness Avenue. In order, however, to make any possible litigation impossible or abortive, it might be well to repeal Ordinance No. 752 (New Series), before and during the construction of the municipal railway upon Van Ness Avenue and after the construction thereof said ordinance could then be re-enacted.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Delay in Completing Steel Contract on Islais Creek Incinerator Held Avoidable, Since if Called to the Attention of City Engineer It Could Have Been Avoided—Contractor Must Forfeit $50.00 Per Day and Board of Public Works Cannot Remit the Forfeiture.

January 14, 1913.

Gentlemen: I am in receipt of a communication from Mr. Ransom of date November 26, 1912, with reference to a question which has arisen concerning the interpretation of specifications of Contract No. 3, Section "B" of the Garbage Disposal System for furnishing, erecting and painting the structural steel frame of the Islais Creek Incinerating Plant.

It appears that the contractor who was to furnish the steel work required seventeen days more time for completing his

contract than allowed by his contract. It is now asserted that the failure to complete the steel contract within the time specified was due to the fact that the general contractor did not conduct his operations so as not to interfere with or in any way delay the completion of the steel contract. It further appears from the communication that the City Engineer requested the steel contractor to meet him and the general contractor in a conference and arrange a method of operation by which the general contractor would not interfere with the work of the steel contractor but that this request of the City Engineer was ignored by the steel contractor. It further appears that the contract entered into with the general contractor provided that the City Engineer had the power to cause the general contractor to cease operations whenever it became necessary for the steel contractor to fulfill his contract and the operations of the general contractor interfered with such fulfillment. The contract with the steel contractor contained provisions relating to extension of time and delays in the completion of the contract. Delays were divided into two classes, unavoidable delays and avoidable delays. Among avoidable delays it was specified that delays in the prosecution of the work which were not called to the attention of the City Engineer at the time of their occurrence should be deemed avoidable delays and that upon the final completion of the contract for every day beyond the time specified for completion it became necessary for the contractor to take in order to complete his contract and which was due to an avoidable delay, as defined in the contract, there should be deducted from the contract price the sum of Fifty Dollars. Under the facts related in your communication it appears that the delay necessitating the contractor to employ seventeen days additional time was caused by the failure of the general contractor to so conduct his work as not to interfere with the operations of the steel contractor but that the cause of the delay or the occurrence of the same was not called to the attention of the City Engineer at the time the same occurred, and that if the same had been called to the attention of the City Engineer the cause of the delay could have been removed and consequently no delay need have occurred. The question which you desire answered is: Has the Board of Public Works the power to now waive the provision of the contract which provides that for every day that the contractor delays in the completion of his contract and which is defined as an avoidable

delay the Board of Public Works shall deduct the sum of Fifty Dollars?

From the above statement of facts it seems to me to be quite clear that there is only due to the contractor the sum specified in his contract less eight hundred and fifty dollars which latter sum is the amount specified in the contract which should be deducted from the contract price by reason of avoidable delays. In other words, subsequent facts and transactions have reduced the amount of the contract price from the amount specified in the contract by eight hundred and fifty dollars. This condition and result occurs by reason of conditions and agreements specified in the contract. It is unnecessary to point out that the Board of Public Works has no power to award to any contractor that to which he is not legally entitled. The Board of Public Works has been given power to transact and do certain things and perform certain acts. It does not have any authority to exceed the powers conferred. It cannot, as above stated, give to a contractor that which a contract does not call for and that to which he is not entitled. If this sum of eight hundred and fifty dollars was remitted to the contractor the result would be exactly the same as if the Board of Public Works had awarded to him the sum of eight hundred and fifty dollars in excess of his contract for which he had furnished no consideration and to which he is not entitled. I therefore advise you that it is my opinion that the Board of Public Works has no authority or power to remit to the contractor the sum of eight hundred and fifty dollars deducted as related in your communication. However unjust it may seem to take from a contractor a sum of money which could have been avoided under the terms of the contract if the contractor had lived up to those terms, nevertheless the Board of Public Works is powerless to prevent such a result if the contractor fails to live up to and perform that which his contract requires him to do.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Application of City Electric Company for Revocable Permits and Draft of Ordinance Covering Underground Extensions.

January 15, 1913.

Gentlemen: You have transmitted to me certain applications of the City Electric Company requesting grants to that Company of revocable permits for the opening of certain streets for the purpose of extending the underground electrical distribution system of that Company, with the request that I advise your Board as to the disposition to be made of such requests. These requests assume that the applicant has no franchise right authorizing it to make the extensions created.

I understand that these revocable permits are desired pending the establishment of some uniform policy as to the granting of franchises for extensions of existing systems. I know of no authority of law, however, which authorizes your Board to grant revocable permits of this character. The Charter prescribes a method by which franchises or privileges for the use of the streets shall be granted and is entirely silent upon the granting of any revocable permit of this character. For that reason I am compelled to advise you that you are not authorized to grant the permits applied for.

In Ordinance No. 2109 (New Series), approved December 17, 1912, service connections are limited to a total length of 120 feet. While I have held that such ordinance is invalid on account of certain other provisions contained therein, it is my opinion that the policy adopted by your Board as to the length of service connections should apply to these applications, all of which exceed the length above stated, and that the permits cannot be granted upon that ground.

I am also requested by your communication to prepare a draft of an ordinance covering the general proposition of underground extensions of electrical service and kindred utilities.

It is impossible for me to comply with this latter request until I am advised as to the provisions desired by your Board in such Ordinance. The question of the conditions under which franchises or privileges should be granted and the general regulations for the opening of streets, under the changed condition brought about by the adoption of the recent Constitutional

Amendment, are questions of policy to be determined by your Board. I should be pleased to co-operate with representatives of your Board and a representative of the Clerk's office, upon whom rests the duty of drafting ordinances, in a general discussion of the proper policy to be adopted in this matter. Until, however, this question of policy is settled I cannot attempt to frame an Ordinance as requested.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Opening Streets for Connections Between Two Telephone Systems.

January 15, 1913.

Gentlemen: Under date of January 11, 1913, you have transmitted to me an application by the Pacific Telephone and Telegraph Company for permission to open Twenty-fifth Street between Capp and Lilac Streets for the purpose of installing creosoted wood ducts to connect a manhole of the Pacific Telephone and Telegraph Company's system with a manhole appurtenant to the automatic system formerly owned by the Home Telephone Company. I am requested to advise you whether or not such application should be granted, or consideration of the same be withheld pending a final adjudication by the Appellate Court of the validity of the recent alleged merger of the two systems above referred to.

Judge Ellison has recently held, in a suit brought by the City, that the merger of the systems of these two companies was valid and has sustained the demurrer to the City's complaint. A similar ruling has since been made by Judge Waste of Alameda County in a suit brought by the City of Berkeley involving practically the same question. An appeal by the City of San Francisco from Judge Ellison's decision will not stay the execution of the judgment. In other words, the decree that the merger is valid is effectual until and unless it shall be

reversed on appeal. The pending application should, therefore, be considered with reference to the law as established by Judge Ellison's decision, independently of the question of what action may be taken by the Appellate Court.

The work desired to be done under this application appears, however, as far as I am advised, to be work which is not authorized by any provision of the franchises heretofore granted to either the Pacific Telephone and Telegraph Company or the Home Telephone Company. Such new work is, therefore, subject to the control of the municipal authorities, both as to the granting of the privilege therefor and the manner of its execution.

I am transmitting to you today an opinion holding that Ordinance No. 2109 (New Series), approved December 17, 1912, is invalid, to which you are hereby referred. Until some new Ordinance is adopted by the Board of Supervisors, I know of no existing authority in your Board to grant the permission applied for under this application.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Improvement of Lincoln Way Westerly from Thirty-Sixth Avenue.

January 15, 1913.

Gentlemen: I am in receipt of your communication of the 4th inst., as follows:

"Budget Item No. 54, provided $40,000, 'for the improvement of Lincoln Way.' Accordingly, this Board prepared specifications and received sealed proposals, 'for the improvement of the northerly half of Lincoln Way from Twentieth Avenue westerly by the construction of an asphalt pavement, etc.'

"Resolution No. 9622 (New Series), of the Board of Supervisors, approved August 29, 1912, set aside $40,000.00, 'for the improve-

ment of Lincoln Way from Twentieth Avenue westerly.' At the unit prices named in the contract with the City Street Improvement Company, to whom the contract was duly awarded, this work can be prosecuted as far as the westerly side of Thirty-sixth Avenue. This would not make a complete roadway to the Ocean and it was the desire to continue this pavement as far as the westerly side of Forty-first Avenue, and the Board of Supervisors appropriated an additional $12,000.00 for this extra work.

"This Board desires to be advised as to whether or not, it can direct the contractor to continue the paving to Forty-first Avenue under the old contract and to certify this additional amount therefor to the Auditor."

Opinion.

As I understand the matter mentioned in your communication, the City Street Improvement Company was awarded a contract for the improvement of the northerly half of Lincoln Way for which the City and County is liable, as the same fronts upon Golden Gate Park, at unit prices for each particular class of work necessary to be done in order to complete said contract, instead of the ordinary method of making a contract for the performance of a certain specified amount of work at certain prices therein named.

There can be no doubt that if the contract between the City and the City Street Improvement Company was of the usual kind that any work necessary to be done on Lincoln Way outside of the work mentioned would have to be bid and contracted for in accordance with the method prescribed by the Charter.

In the view that I take, it is immaterial whether the contract is for the work to be done, specifying only the unit prices for doing said work, or whether the contract embraces certain work to be done under said contract. There is nothing in the Charter which authorizes or allows the Board of Public Works to allow the City Street Improvement Company to continue with the additional work necessary to be done on Lincoln Way, westerly from Thirty-sixth Avenue. The Board of Supervisors having provided the sum of $40,000, in Budget Item No. 54, for the improvement of Lincoln Way, and the City Street Improvement Company having submitted its bid to do the work according to

the specifications at unit prices for the same, there can be no question that it was the intention to simply do so much of said work as the said sum of $40,000.00 would provide for.

It may be a fact that the unit prices for which the work is being done by the City Street Improvement Company under the contract which it now has for the improvement of Lincoln Way are low, and that it would be advantageous to the City to continue said work at the prices specified in said contract, but it cannot be assumed that the City would not obtain a more advantageous contract by calling for bids on the remainder of said work and executing a new contract for the same. It would be a bad precedent to establish, to permit contracts to be made in this way. If it can be done in this case there is nothing to prevent a contract being made similar to the contract in this instance which would provide for the doing of a very inconsiderable amount of work and then continuing said contract to provide for the doing of an amount of work which would be out of all proportion to the work provided for in the original contract.

The Charter has thrown certain safeguards around the execution of contracts by the City and County, and in order to take advantage of those safeguards it is necessary that the officials entrusted with the execution of contracts follow strictly the provisions of the Charter in relation thereto.

As I stated to your Honorable Board on a former occasion, in an opinion rendered on December 27, 1909, concerning a proposal submitted by the Hansbrough Brothers Company, a corporation, "it is unfortunate that a bidder should lose a favorable contract by reason of an irregularity in his proposal and that the City should lose the advantage of a favorable contract for the same reason. The provisions of the Charter, however, are mandatory and there is no course for your Board to pursue but to follow strictly the provisions of the Charter in these matters."

You are therefore advised that in my opinion the additional work on Lincoln Way, westerly from Thirty-sixth Avenue, cannot be prosecuted under the contract now existing between the City and County of San Francisco and the City Improvement Company.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Construction of Ordinance 2109 (New Series), as to Opening of Streets.

January 15, 1913.

Gentlemen: Under date of January 8, 1913, you have transmitted to me a communication addressed to your Board by A. J. Donovan, office deputy, to which are attached certain notices from the Pacific Gas and Electric Company and the Spring Valley Water Company in which those corporations state that they have opened trenches in certain streets for the installation of "Services" and "mains." It is further stated in said communication that neither of said corporations has complied with the terms of Ordinance No. 2109 (New Series) approved December 17, 1912; that no permit has been issued by your Board to either corporation for the opening of such streets; and that neither corporation has made any deposit with your Board, as required by the terms of the ordinance above referred to. I am requested to advise you as to the proper course to be taken upon such notices.

Opinion.

The questions presented by these communications involve the validity of Ordinance No. 2109 (New Series) above referred to and the general question of the right of public service corporations to open streets in San Francisco and the conditions under which such right, if it exists, may be exercised.

Since the amendment to the State Constitution of October 10, 1911, the Constitutional privilege theretofore existing in favor of water and lighting companies for the use of the streets of municipalities without permit from the municipal authorities has been withdrawn. Such withdrawal did not, however, affect any rights which were vested at that date. Since that amendment applications made by public service corporations for permission to open streets are divided into two general classes, viz.: those which are based upon rights conferred by existing franchises, and those made in connection with work which is not claimed to be authorized by any such existing franchise.

The franchises which now exist in favor of public service corporations are also of two classes, viz.:

Those which were conferred by Section 19, Article XI of the State Constitution prior to its amendment: the rights acquired thereunder to the extent that they existed on October 10, 1911, being still preserved. Under the decision in re Russell (44 Cal. Dec. 352), these rights are limited to such portions of the streets as were actually occupied prior to the amendment of the Constitution. The franchise rights claimed by the Spring Valley Water Company and certain lighting companies, fall within this class.

The second class of franchises now existing are special franchises granted by ordinance of the Board of Supervisors, such as those claimed by the San Francisco Gas and Electric Company and the Pacific Telephone and Telegraph Company. The extent of these latter franchise rights is measured by the terms of the ordinance granting such franchises as far as such provisions were authorized by the law as it existed at the time such ordinances were passed.

All of such franchise rights, whether obtained under the Constitutional provision or under special ordinances, are held by the grantees thereof, subject to the exercise of the police power by the municipality for the protection, safety, comfort and convenience of the people of the City.

The Supreme Court, in construing the extent of the franchise rights granted under the former Constitutional provision, held that the exercise of that right could not be made dependent upon the obtaining of a permit from municipal authorities. The Constitution was construed as conferring an undeniable right to open streets, subject to such rules and regulations as might be adopted by the municipal authorities to protect the municipality and its inhabitants against liability for damages and subject also to the exercise of the police power.

The reason why an ordinance requiring a municipal permit was held to be invalid was that such a provision was decided not to be an exercise of the police power. In this connection the Court further said:

"Under the provision that the work shall be done 'under the direction of the Superintendent of Streets' ample protection is afforded to the inhabitants of the City against unnecessary encroachment or hindrance in their use of the streets."

(In re Johnston, 137 Cal. 122.)

It was the established law therefore, prior to the amendment of the Constitution, that the exercise of a Constitutional franchise was subject at all times to such reasonable regulations as might be adopted by the municipal authorities in the exercise of the police power. The same rule applies with equal, if not greater force, to the exercise of rights obtained under grants of special franchises.

You are therefore advised that the exercise of all rights to open streets claimed under franchises existing prior to the amendment of the Constitution, is subject to all reasonable police regulations; but that the exercise of such rights cannot be denied nor be made dependent upon the obtaining of a permit from municipal authorities.

As to applications for opening streets for new work for which no franchise rights are claimed to have existed prior to October 10, 1911, the privilege of so doing, as well as the manner of the exercise of that privilege, is now in the absolute control of the Board of Supervisors and such privilege may be granted or withheld as may be determined by such Board.

The recent Ordinance (No. 2109, New Series, above referred to) attempts to prescribe conditions under which all street openings shall thereafter be made and provides that the opening of streets in any other manner shall be unlawful. The right to open such streets is made dependent upon obtaining a permit therefor from the Board of Public Works and the making of a deposit of money to protect the City in the performance of the work. The requirement of this permit from corporations which were in possession of a Constitutional franchise prior to October 10, 1911, is unauthorized as far as the work desired to be done is in accordance with rights which were vested under that franchise prior to the Constitutional amendment. This does not mean, however, that such opening may be done free from municipal control. As stated above, all of this work, even when done under the terms of a Constitutional franchise, is subject to police control of the municipal authorities. The character of the police regulations which may lawfully be applied to such work is somewhat narrower than regulations which may be applied to work not covered by such Constitutional franchise. For that reason I am of the opinion that an ordinance covering the matter of street opening should prescribe different regulations with regard to work done under franchises existing prior to

the Constitutional amendment and work desired to be done when no existing franchise is claimed.

It is not necessary, at this time, to discuss the extent of the rights which were vested under Constitutional franchises prior to October 10, 1911, except to call attention to the fact that the Supreme Court has decided that such rights are limited to the portions of streets actually occupied prior to the Constitutional amendment.

Further objection has been made to Ordinance No. 2109 (New Series) in that it is provided in Section 4 thereof that your Board should hold a public hearing whenever an application is made for a permit under the terms of the ordinance, and that, if a protest is made and good cause appears therefor, your Board may refuse such permit. The objection which has been urged to this section of the ordinance is that it confers discretionary powers upon your Board to grant or refuse the permit therein provided for as to your Board may seem wise. I am of the opinion that this objection is sound. The duties of your Board are of an administrative and not of a legislative character.

The Charter provides in Article VI, Chapter I, Section 9, as follows:

"The Board of Public Works shall have charge, superintendence and control under such ordinances as may from time to time be adopted by the Board of Supervisors" of various matters concerning streets.

The uniform construction of this section, which has been followed ever since the Charter was adopted, has been that the duty of prescribing the conditions under which your Board should act in the control of streets was a duty to be performed by the Board of Supervisors. My predecessor, Mr. Franklin K. Lane, in an opinion rendered shortly after the adoption of the Charter, stated:

"As I have said before, it is for the Board of Supervisors to determine a municipal policy and for the Board of Public Works to act in conformity with such determination. * * The one body expresses the legislative will, the other body is the hand that executes and enforces such will."

(Lane's Opinions, page 362).

I am therefore of the opinion that Section 4 of Ordinance No. 2109 (New Series) is an invalid attempt to confer legislative power upon your Board and for that reason said ordinance should be repealed and a new ordinance or ordinances adopted in place thereof. Such new ordinance or ordinances should, as stated above, prescribe all necessary police regulations for the exercise of any existing franchise rights for the opening of streets but should not make the exercise of such rights dependent upon obtaining a permit therefor. These regulations can very properly go to the extent of requiring a notice to be filed with your Board before any opening of streets is made and can further prescribe all regulations which in the judgment of the Board of Supervisors, may be necessary to insure the public safety, comfort and convenience and indemnity against damage in the exercise of such franchise rights.

Ordinance No. 658 (New Series), approved January 20, 1909, (page 320, General Ordinances) prescribes certain rules and regulations under which this right may be exercised; but the Board of Supervisors has power to impose any additional conditions or regulations in this matter which in its judgment may be deemed wise.

Ordinance No. 1564 (page 340, General Ordinances) also prescribes certain conditions as to the erection of telephone and telegraph poles.

Until a new ordinance is adopted, the ordinances above referred to are to be considered as the only valid ordinances which control the exercise of the right to open streets for the purposes above named.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Method of Acquiring Franchise of the Presidio and Ferries Railway.

January 20, 1913.

Gentlemen: I am in receipt of your Resolution No. 9846 (New Series), as follows:

Whereas, the franchise of the Presidio and Ferries Railway will expire on the 10th day of December, 1913; and

Whereas, under the Charter of the City and County it is the policy of this community to gradually acquire for public ownership the public utilities operated therein:

Resolved, That the City Attorney be requested to report to the Board of Supervisors a plan of procedure to be followed by them for the purpose of operating a railway by the City and County of San Francisco along the line of the Presidio and Ferries Railway upon the expiration of the franchises of that Company, and that such plan of procedure include an opinion as to what rights, if any, the City may have in the roadbed, and also what procedure must be followed to acquire the rolling stock and other physical property of that Company if that be desired.

Opinion.

The only franchises, ordinances or orders of the Board of Supervisors in the above matter which are before me are the following, and if there be any other franchises or ordinances or orders of the Board of Supervisors affecting the situation I would respectfully request that they be called to my attention:

Order No. 1549, finally approved December 30, 1879; Order No. 2015, finally approved December 10, 1888; Ordinance No. 547 (New Series), approved September 14, 1908; Ordinance No. 51 (New Series). At pages 42 and 43 of the "Book of Franchises Granted by the Board of Supervisors"—published by authority of the Board of Supervisors, after Order No. 1549, reference is made to resolution No. 991 (Fourth Series), Resolution No. 12,627 (Third Series), Resolution No. 6878 (Third Series); Order No. 2419; Order No. 2621 and Resolution No. 12,120 (Third Series). I have none of these orders or resolutions before me. Also in Order No. 1549 reference is made to Order No. 1465, approved October 9, 1878,

which I have no copy of. I also understand that there is an order, or ordinance, No. 551 (New Series), which has to do with this franchise of the Presidio and Ferries Railroad Company.

It is possible that there is something contained in some of the foregoing which may have some bearing upon the questions which you ask, and I therefore suggest that the copies of these orders and resolutions, most of which, I understand, were destroyed by the fire, be obtained from Sacramento.

Unless such examination shows some pertinent facts not now known to me, I shall advise that as the franchise of the Presidio and Ferries Railway Company expires on December 10th, 1913, the Board of Supervisors may by resolution before that date notify the holder of the franchise, that it is the intention of the City and County of San Francisco to operate a municipal street railroad line over and upon the streets designated in the franchise and that after the date of expiration the existing service must be discontinued.

The City and County of San Francisco should then notify the Presidio and Ferries Railroad Company to remove all obstacles which may have been placed by the Company in the streets in order that the City may have the full enjoyment thereof.

The ownership of all rails is in my opinion vested in the franchise holder and not in the City and County of San Francisco. In my opinion to your Board of date May 1st, 1911, I so held in discussing the rights of the Geary Street Railroad and that opinion holds equally good here; with the exception, however, that in the above Ordinance No. 547 (New Series), a franchise was granted to the Presidio and Ferries Railroad Company to maintain and operate a railroad upon and along certain streets of the City; and in the second condition contained therein it was provided that, at the end of the term of said franchise the road, track and bed, the use of which was so granted in said franchise; and all the said Company's stationary fixtures upon the public streets therein granted, shall become the property of the City and County.

The route so granted in said franchise was as follows:

"Commencing at a point formed by the intersection of Union and Larkin Streets; thence running southerly along said Larkin

Street to the intersection of Larkin and Vallejo Streets; thence curving into Vallejo Street, and running westerly along said Vallejo Street to the intersection of Franklin and Vallejo Streets, and thence curving into Franklin Street and running northerly along Franklin Street to the intersection of said Franklin and Union Streets."

So far as said franchise may have been so used, it is, of course, subject to the above provision requiring that the road, track and bed of said railway and all its stationary fixtures upon the public streets shall become the property of the City and County.

In order to acquire the rails, rolling stock and other physical properties of the Company to which the City may not, as above described be entitled, the City might either purchase the same from the Presidio and Ferries Railroad Company or attempt to acquire the same by eminent domain proceedings. This right under eminent domain is not free from doubt under the law as now on the statute books of our State. While I believe that the right could probably be maintained, it is my intention to endeavor to have enacted at the present session of the Legislature laws which will give this right without any question.

Respectfully yours,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Rights of Way of the Southern Pacific in Certain Streets.

January 20, 1913.

Gentlemen: I am in receipt of Resolution No. 9104 (New Series), as follows:

"Resolved, That the City Attorney be and is hereby requested to advise the Board of Supervisors as to what rights, if any, the Southern Pacific Railway Company has to run or lay its tracks over the following named streets, to-wit:

"Berry, Seventh, Division, and the crossings of Fourth, Fifth, Sixth and Seventh Streets and through the Mission District."

Opinion.

The subject matter of said resolution embraces nearly all franchises granted to the San Francisco and San Jose Railroad Company and to the Southern Pacific Company, also to the Southern Pacific Railroad Company and the Central Pacific Railroad Company, successors to the Western Pacific Railroad Company. The first of said franchises was granted on January 19, 1864, by the Board of Supervisors of the City and County of San Francisco. It necessitated an examination of the grants made by private individuals to said Companies.

During the course of my examination I ascertained that some years before the fire of 1906 and during the administration of former City Attorney Franklin K. Lane, an action was commenced by the City and County of San Francisco to enjoin the Southern Pacific Company from operating its cars over, across and along certain streets in the Mission District.

An order to show cause was issued in said action directing the Southern Pacific Company to show cause, if any it had, why the injunction should not be made permanent pending the trial. After a hearing on said order Judge Seawell issued a preliminary injunction and rendered a written opinion upon the same. Sometime thereafter he set aside said preliminary injunction and the defendant filed an answer. The reason that he gave for setting aside the preliminary injunction was, as I am informed, the inconvenience and embarrassment to the patrons of the road, resulting in the stoppage of transportation over the lines of said Company. I have been unable to obtain any of the records in said action or any information concerning the same other than that disclosed above.

I communicated with the Secretary of State of the State of California relative to the term of the existence of the San Francisco and San Jose Railroad Company and also the Southern Pacific Railroad Company, the Central Pacific Railroad Company and the Western Pacific Railroad Company. It appears from his answers that the San Francisco and San Jose Railroad Company was chartered April 17, 1860, and consolidated with the Southern Pacific Railroad Company March 8, 1902. Its term of existence shown in the articles of incorporation was fifty years.

The Southern Pacific Railroad Company was incorporated under the laws of this State March 8, 1902, and its term of existence

is fifty years; the original articles of incorporation of the Southern Pacific Railroad Company were filed in the office of the Secretary of State December 2, 1865, and its term of existence, as specified therein, was fifty years.

The Central Pacific Railroad Company was chartered under the laws of the State of California June 23, 1870, and its term of existence is fifty years.

The Western Pacific Railroad Company was chartered December 19, 1862, and its term of existence, as appears from the articles of incorporation, was fifty years.

For your information I will attach hereto a blue print copy of the map of the San Francisco and San Jose Railroad Company as located by a Board of Directors, William J. Lewis, Chief Engineer, in 1862, and prepared by G. F. Allardt, Chief Draftsman. As appears from a notation upon said blue print, it was traced from a map in the Construction Engineer's department of the Southern Pacific Railroad by J. W. Parker, Assistant Engineer, City Engineer's office, in June, 1910.

I addressed a letter to Mr. William Hood, Chief Engineer of the Southern Pacific Company, Flood Building, San Francisco, requesting him to furnish this office with any map or maps showing the route of the Southern Pacific Company over the streets of this City and County and a memorandum of the franchises under which the same are operated.

On June 18th of this year I received the following communication from Mr. W. F. Herrin, Vice President and Chief Counsel of the Southern Pacific Company:

"Percy V. Long, Esq.,
City Attorney,
San Francisco, Cal.

"Dear Sir: Referring to your letter of May 29th to Mr. Wm. Hood, relative to the opinion requested by the Board of Supervisors as to the right of this Company to maintain and operate its tracks upon certain streets in this city and county, and requesting a map showing all tracks of this Company upon such streets, and a memorandum of the franchises under which the same are operated.

"I herewith hand you map showing all of the railroad tracks in the City and County of San Francisco owned or operated by this Company, and trust that this may be of assistance to you.

"As stated to your Mr. O'Brien, all of the property records of this Company were destroyed in the fire of 1906, and I have no doubt franchises or permits were obtained by this Company to which we have now no reference.

"The map makes no reference to franchises for the use of streets occupied by the old line leaving the City via Colma, south of Sixteenth and Harrison Streets; the Company has maintained its tracks upon Harrison Street from Sixteenth southerly and across certain streets to Twenty-fifth and Valencia Streets for many years, basing its right thereto upon deed from John Center et al. to the San Francisco and San Jose Railroad Company, the predecessor of the present Southern Pacific Railroad Company, dated October 10th, 1863, and recorded in volume 425 of Deeds at page 291, Records of the City and County of San Francisco. This Company has always maintained that the title thus acquired preceded the laying out of all streets now occupied thereunder.

"South of Twenty-fifth and Valencia Streets the construction of the old San Francisco and San Jose Railroad actually preceded the laying out of all streets in the vicinity, except the old San Jose Road. The enclosed map shows that there are some four or five crossings of the San Jose Road maintained under the Incorporation Act of 1861.

"In order that the rights of this Company to maintain all its tracks on the streets of the City and County of San Francisco may be clear of record, this Company intends to apply to the Board of Supervisors for a franchise covering all streets where its rights are now in any way open to question."

I will forward to you a copy of the map referred to in the above letter. On said map are delineated the tracks of the Southern Pacific Railroad Company operated under the franchises which they now hold and a reference is made thereon to the grantees of the franchise, the date of the granting thereof, the term for which it was to exist, the order of the Board of Supervisors granting the franchise and the page of the book of franchises published by order of the Board of Supervisors of the City and County of San Francisco in 1910.

I will answer your inquiries concerning the streets mentioned in the resolution in the order in which they appear in said resolution.

Berry Street.

Berry Street is mentioned in only two grants of the Board of Supervisors of franchises to the Southern Pacific Railroad Company. The first is Order No. 1025, approved December 12, 1871, and the other is Ordinance No. 828 (New Series), approved July 19, 1909. Under Order No. 1025 the Southern Pacific Railroad Company and the Central Pacific Railroad Company were granted, during the corporate existence of said companies, the right to lay down and construct double or single tracks from a point in Townsend Street between Fourth and Fifth Streets, thence curving southerly and easterly to Block No. 43 in Mission Bay, crossing Fourth, King, Berry, between Third and Fourth Streets, and Channel Streets; thence crossing Hooper, Irwin, Kentucky, Hubbell, Fourth, South, Merrimac, Alameda, Fifth, El Dorado, Center (now Sixteenth), Santa Clara (now Seventeenth), Mariposa, Solano (now Eighteenth), Butte (now Nineteenth), Napa (now Twentieth), Shasta (now Twenty-first), Sierra (now Twenty-second), Humboldt, Nevada (now Twenty-third), Sonoma (now Twenty-fourth), and Yolo (now Twenty-fifth) Streets; also to construct its double or single tracks from a point in King Street between Third and Fourth Streets; thence curving southerly and westerly crossing Berry Street and connecting with first above described line at a point between Berry and Channel Streets.

Under Ordinance No. 828 (New Series) the Southern Pacific Company was granted the right to lay down, maintain and operate a spur track for four tracks from Block No. 27 to the South line of King Street to Block No. 28, crossing Berry Street between Sixth and Seventh Streets, to Block No. 29; crossing Channel Street to Seventh Street to Block No. 30; crossing Hooper Street to Block No. 31.

Seventh Street.

Seventh Street is mentioned in two orders of the Board of Supervisors:

1st. Order No. 2406, approved June 14, 1891, granting to the Southern Pacific Railroad Company the right to lay down and maintain, during the operation of its road from and after the date of the passage of said order, a single or double standard gauge track along and upon the following named streets, to-wit:

Beginning on Townsend Street at a point 300 feet distant northeasterly from the northeasterly line of Seventh Street; thence on a curve southerly and southwesterly through private property and into Seventh Street; thence along Seventh Street to its intersection with Santa Clara Street; thence along Santa Clara Street to its intersection with Kentucky Street; thence curving to the right to an intersection with the existing track of said Railroad Company at or near the northerly line of Mariposa Street near the intersection of said northerly line with the westerly line of Illinois Street.

Ordinance No. 1699 adopted by the Board of Supervisors December 11, 1905, grants to the Southern Pacific Company, during the pleasure of the Board of Supervisors, the right to construct, maintain and operate spur tracks as follows:

Spur Track No. 2. Commencing at a point on the constructed line of railroad of the Southern Pacific Company on Seventh Street between Pennsylvania Avenue and Mississippi Street at a point about four feet southeasterly from a point opposite the intersection of the easterly line of Mississippi Street with the southwesterly line of Seventh Street and running thence on a curve in a general northwesterly and westerly direction along and upon Seventh Street and Sixteenth Street to a point in the center of Sixteenth Street about thirty-three feet easterly from the easterly line of Texas Street to a connection with the railroad track laid or to be laid by the Atchison, Topeka and Santa Fe Railway Company, pursuant to authority granted by Ordinance No. 1470 of the City and County of San Francisco.

Division Street.

Division Street is mentioned in only one ordinance of the Board of Supervisors, viz.: Order 2933, December 2, 1895, granting a franchise to the Southern Pacific Railroad Company, its successors and assigns the right to lay down, maintain and operate for fifty years, a single or double track street railroad, with all necessary switches and turnouts, across, along and upon the following named streets in this City and County, to-wit:

From a point on the main line of the Southern Pacific Railroad at the intersection of York and Division Streets; thence along said Division Street to Sixteenth Street; thence across Sixteenth Street and along Harrison Street to an intersection with the main line of the Southern Pacific Railroad at a point between Sixteenth and Seventeenth Streets.

Crossing of Fourth Street.

The Southern Pacific Company was granted a spur track privilege on February 19, 1906, by Ordinance No. 1751 to lay down, maintain and operate railroad tracks from its tracks at Fourth and Townsend Streets into property on the northeast corner of Fourth and Townsend Streets and to and along Bluxome Street, crossing Fifth and Sixth Streets into private property.

Under Order No. 1025 hereinabove mentioned in connection with Berry Street, the Southern Pacific Railroad Company and the Central Pacific Railroad Company were granted the right to cross Fourth Street between Townsend and King Streets.

Under Order No. 1154, approved June 19, 1874, the Southern Pacific Railroad Company and the Central Pacific Railroad Company were granted the right to use, during the pleasure of the Board of Supervisors, certain streets, as therein specified, crossing Fourth Street at King Street.

Under Order No. 1975 approved July 17, 1888, the Southern Pacific Company was granted the right to lay down and construct a single track railway across Fourth Street from 100 Vara Lot No. 165, on the easterly side of Fourth Street to Block 16 on the westerly side of Fourth Street bounded by Fourth, Berry, Fifth and King Streets; no term is specified in this ordinance.

It will be noticed by reference to the large map that certain tracks are delineated thereon on Fourth Street just south of Townsend Street for which there appears no franchise. Said tracks are delineated in blue.

Crossing of Fifth Street.

Under Ordinance No. 152 (New Series), approved February 20, 1907, the Southern Pacific Company was granted the right to lay down and maintain spur tracks from tracks at Fourth and Townsend Streets into property on the northeast corner of Fourth and Townsend Streets and to and along Bluxome Street, crossing Fifth and Sixth Streets into private property.

Under Resolution No. 3154 of the Board of Supervisors, approved January 19, 1864, the San Francisco and San Jose Railroad Company were granted the right to use Townsend Street during the corporate existence of said Company, from its intersection with

Fourth Street to the westerly end of said Townsend Street, crossing Fifth Street.

Under Order No. 1025 approved December 12th, 1871, the Southern Pacific Railroad Company and the Central Pacific Railroad Company were granted the right to lay down and construct double or single tracks from a point on Townsend Street between Sixth and Seventh Streets, thence curving southerly and easterly, crossing Sixth and Seventh Streets; thence tangent, crossing Fifth and along Jewett Street and crossing Fourth, etc.

Under Order No. 1154, approved June 19, 1874, the Southern Pacific Railroad Company and the Central Pacific Railroad Company were granted the right to use, during the pleasure of the Board, a part of King Street, as follows:

From a point in King Street between Third and Fourth Streets; thence westerly to the intersection of King and Sixth Streets, crossing Fourth, Fifth and Sixth Streets.

Crossing of Sixth Street.

The franchise enumerated herein concerning the crossings of Fifth Street, include also crossings at Sixth Street. It appears further that under Ordinance No. 1751, approved February 19, 1906, the Southern Pacific Company was granted the right to lay down and operate a spur track commencing in Sixth Street near Channel Street in Potrero Nuevo Block No. 389.

Crossings of Seventh Street.

Under Resolution No. 3154 cited above, in reference to Fifth Street, the San Francisco and San Jose Railroad Company was granted the right to cross Seventh Street at Townsend Street.

Through the Mission District.

On October 10, 1863, John Center of the City and County of San Francisco granted to the San Francisco and San Jose Railroad Company a right of way for railroad purposes only over, along and upon the following described real property.

"Beginning at a point on the central line of the San Francisco and San Jose Railroad as now located on the eastern line of the old San Jose Road, 130 feet southerly from the southeast corner of Temple Street and the old San Jose Road, thence along

said central line N. 54° 24½′ east, true course 1358 feet to the southern line of Park Street ten (10) feet westwardly of the western line of Capp Street, including a width of fifteen feet on each side of said central line, and containing an area of 94-100 acres, thence along said central line on said course of N. 54° 24′ east 1107 feet to a point five (5) feet westerly of the western line of Folsom Street and two (2) feet south of the southern line of Horner Street, including a width of twenty feet on each side of said central line and containing an area of 1 2-100 acres, thence along said central line curving to left with a radius of 1433 feet for 1457 feet to a point in the middle of Harrison Street fifteen feet south of the northern line of Alta Street, including a width of thirty feet on each side of said central line and containing an area of 21-100 acres, thence along said central line and middle of Harrison Street N. 3° 52′ west 2535 feet to a point one hundred and eighty-four (184) feet northerly of the northern line of Corbett Street, including a width of thirty-three feet on each side of said central line, and containing an area of 3 84-100 acres, thence along said central line curving to the right with a radius of 1910 feet for 675 feet, including a width of thirty-three feet on each side of said central line, and containing an area of 76-100 acres, thence along said central line on a course of N. 16° 23′ east 500 feet, including a width of thirty-three feet on each side of said central line, and containing an area of 1 15-100 acres, thence along said central line on a curve to the right of 1146 feet radius, 830 feet to the right bank of Mission Creek, including a width of thirty-three feet on each side of said central line and containing an area of 1 26-100 acres.

Including the right, title and interest of said Center in and to all the streets crossed by said railroad for the distances specified on each side of said central line.

The right of way granted under said deed extends from the westerly line of Harrison Street in Mission Block No. 54 to the easterly line of the old San Jose Road in Mission Block No. 184, extending through Mission Blocks Nos. 54, 139, 153, 154, 170, 171 and 184. There are some intervening blocks which are not numbered on the map of the City and County of San Francisco and which are included in the grant of the right of way.

It appears, however, from the records, that on December 23, 1861, John Center, John Treat, Eugene Casserly and George Treat

conveyed to San Francisco Homestead Union, by deed of bargain and sale, the following property.

Commencing at the intersection of the old San Jose Road with the center of Park Street (now Twenty-fourth Street); thence easterly through Park Street to the center of Howard Street; thence southerly through Howard Street to the center of Navy Street (now Twenty-sixth Street), to the old San Jose Road; thence northerly to beginning, containing 40.53 acres, being a portion of the Pioneer Race Course Tract.

The San Francisco Homestead Union subdivided said tract into lots and a map and plan thereof were recorded in Liber 163 of Deeds, page 1, and on April 30, 1862, said San Francisco Homestead Union distributed the same among its shareholders, and on May 20, 1862, executed deeds to said shareholders.

It thus appears that at the time of the execution of the deed from John Center to the San Francisco and San Jose Railroad Company that said John Center had no right, title or interest in or to any part or portion of the land previously conveyed to the San Francisco Homestead Union and it nowhere appears that the San Francisco Homestead Union ever granted a right of way over the streets embraced within the property so conveyed to it by said Center to the San Francisco and San Jose Railroad.

The streets over which the Southern Pacific Company now maintains its tracks and operates its cars along the lines of the right of way granted by Center to the San Francisco and San Jose Railroad Company are as follows: Poplar Street from Twenty-fifth to Twenty-sixth Streets; Twenty-fifth Street at the crossing of Valencia Street; Orange Alley between Twenty-fourth and Twenty-fifth Streets; Bartlett Street between Twenty-fourth and Twenty-fifth Streets; Osage Alley between Twenty-fourth and Twenty-fifth Streets; Mission Street between Twenty-fourth and Twenty-fifth Streets; Lilac Street between Twenty-fourth and Twenty-fifth Streets; Twenty-fourth Street at its intersection with Capp Street; Howard and Shotwell Streets between Twenty-third and Twenty-fourth Streets; the intersection of Folsom and Twenty-third Streets; Treat Avenue between Twenty-second and Twenty-third Streets; Twenty-second Street westerly from Harrison Street.

It also appears that no franchise was ever granted to the San Francisco and San Jose Railroad Company, or the Southern Pacific

Company or the Southern Pacific Railroad Company, or to the Central Pacific Railroad Company or to the Western Pacific Railroad Company, or to any other railroad company for that portion of Harrison Street commencing at a point about midway between Sixteenth and Seventeenth Streets, which point marks the termination of the franchise granted to the Southern Pacific Railroad Company on December 2, 1895, by Order No. 2933 and a point on Harrison Street between Twenty-first and Twenty-second Streets, which point marks the beginning of the right of way granted to the San Francisco and San Jose Railroad by John Center under the deed of October 10, 1863.

It also appears that no franchise was ever granted to any of the railroad companies mentioned above or to any other company from a point at the westerly termination of Townsend Street, which point marks one of the terminal points of the franchise granted to the San Francisco and San Jose Railroad Company under Resolution No. 3154 approved January 19, 1864, and thence along Division Street to the point of intersection of said Division Street with York Street, which point also marks one of the terminal points of the franchise granted to the Southern Pacific Railroad Company on December 2, 1895, by Order No. 2933.

In relation to the right of way of the Southern Pacific Company from a point on the old San Jose Road (now San Jose Avenue), between Twenty-fifth and Twenty-sixth Streets and the boundary line between San Francisco and San Mateo Counties, it would appear from the map of the San Francisco and San Jose Railroad Company, hereinbefore referred to, and to which reference is hereby made, that said Company, the San Francisco and San Jose Railroad Company, obtained a right of way through private property from the various owners thereof prior to the location of any streets through said territory. An abstract of title of this portion would be necessary to finally determine that question.

Whether the Southern Pacific Company is maintaining tracks and operating cars on other streets than those mentioned in its franchises is a matter that I am not able to determine unless I am informed on just what streets the Company is now operating. It would require an investigation and a survey to determine said question which should be conducted at the discretion of the Board.

From such information as I have been able to secure, it appears:

1st. That the Southern Pacific Company has the right to cross Berry, Seventh, Division and the crossings of Fourth, Fifth, Sixth and Seventh Streets as indicated above and as authorized by the various franchises hereinbefore enumerated.

2nd. That the said Company is authorized, under the deed from John Center, to operate its trains, over the lands, exclusive of the streets, from a point in Mission Block No. 54 commencing on the westerly side of Harrison Street, running thence through the intervening blocks in a general southwesterly direction through Mission Block No. 154 on the northerly side of Twenty-fourth Street.

3rd. That the Southern Pacific Company was not granted a franchise and was not granted any private easement over and along Harrison Street from a point about midway between Sixteenth and Seventeenth Streets to a point on the westerly side of Harrison Street in Mission Block No. 54, between Twenty-first and Twenty-second Streets.

4th. That the Southern Pacific Company was not granted a franchise and was not granted a private right of way over and along Division Street from its intersection with the westerly end of Townsend Street to a point at the intersection of Division and York Streets.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Free Transportation for Special Policemen—Not Entitled Thereto.

January 22, 1913.

Gentlemen: I am in receipt of your communication of recent date, asking for the opinion of this office as to whether or not employees of your Department, appointed as special police officers in municipal work are entitled to free transportation on the street cars of the City.

Opinion.

The various street railway franchises granted within the last fifteen years by the municipality contain provision for the free transportation of "police officers," or of "policemen of the City and County of San Francisco," or of "policemen * * * when in uniform."

A special policeman is not a "police officer," or "a policeman of the City and County of San Francisco." The term "special policeman" is ordinarily used to designate one who is not a member of a permanent and organized police force, but who merely engages to do temporary police duty in a particular place on a special occasion (Fogarty vs. York, 60 N. Y. Sup. 352).

You are therefore advised that special police officers on municipal work are not entitled to free transportation on the street cars of this City.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Health.

Conditions of Bonds of Officials.

January 22, 1913.

Dear Sir: I am in receipt of your communication calling attention to the condition of the blanket provision of some of the bonds of the City officials, which condition reads as follows:

"Now, therefore, the condition of the above obligation is such that if the principal shall well, truly and faithfully perform all official duties required of him by law, or by ordinance, or by the Charter of the City and County of San Francisco, State of California, and such additional duties as may be hereafter imposed upon him as such official by any law of the State of California, then the above obligation shall be null and void, otherwise to remain in full force and effect."

You have asked to be advised whether the provision quoted is sufficient to cover the requirements of the City in the matter of these bonds.

Opinion.

Article XV of the Charter contains the requirement with respect to the bonds of officials. Section 3 of that Article reads as follows:

"City and County officers shall not be accepted as surety for each other on official bonds. Every bond shall contain a condition that the principal will faithfully perform all official duties then, or that may thereafter be imposed upon or required of him by law, ordinance, or this Charter, and that at the expiration of his term of office he will surrender to his successor all property, books, papers, and documents that may come into his possession as such officer. Such bond must also be executed by two or more sureties who shall each justify in the amount required for said bond; but when the amount of the bond is more than five thousand dollars, the sureties may become severally liable for portions of not less than twenty-five hundred dollars. When there are more than two sureties, such sureties may justify in an amount which in the aggregate shall equal double the amount of said bond."

Section 6 of said Article provides:

"Every officer shall be liable on his official bond for the acts and omissions of his deputies, assistants, clerks and employees, appointed by him, and of any and each of them, and every official bond shall contain such a condition."

If the bonds referred to in your communication contain no other provision than that stated in your letter then those bonds do not meet the requirements of Article XV for the reason that it does not contain the stipulation as required by Section 3 that at the expiration of the official's term of office he will surrender to his successor all property, books, papers and documents that may come into his possession as such officer, and also for the reason that it does not contain the provision required by Section 6 that every officer shall be liable on his official bond for the acts and omissions of his deputies, assistants, clerks and employees appointed by him and of any and each of them.

In my opinion the proper provision to be inserted in the bonds of officials should read as follows:

"The condition of this obligation is such that if the above bonded (here insert name of officer) principal, shall well, truly and faithfully perform all official duties that now are and may hereafter be imposed upon or required of him by law, ordinance, or the Charter of the City and County of San Francisco, or by law, and shall at the expiration of his term of office surrender to his successor all property, books, papers and documents that may come into his possession as such (here insert title of office); and further, if all his deputies, assistants, clerks and employees appointed by him, and all and each of them, shall faithfully perform all the duties that now are or may hereafter be lawfully imposed or required of them and of any and each of them as such deputies, assistants, clerks or employees, then this obligation to be void, otherwise to remain in full force and effect.

"The above principal and surety shall be liable on this bond for the acts and omissions of the said principal's deputies, assistants, clerks and employees appointed by said principal and of any and each of them."

In order that in the future bonding companies in submitting bonds of public officials may present bonds to you which in my judgment meet the requirements of the Charter, I am sending to those surety companies doing business in the City and County of San Francisco a copy of this opinion.

Respectfully,

PERCY V. LONG,
City Attorney.

Mayor.

Civil Service Commission Cannot Remove Name from Eligible List Upon Failure of Person Charged to Present Himself for Hearing Without Investigating Charges.

January 23, 1913.

Gentlemen: I have before me the petition of Charles B. Dennis setting forth his claim that his name was removed from the Civil Service register of stenographer-typewriter by your Honorable Board without his consent and without trial

or hearing had for that purpose, together with certified extracts from the minutes of your Board bearing upon the subject, all of which were transmitted to me by your Secretary with the request that I advise your Board whether or not there is any merit in the contention set forth in said petition by Mr. Dennis.

I have examined the entire record presented to me and find the proceedings taken by your Board leading up to the removal of the name of said Dennis from the eligible list of stenographer-typewriters to have been legal and regular, with the exception of the hearing had upon the charges. Such being the case it is only necessary to consider the resolution set forth in your minutes of December 27, 1910, as follows:

"The case of C. B. Dennis, stenographer-typewriter, charged by the Board of Public Works with abandonment of position, came up for action. Commissioner Rosenthal submitted the following Resolution and moved its adoption:

"Whereas, On November 25, 1910, a charge of abandonment of position was filed in this office by the Board of Public Works against Charles B. Dennis, a Civil Service stenographer employed by said Board; and

"Whereas, A copy of said charge and a copy of the rules of this Commission were delivered to said Dennis through registered mail on November 30, 1910; and

"Whereas, The attention of said Dennis was particularly called to the provisions of Rule 26, on 'Trials and Dismissals,' and was directed to file an answer to above mentioned charge within ten days from the date of its receipt; and

"Whereas, Said Dennis has failed to comply with the provisions of said Rule 26, and has failed to make answer to said charge; therefore be it

"Resolved, That the above mentioned charge of abandonment of position is hereby sustained and the said Charles B. Dennis is hereby ordered dismissed from the service of the Board of Public Works and his name is hereby ordered removed from the Civil Service register of stenographer-typewriter.

"Commissioner MacDonald seconded the motion and the resolution was adopted."

There is no recital anywhere in the resolution or elsewhere in your minutes that your Commission took any steps to inquire into the truth or falsity of said charges or that they referred said charges to any other board or officer for investigation. The Charter of the City and County of San Francisco, Section 12 of Article XIII thereof, is as follows:

"Section 12. No deputy, clerk or employee in the classified Civil Service of the City and County, who shall have been appointed under said rules, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before the Civil Service Commission, or by or before some officer or board appointed by the Commissioners to conduct such investigation. The findings and decision of the Commissioners or such investigating officer, or board, when approved by the Commissioners, shall be certified to the appointing officer or board and shall be forthwith enforced by such officer. Nothing in this article shall limit the power of any such officer or board to suspend a subordinate for a reasonable period not exceeding thirty days."

The provision that "such charges shall be investigated by or before the Civil Service Commission or by or before some officer or board appointed by the Commissioners to conduct such investigation" is mandatory and not merely directory. The Charter, by this language, makes it plain that the charges do not prove themselves and that a judgment by default cannot be taken against the person charged. There must be a hearing, an investigation by the Commission to determine the truth or falsity of such charges for the purpose of furnishing said Commission with sufficient proof of the existence or non-existence of facts necessary to establish the charges and upon which the Commission can predicate their decision. The word "investigate" is defined by Webster's International Dictionary as "to search into; to enquire and examine into with care and accuracy; to find out by careful inquisition."

Professor March in his Thesaurus of the English language defines it as a "careful inquiry or search."

The language of this section defines the rights of the eligible to his tenure of position and lays down the method of removing his name from the list of eligibles. There are two methods

provided in the section for accomplishing this purpose, first by a trial or hearing before the commissioner or board or office designated by the Commission for the purpose and at which the language used implies that the person charged appears, answers and defends himself against the charges. The second method is where the party charged fails to appear at the hearing in which instance the language of the section plainly provides that there be an investigation of the charges by the Commission or by some board or officer designated by the Commission for the purpose; and the specifying of these two methods by the Charter framers, by a familiar rule of statutory construction, eliminates the consideration or use of other methods to accomplish the purpose.

The mode being set forth in the section, that mode is the measure of the power of your Commission in making removals and must be strictly followed, otherwise the attempted removal is a nullity.

The record presented to me shows that Mr. Dennis failed to appear and answer the charges filed against him. Thereupon it became the duty of your Commission before it could remove his name from the eligible list of stenographer-typewriters, either to investigate the charges itself or to cause an investigation to be made of said charges by some board or officer named by your Board for the purpose, and, in such an instance as the record here presents it is only after such investigation or inquiry that your Board has the power or is authorized to cancel a name from the eligible list.

I am satisfied from the language of the Charter set forth in Section 12 of Article XIII thereof that your Commission is without power to remove a name from an existing eligible list upon the failure of the person charged to present himself at the hearing of said charges, without proceeding to investigate the truth or falsity of said charges.

It is entirely consistent with the provisions of Section 12 of Article XIII of the Charter that a Civil Service employee against whom charges are filed should not answer these charges since he may rely on the investigation of the Commission to disclose their falsity or insufficiency.

The power conferred upon the Commission by Section 3 of Article XIII of the Charter to make rules "to carry out the

purposes of (Article XIII) and for * * * removals" does not permit the adoption of a rule as to removals which is inconsistent with Section 12 of Article XIII. As above pointed out such a rule would be inconsistent with Section 12.

It follows therefore that if your Commission made no further investigation of the charges against Mr. Dennis than your minutes disclose, then the attempted removal of his name from the eligible register of stenographer-typewriters was void, and Mr. Dennis is entitled to certification by your Board as such stenographer-typewriter, notwithstanding such charges. Nothing herein contained should be construed as indicating that your Commission cannot proceed to try a person charged in his absence or upon his failure to appear at the time set for the hearing.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Rights of Ocean Shore Railway in Potrero Avenue and in Twenty-fifth Street.

January 23, 1913.

Gentlemen: I am in receipt of your communication as follows:

"I am directed by Supervisor George E. Gallagher, Chairman of the Committee on Streets and Sewers, to refer to you for advice, all matters pending before the Committee relating to the Ocean Shore Railway Company.

"Various communications have been received from property owners and others protesting against the maintenance of the tracks of the Ocean Shore Railway Company in that part of Potrero Avenue between Twenty-fifth and Serpentine Avenue.

"Also, whether or not the said Company has any legal rights in Twenty-fifth Street from Potrero Avenue to Vermont Street, and in Vermont Street from Twenty-fifth to Army Street.

"The tracks on Twenty-fifth Street between the points named having been abandoned and removed."

Opinion.

Right of Ocean Shore Railway Company in That Part of Potrero Avenue Between Twenty-fifth Street and Serpentine Avenue.

I have examined the franchises granted by the Board of Supervisors of this City and County to the Ocean Shore Railway Company under and pursuant to the power and authority granted by said Board in and by Subdivision No. 28 of Section 1, Chapter II, Article II of the Charter, which authorizes the Board of Supervisors to allow any "transcontinental or any other railroad company having not less than fifty miles of road actually constructed and in operation, to enter the City and County with its road and run its cars to the water front at the most suitable point for public convenience" and find that it is only necessary to consider Ordinance No. 1808 (New Series), approved April 2, 1906, and Ordinance No. 758 (New Series), which went into effect without the Mayor's signature on the 10th day of May, 1909, and Ordinance No. 40 (New Series), approved July 31, 1906, which grants to the Ocean Shore Railway Company the right to construct, maintain and operate, by means of electricity, a single or double-track railroad, over, along, across and upon certain specified streets, among which is Potrero Avenue from Twenty-fifth Street to Mariposa Street. Ordinance No. 758 (New Series) contains a proviso as follows:

"Provided, however, that the grantee of this franchise shall be, and it is hereby authorized and permitted, to construct, maintain and operate its railroad over, along, upon and across any private right of way which said grantee may acquire at any time hereafter, between * * * the point of intersection of the southeasterly line of Market Street with Twelfth Street, and a point on Barneveld Avenue, at or near Luck Street; and across, over, along, upon and under such streets as will be met with or intersected by the construction, maintenance and operation of the line of railway which may be constructed by the said Ocean Shore Railway Company or its assigns over private rights of way between any of said points."

I find that portion of Potrero Avenue between Twenty-fifth Street and Serpentine Avenue is of no considerable length, being less than one block.

The language used in the above proviso is almost identical, the only point of difference being that it is more comprehensive, with the language of Subdivision 5 of Section 465 of the Civil Code, which specifies the powers of railroad corporations in this State. That Subdivision gives to railroad corporations the power "to construct their roads across, along or upon any stream of water, water course, roadstead, bay, navigable stream, street, avenue or highway * * *"

The Court in the case of Madera Railway Company vs. Raymond Granite Company, 3 Cal. App., 668, holds that the legislative grant to railroads to construct their roads across, along or upon any avenue or highway authorizes the appropriation of a highway longitudinally.

I cite this case for the purpose of showing that under the terms and wording of the provision in Ordinance No. 758, the Ocean Shore Railway Company has the right, in order to connect its railroad at Twenty-fifth Street and Potrero Avenue with a certain private right of way acquired by it, which runs from the southerly termination of Potrero Avenue in a general southeasterly direction, to construct its tracks and operate its road along that portion of Potrero Avenue between the points indicated. In this connection and in order to show the intent of a former Board of Supervisors in regard to this matter, I call your attention to the fact that the Board of Supervisors adopted Resolution No. 4009 (New Series), June 14, 1908, approved by the Mayor, June 24, 1908, as follows:

"Whereas, The said Ocean Shore Railway Company now intends to extend its tracks over and along Potrero Avenue, produced, to Army Street, and thence over and along Army Street, Holladay Avenue and San Bruno Avenue and through private property to connect with its present tracks in Vermont Street southerly from Army Street; and,

"Whereas, All private rights of way necessary for said route have been acquired by the Ocean Shore Railway Company, with the exception of one parcel lying southeasterly from the present southerly termination of Potrero Avenue at Serpentine Avenue and adjoining a sewer right of way of the City and County of San Francisco, which parcel is now in course of condemnation; and,

"Whereas, In order to permit of the extension in the manner intended it will be necessary to use temporarily the sewer right of way of the City and County of San Francisco of thirty feet in width extending from the present southerly termination of Potrero Avenue and connecting with Army Street; now therefore,

"Resolved, That the Ocean Shore Railway Company be and is hereby granted permission, revocable at will of the Board of Supervisors to temporarily extend its tracks over and along the following described sewer right of way of the City and County of San Francisco, to-wit: A strip of land thirty feet in width running from the present southerly extremity of Potrero Avenue at Serpentine Avenue to the northerly line of Army Street.

"The Ocean Shore Railway Company shall press to as speedy a termination as possible the said condemnation suit, and shall enter into possession of said land as soon as the law will permit, and shall with all possible diligence thereafter remove its tracks from the aforesaid sewer right of way of the City and County of San Francisco to its own property."

The Supreme Court of this State said in case of People vs. Craycroft, 111 Cal., page 547:

"It is the policy of this State to encourage the building of railroads and a corporation complying with the statutory prerequisites requires, among other things, the right to construct and operate its road between the termini named in its articles of incorporation. In the exercise of this right it may pass through cities and towns along its route, if they are willing to grant the privilege."

It seems clear to me that the Ocean Shore Railway Company in the construction of its railroad track along Potrero Avenue proceeded strictly in accordance with and within the lines of the franchise granted to it by the City and County of San Francisco.

Judge Dillon in his work on Municipal Corporations, Fifth Edition, Section 1233, lays down the doctrine from the adjudicated cases:

"Legislative authorization to railroad companies to occupy the streets of an incorporated place, although it must exist to

warrant the occupation, need not be expressly conferred but may be given by necessary implication. But a grant of a franchise to construct and operate a railroad or other utility in the street is to be construed strictly and in cases of fair doubt in favor of the public as against those claiming under the grant."

In the matter under discussion there is no doubt that under the terms of Ordinance No. 758 (New Series) contained in the proviso of that ordinance, that the Ocean Shore Railway Company has the right to operate its cars over said portion of Potrero Avenue. It has been suggested that the right given the Ocean Shore Railway Company to construct its tracks over any streets that might be met with or intersected, as provided for in said proviso, would only give to that company the right to cross said streets and not the right to construct their tracks along any of said streets longitudinally, but as has been pointed out, the Supreme Court has decided in favor of such longitudinal use.

Twenty-Fifth Street Between Potrero Avenue and Vermont Street.

Ordinance No. 1808, approved April 2, 1906, gives to the Ocean Shore Railway Company the right to construct, maintain and operate, by means of electricity, a single or double-track railroad, standard gauge, over and along Twenty-fifth Street between Vermont Street and Potrero Avenue.

Ordinance No. 40 (New Series), approved July 31, 1906, grants to the Ocean Shore Railway Company the right to construct, maintain and operate, by means of electricity, a single or double track railroad, standard gauge, over, along and upon Twenty-fifth Street from Vermont Street to Potrero Avenue.

Your communication states that the tracks on Twenty-fifth street constructed by the Ocean Shore Railway Company have been abandoned and removed.

Section 468 of the Civil Code, provides, in part, as follows:

"Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road until the same is fully completed; and upon its failure so to do for the period of one year, its right to extend its road beyond the point

then completed is forfeited. After the completion of any railroad, or any part thereof, capable of being operated, its owner must operate it and upon its failure to keep it, or any part thereof, in full operation for the period of six months his right to operate it in whole or in part, as the case may be, is forfeited. * * * "

There is here presented a question of fact which I cannot go into, but which your Board must determine, whether a non-user by the Ocean Shore Railway Company of its franchise to operate a railroad on Twenty-fifth Street from Potrero Avenue to Vermont Street has continued for the period of six months, as specified in Section 468 of the Civil Code.

Section 7 of Ordinance No. 1808, after providing that the Ocean Shore Railway Company must commence construction of the line of its said railroad authorized therein, within one year after the passage of said ordinance, and fully complete the same within five years from the date of such passage, proceeds:

"In case of failure or neglect on the part of said Company to commence and complete said track within the time herein specified all rights and privileges hereby granted and this franchise shall cease and determine as to such portion of the said line of said railroad as may then remain uncompleted."

I fail to find any clause in either of said ordinances, namely, Ordinance No. 1808 and Ordinance No. 40 (New Series), providing for a forfeiture in case of non-user, so that, therefore, Section 468 of the Civil Code must govern as the law in regard thereto.

In the event that your Honorable Board should, after an examination of the facts, decide and determine that the Ocean Shore Railway Company has abandoned, discontinued and not used Twenty-fifth Street from Potrero Avenue to Vermont Street for its railroad, your Honorable Board could not declare such franchise forfeited, nor could any action be maintained by the City and County of San Francisco to have said forfeiture declared in an appropriate proceeding brought for that purpose. In a proceeding to have a franchise declared forfeited the action must be brought by the Attorney General of the State of California either upon his own motion or at the instance of a

citizen when proper showing is made to him to warrant such proceeding.

As was said by the Supreme Court in the case of People ex rel. vs. Los Angeles Railway Company, 91 Cal. 340:

"Acts sufficient to cause a forfeiture of a franchise conferred upon a corporation do not *per se* produce a forfeiture; but the corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture, and enforce it."

Also, in the case of the People vs. Sutter Street Railway Company, 117 Cal., at page 612, the Supreme Court says:

"If the law be, as is claimed by some, that such a franchise is not lost until it has been declared forfeited in a judicial proceeding, the City could not acquiesce. It has no power to institute an action to secure a forfeiture. That power is vested in the Attorney General."

It is always a question of fact to be submitted to the Court or jury trying the case whether or not there is sufficient grounds for a forfeiture of a franchise for non-user. Non-user of a franchise is of itself, as provided for in Section 468 of the Civil Code, sufficient ground upon which an action to decree a forfeiture may be based. The facts in the matter must, however, be presented to the Attorney General of this State who would, upon a proper showing therefor, institute an action for the forfeiture of the particular portion of the franchise under consideration. What I have said herein as to the law pertaining to the forfeiture of the franchise of the Ocean Shore Railway Company on Twenty-fifth Street applies with equal force to Vermont Street from Twenty-fifth Street to Army Street.

There were transmitted to me by your Honorable Board copies of letters from the East Mission Improvement Club and also from the President of the Ocean Shore Railway Company. Said letters concerned complaints as to the manner of the operation of said road within the City and County of San Francisco and more particularly in reference to Potrero Avenue.

The first of said complaints concerned an unused spur track at Twenty-second Street and Potrero Avenue leading into

the City and County Hospital. I have been informed that said spur track was constructed under a permit from your Honorable Board by parties other than the Ocean Shore Railway Company, and if such be the case all that is necessary to be done in order to effect the removal of said spur track is for your Honorable Board to revoke the permit and direct the removal of the same.

The second complaint concerned two spur tracks on Potrero Avenue between Twenty-fourth and Twenty-fifth Streets, which I understand have been removed.

The third complaint concerned the unused rails and poles in the middle of Twenty-fifth Street between Potrero Avenue and Vermont Street, which I have been informed have also been removed.

The fourth complaint concerned the restoration of those streets to the same condition as they were before the rails were installed and I have been informed that this has been done.

The fifth complaint concerned the loading and unloading of manure on Mariposa Street and the hauling of the same on or over Potrero Avenue. I have also been informed that this practice has been stopped.

The sixth complaint concerned the sprinkling of Potrero Avenue at least once each day from March to December. Nothing has been done by the Ocean Shore Railway Company in this regard.

The seventh concerned the paving of Potrero Avenue between Twenty-fourth and Twenty-fifth Streets from curb to curb. I have been informed that the contract for this work has been let by the Ocean Shore Railway Company and the work has been commenced and will be rushed to completion.

The eighth complaint concerned the running of locomotives on Potrero Avenue. My information on this matter is that this was done only on two or three occasions and that there will be no repetition of the same in the future.

The ninth complaint concerned the rapid running of trains over and along Potrero Avenue. I have examined the ordinances of the City and County and find that there is only one ordinance

regulating the speed of cars in this City and County and that is Ordinance 1604, approved November 29, 1905, regulating the operation of street railway cars by limiting their speed, etc. This ordinance applies only to the operation of street railway cars as therein specified and does not apply to the operation of the cars of commercial roads such as the Ocean Shore Railway Company.

The tenth complaint is in regard to the pushing of trains of cars along Potrero Avenue and other streets included in the franchises of said Company. I have been informed that this practice has been indulged in in the past and will probably be indulged in in the future by said Company.

All public service corporations operating in the City and County of San Francisco are subject to the police power of the City and County of San Francisco and under said police power the Board of Supervisors of this City and County possess the right to regulate the operation of trains and cars by the Ocean Shore Railway Company, and also the matter of the construction of its roadbed, and in addition thereto the Ocean Shore Railway Company is obliged to conform strictly with the terms and conditions expressed in its various franchises.

In the matter of street work the Ocean Shore Railway Company is obligated under the first franchise granted to it by Ordinance 1623 to pave and keep in repair any public street upon the surface thereof, upon which it constructs or lays any of its track or tracks, from curb to curb, in such manner and with such material as may from time to time be prescribed by the Supervisors, and where any such track crosses any public street upon the surface thereof the said Company shall pave and keep in repair the roadway of the street, including curbs, for fifty feet on each side of the center line of such track, and in case of oblique crossings the roadway of the streets including curbing, between lines drawn at right angles to the direction of the street at parts fifty feet beyond the intersection of the lines by the center line of the track, in such manner and with such material as may from time to time be prescribed by the Supervisors. Ordinance 1808 contains a similar provision in Section 3 thereof. In Section 5 of Ordinance 1623 and also in Section 5 of Ordinance 1808 it provides as follows:

"The rights hereby granted are upon the express condition prescribed in and by the Charter of the City and County of San

Francisco and especially in and by Subdivisions 27 and 28 of Section 1, Chapter II, Article II thereof."

Subdivision 27, Section 1, Chapter II, Article II provides:

The Board of Supervisors shall have power "to regulate street railroads, tracks and cars; * * * to regulate rates of speed and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

The Ocean Shore Railway Company has accepted its franchises subject to the police power of the municipality as contained in Subdivision 27 and it simply remains for the Board of Supervisors to enact such ordinances as it may deem proper to regulate the Ocean Shore Railway Company, its tracks and cars and to regulate the rate of speed at which its cars shall be propelled and any other ordinances which it may deem proper to protect the public from danger or inconvenience in the operation of said road.

I suggest to your Honorable Board that the following resolution be adopted; and that the attention of said Company be called to said resolution:

First: Denoting the rate of speed at which the cars of the Ocean Shore Railway Company should be operated.

Second: Declaring against the pushing of cars and trains of said railroad and requiring such cars and trains to be pulled along and over the streets upon which said road operates.

I also suggest that your Honorable Board adopt a resolution calling the attention of the Board of Public Works to Section 6 of Ordinance 1623, which is as follows:

"The character and general arrangement of all structures and poles herein referred to, the materials of which they are to be built and all work of whatsoever kind upon the streets will be subject to the supervision of the Board of Public Works when approved by the Board of Supervisors and the nature and character of tracks to be used shall be prescribed by said Board of Public Works."

And also to Section 6 of Ordinance 1808, which is as follows:

"The character and general arrangement of all structures and poles herein referred to, the materials of which they are to be

built, the nature and character of tracks to be used and all work of whatsoever kind upon the streets will be subject to the supervision of the Board of Public Works."

I make this suggestion by reason of the fact that complaints have been made that the track now used by the Ocean Shore Railway Company is of light weight and construction and that heavier tracks should be used and installed by said Company. Under the power granted in said franchises the Board of Public Works, upon investigation, may prescribe heavier tracks to be used.

The Ocean Shore Railway Company is compelled by its franchises to keep the streets upon which it maintains tracks in proper condition at all times. It cannot escape that duty and obligation and it is only necessary that the proper officials of the City and County enforce the terms of its franchises and compel it to observe them.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Responsibility re Approach to Beale Street Bridge.

January 24, 1913.

Gentlemen: I am in receipt of your communication requesting this office to "examine the specifications and plans and contract for the construction of the Beale Street Bridge and advise the Board of Supervisors as to whether the City or the contractor under said specifications and contracts is responsible for the fill-in and sustaining of same by wing-walls for the approaches to said Beale Street Bridge."

Opinion.

The difficulty that now is confronted in respect to the "fill-in" for the approaches to the bridge is that the contractor asserts that in order to make the "fill-in" as required by the specifications it would be necessary to construct "wing-walls" to extend

from the bridge to the slopes to prevent the material which is going into the "fill-in" from sliding into Beale Street.

The City Engineer's office concedes that it is impossible to make the "fill-in" in accordance with the specifications without such "wing-walls." The contractor contends that under the specifications and contract he is not required to construct the necessary "wing-walls" to retain the "fill-in," the cost of which would amount to a very considerable sum.

If it is impossible to make the "fill-in" without constructing the "wing-walls" and the contractor is not required under his contract to construct the "wing-walls" the result is that either the City itself must consruct the "wing-walls" or the contractor, by reason of the impossibility of performing, is relieved from making the "fill-in." The question therefore involved is whether or not, under the plans and specifications for the Beale Street cut and bridge, the contractor is required to construct the "wing-walls."

On this point I find that the specifications are very indefinite. The specifications and the contract do not in terms require the construction of "wing-walls" by the contractor and if such are required by the specifications and contract it is by implication rather than by direct terms. Nor do the drawn plans for the bridge show "wing-walls."

I am informed that several types of construction could be employed for these "wing-walls"—the better method being concrete inasmuch as the bridge itself is constructed of concrete.

It is strange, therefore, that if it was intended to require the contractor to construct "wing-walls," that "wing-walls" were not provided for in the contract and specifications and the character of the construction of the same defined.

A second difficulty in interpreting the specifications arises from the fact that the specifications for the bridge and the specifications for the excavation of Beale Street are intermingled and it is difficult to determine whether some specifications relate to the construction of the bridge or relate to the excavation of the street. Whether or not the specifications call for the construction of "wing-walls" by the contractor is more a question of engineering than that of law. I therefore submitted the question to the City Engineer's office whether, from an engi-

neering standpoint, the work required to be done in the specifications provided for the construction of "wing-walls" and I am advised by the Engineer's office that the specifications do not. In other words the work which is required to be done does not include the erection of "wing-walls."

The legal question involved then is, inasmuch as the contract and specifications require the "fill-in" to be made to the approaches can the City now command the contractor to make the "fill-in," and if necessary to retain the "fill-in" in its proper place, to construct "wing-walls" at a very large expense, notwithstanding that "wing-walls" were not specified and therefore not contemplated by the contract and specifications. In my judgment this cannot be required of the contractor. A contractor is only required to do such things as are specified in his contract and contemplated by it.

The failure to provide for "wing-walls" may be accounted for in two ways, (1) either that it was intended that when the cut had been made and the bridge had been completed and the extent of the necessity for "wing-walls" had been demonstrated, "wing-walls" would then be provided by the City, or (2) that conditions have arisen which were not foreseen at the time the contract was entered into, that is, that at the time the contract was entered into and the specifications prepared it was believed that "wing-walls" would not be necessary and therefore not required, but that conditions not then foreseen have arisen which now make "wing-walls" necessary. In either of which contingencies the contractor is not required to construct the "wing-walls."

The physical situation which required the construction of "wing-walls" to retain the "fill-in" is that the slopes of the embankment have caved in from the top and instead of the embankment being perpendicular the slopes are now at an angle.

The contract for the Beale Street cut required the contractor to make the cut the entire width of Beale Street and in making the cut the embankments necessarily caved in from the top, forming a slope.

There seems to have been an understanding or belief that the property owners would be required to erect, or of their own volition would erect retaining walls which would have

prevented or avoided the slopes in the embankment, and the City Engineer's office in making an estimate of the cost of doing the whole of the work did not include an estimate of the cost of "wing-walls." As the situation is now, however, these slopes being present, if the "fill-in" is made, as required by the specifications, the "fill-in" would slip around the ends of the bridge. But whether the difficulty arises out of the unforeseen situation of the slopes appearing or whether it was intended that the City should provide "wing-walls" when the excavation had been completed, the legal result is the same. The contractor could not be required to do that which the contract did not contemplate him to do, whether the necessity for the doing of the work arises from the fact that that necessity was not foreseen at the time the contract was entered into or whether it was intended to provide for the work when the physical conditions had fully developed.

It is unnecessary for me to go into the different provisions of the specifications for the reason that they are largely engineering terms and provisions, in the interpretation of which I have consulted the City Engineer's office. In arriving at my conclusion I have considered all of the specifications and with the aid of the Engineer's office I have interpreted them as above set out.

To relieve the situation two things can now be done. Either the City can provide the necessary "wing-walls" to retain the fill-in (which could be done by ordering the present contractor on the job to make the necessary wing-walls, paying him the cost thereof as an extra, or by letting an independent contract), or the fill-in could be dispensed with and another method of approach to the bridge provided. In the latter case there should be a deduction from the contract price by reason of the fact that certain work, namely, the "fill-in" and street paving of approaches has been dispensed with. Which course should be pursued is an engineering and financial question for the Board of Supervisors and the City Engineer to decide.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Franchise Claimed by the Western Union Telegraph Company.

January 29, 1913.

Gentlemen: There has been transmitted to me a copy of a communication filed with the Board of Public Works by the Western Union Telegraph Company in response to Resolution No. 485 of the Board of Supervisors, adopted November 4, 1912, in which communication the said company states the grounds upon which it claims an existing franchise for the use of the streets of San Francisco for its telegraph system and I have been requested to advise you as to what rights now exist in favor of that company.

Opinion.

The franchise claimed by said Western Union Telegraph Company is claimed by that company to exist under the provisions of the Act of Congress of July 24, 1866 (U. S. Statutes at Large, 221), and upon the acceptance of the terms of that Act by said company. It is claimed that the Western Union Telegraph Company, being engaged in an interstate business and being in possession of a federal franchise under the provisions of the above Act, has an existing right to the use of the streets of San Francisco. The rights conferred under the Act of Congress above referred to have been under consideration by the Supreme Court of the United States in several cases most of which have recently been reviewed by the Supreme Court of this State in the cases of Western Union Telegraph Co. vs. Hopkins, 160 Cal. 106, and Sunset T. & T. Co. vs. Pasadena, 161 Cal. 265.

In the first of the above cases the Supreme Court of this State following the rule enunciated by the United States Supreme Court has declared that:

"The privilege conferred by the Act of July 24, 1866, on telegraph companies to construct, maintain and operate lines of telegraph over such post roads as are public streets or highways of a state, is subject to the right of the state to charge and receive compensation from the telegraph company for the use by it of so much of the street or highway as is exclusively devoted to its purposes."

And again the Court says:

"Notwithstanding the Act of Congress, a telegraph company cannot appropriate to its exclusive use portions of such high-

ways without being subject to charges on behalf of the state by way of compensation for such use."

The cases above referred to establish the rule that notwithstanding the federal franchise it is competent for the municipal authorities to impose a charge for the use of these streets by the telegraph company and, further, that the use of such streets is at all times subject to all reasonable regulations made by the city under its general police powers. Under the rule thus established the City may prescribe any reasonable regulations which it may deem proper as a condition upon which the right of the telegraph company to use the streets shall be exercised; provided that such regulations do not amount to a denial of such right.

The communication from the telegraph company, above referred to, does not state any further basis upon which its present rights in the streets of San Francisco are placed. It is manifest, however, that prior to the amendment of the State Constitution of October 10, 1911, this company was in possession of a franchise from the State granted under the terms of Section 536 of the Civil Code, which reads as follows:

"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

The privilege conferred by this section has been held by the Supreme Court of this State to constitute a franchise conferring valuable privileges which are subject to taxation.

> Western Union Telegraph Co. vs. Hopkins, supra;
> Sunset T. & T. Co. vs. Pasadena, supra.

If the provisions of the State Constitution were now the same as when construed by the Supreme Court in the two cases above referred to I should be of the opinion that the Western Union Telegraph Company had an existing franchise in the streets of San Francisco granted to it by the terms of the above section of the Civil Code.

The Court recognizes, however, in the second of the cases above cited, the possibility of a later enactment having the effect of repealing the section above referred to. In that connection the Court in considering the effect of the first decision used this language (161 Cal. 273):

"It was there concluded that the section is operative to effect a grant to all telegraph corporations so far as acceptance of its provisions by construction and maintenance of its lines in public highways is had, *in the absence of later enactment having the effect of repealing the same or suspending its operations as to particular portions of the State*, and that in so far as such acceptance is had prior to any such repeal or suspension, and to the extent of the actual occupation by any corporation of public streets constituting such acceptance, a vested right accrues to the corporation, subject only to the lawful exercise of the police power, of which it cannot be deprived at the instance of the state without compensation."

This quotation shows that the right acquired under the section of the Code above referred to is limited to the streets actually occupied thereunder and further that such right is subject to withdrawal by repeal or suspension of the law under which it was granted.

On October 10, 1911, Section 19, Article XI of the Constitution was amended to read as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

As the term "other means of communication" used in the above constitutional provision manifestly includes telegraph service, said section applies to that class of service to the same extent as if it had been particularly mentioned therein.

The above amendment to the Constitution was the result of the adoption of a new policy by the people of the State with regard to the use of streets by public service corporations and, in my judgment, this constitutional provision establishes a new rule which is inconsistent with the franchise theretofore conferred under Section 536 of the Civil Code, and for that reason the last-named section so far as it relates to the use of the streets of the cities is repealed by the constitutional amendment.

"The adoption of a self-executing constitutional provision which conflicts with an existing statute operates as an implied repeal of such statute."

26 Am. & Eng. Cyc. of Law, 723.

If a later statute prescribes the only rule which should govern in a given case it will be construed as repealing a prior act.

City and County of Sacramento vs. Bird, 15 Cal. 294;
State vs. Conkling, 19 Cal. 501.

It would not be constitutional for the Legislature to now enact a law similar to that contained in the section of the Code above referred to. The same reasons which would make such an Act unconstitutional show a conflict between the provisions of the section of the Code and the later amendment of the Constitution, which, in my judgment, warrants the position that the Code section was repealed by the constitutional amendment so far as the use of city streets is concerned.

You are therefore advised that the only rights which the Western Union Telegraph Company has for the present use of the streets of San Francisco are such as are based upon the Act of Congress hereinabove referred to. While the possession of that franchise might prevent the City of San Francisco from absolutely refusing the use of its streets to the Western Union Telegraph Company for the transaction of interstate business, such use is subject to any reasonable condition which the municipality may prescribe both as to the use and control of the streets and as to the payment of a license or franchise fee for that purpose. In this

connection it may be noted that any rights conferred by the federal franchise are limited to the transaction of interstate business as distinguished from intrastate business.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.
Board of Public Works.

Franchise Claimed by the Municipal Light and Power Company.

January 29, 1913.

Gentlemen: You have requested my opinion as to the present rights of the Municipal Light and Power Company in the streets of San Francisco. That company has filed a communication with your Board in which it has stated that the only franchises claimed by said company are such as were derived "under the general grant and franchise contained in Article XI, Section 19 of the Constitution of California as amended February 12, 1885, and as the same stood from the date last mentioned to and until a further amendment of said section approved October 10, 1911."

Opinion.

The rights which were acquired under the above constitutional grant have been defined by the Supreme Court of this State to be limited to such portions of the streets as were actually occupied prior to the amendment of the Constitution on October 10, 1911, and it has been expressly decided that public service corporations can acquire no rights under their constitutional franchise in addition to those which were vested in them by actual occupancy of the streets prior to October 10, 1911.

In re Robert Russell, 44 Cal. Dec. 352; 126 Pac. 875.

You are therefore advised that the Municipal Light and Power Company has no existing rights in the streets of San Francisco

except as to those portions thereof which were actually occupied by it prior to October 10, 1911.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.
Board of Public Works.

Franchise Rights Claimed by Pacific Gas & Electric Company.

January 29, 1913.

Gentlemen: You have requested my opinion as to the existing rights of the Pacific Gas & Electric Company in the streets of San Francisco under franchise claimed by them.

That company filed with your Board on November 6, 1912, copies of three orders of the Board of Supervisors under which it claims existing rights. The orders are as follows:

1. Order No. 1667, by which the Board of Supervisors on March 20, 1882, granted to the California Electric Light Company, its successors and assigns, the right to lay down, maintain and operate in all the streets of the City of San Francisco wires and other conductors for the transmission of electricity for illumination, telegraphic, telephonic, electric power and other purposes for which electricity may be used. This order further provides that the rights, privileges and franchises granted thereunder shall continue and be in force for a period of fifty years from and including the passage of such ordinance.

2. Resolution No. 15, 139, New Series, adopted by the Board of Supervisors on April 25, 1881, by which the said Board granted permission to the California Electric Light Company to erect and maintain poles along and upon the streets of San Francisco for the purpose of placing electric light wires thereon.

3. Resolution No. 2727, Fourth Series, adopted by the Board of Supervisors on April 24, 1899, by which said Board granted to the Mutual Electric Light Company and to the Independent Light & Power Company, and their respective assigns, the privilege of erecting and maintaining poles and posts along and upon

certain streets of San Francisco for the purpose of placing electric light wires thereon.

The Pacific Gas & Electric Company further states that it has acquired by mesne conveyances all the rights granted under the above orders to the respective grantees therein named. The same company has also requested from the Department of Electricity its approval of certain overhead construction consisting of the placing of poles and stringing wires thereon, claiming the right to do so "pursuant to our franchise"; and I am in receipt of a communication from the Chief of the Department of Electricity requesting my opinion as to the validity of such claim. I have also been favored with a communication from the attorney for the said Pacific Gas & Electric Company stating the contentions of that company and the grounds upon which it is claimed that rights now exist under the orders above referred to.

Opinion.

The first question in this matter is as to the power of the City and County of San Francisco to enact the ordinances and resolutions hereinabove cited. If such power did not exist, a consideration of the nature or extent of the rights granted is unnecessary. The principal claim of right is based upon Order No. 1667, purporting to grant a fifty year franchise for the use of the streets of San Francisco for the purposes named.

The power of the City of San Francisco to pass this order is placed by the attorney for the Pacific Gas & Electric Company upon the following grounds, viz.:

1. Upon Section 74 of the Consolidation Act which was in force at the time the ordinance above referred to was passed, which section provided as follows:

"The Board of Supervisors shall further have power by regulation or order: * * *

"Fourth: To provide for cases omitted in this Act, and in conformity with the principles adopted in it for opening, altering, extending, constructing, repairing, or otherwise improving of public streets and highways, at the expense of the property benefited thereby, without any recourse, in any event, upon the City and County, or the public treasury, for any portion of the expense

of such works, or any delinquency of the property holders or owners.

"Fifth: Providing for lighting the streets. (Amended, April 26, 1862, 466.)"

In my opinion Subdivision fourth above quoted has no reference to the granting of franchises of this character, but applies to an entirely different matter, viz.: to street improvements to be performed "at the expense of the property benefited thereby."

Subdivision fifth, conferring general power to provide for lighting the streets, does not warrant the granting of a franchise to a public service corporation for the use of the streets. This last provision is general in character and, for reasons hereinafter stated, is not sufficiently broad to warrant the granting of this class of franchises.

2. It is further claimed that the passage of the ordinance above referred to is warranted by the fact that the City of San Francisco owns the fee in its streets and that it has general police power over the same and under such power can grant franchises for the use thereof.

The fundamental rule as to the extent of powers which municipal corporations may exercise is stated by Judge Dillon as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others:

"1. Those granted in express words;

"2. Those necessarily or fairly implied in or incident to the powers expressly granted;

"3. Those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but essential."

Dillon on Municipal Corporations, 5th Edition, Sec. 237.

In Abbott on Municipal Corporations, Vol. III, Section 897, it is stated:

"The rule ordinarily obtains that a general grant of power to municipal corporations to light streets and public places will not

authorize them to grant exclusive privileges or licenses to private persons to occupy and use public highways for the purpose of constructing and operating lighting plants."

In Freund on Police Power, Section 163, the author states:

"A grant of more than a license, so the grant of a franchise to occupy the street with tracks, poles, etc., requires express legislative authority."

And again, in Section 658, it is further stated:

"That a municipality is held not to have inherent power to grant street franchises, is no argument against the constitutionality of such monopolies, but simply a matter of limitation of delegated powers in the hands of subordinate authorities."

The text book last above quoted from is devoted to a consideration of the extent of the general police power vested in states and municipalities.

The rule stated by the text writers above cited is sustained by a great number of judicial authorities. A clear statement of the general rule is found in an opinion of United States District Judge Jenkins, in which he says:

"It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted or fairly to be implied. It may be that, by virtue of its duty to care for the public health and safety, a city has the power to contract for a supply of water; but it cannot, without express legislative authority, construct, maintain, or operate waterworks. Dill. Mun. Corp. (4th Ed.), Sec. 27. Without like authority it cannot grant exclusive right to use the streets, and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority directly granted or delegated to municipalities. So, likewise, the right to operate waterworks is of legislative origin, and can only be conferred by a municipal corporation when expressly authorized by the supreme legislative power of the state."

National Foundry & Pipe Works vs. Oconto Water Co.,
52 Fed. Rep. 33.

3. It is further claimed that power to grant the franchise under consideration was conferred upon the City and County of San Francisco by Section 11, Article II of the Constitution, which reads as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In Ex parte Hodges, 87 Cal. 165, the Supreme Court has defined the meaning of this constitutional section as follows:

"But the ordinance is not intended to preserve the peace and quiet of the county, or to prevent the use of one's property to the injury of another, or for the protection of the lives, limbs or comfort of all persons, or to prevent the propagation or spread of disease, nor is it in any proper sense a police or sanitary regulation. What is meant by 'other regulations' in the section cited, may be a question, but it must certainly be limited to objects similar to those denominated police and sanitary."

Under the definition of the constitutional section above quoted the power to grant a franchise is not embraced within the terms of that section.

In view of the rules above stated, I am of the opinion that the Board of Supervisors had no authority to grant the franchise attempted to be conferred by Order 1667 above referred to. My attention has not been called to, and I have been unable to find, any legislative authority for such grant and in the absence of such authority I am forced to the conclusion that the grant of the franchise was unwarranted.

The other two orders above referred to were temporary permits for the erection of poles and posts. It is unnecessary to consider the validity of these orders for the reason that the Board of Supervisors had undoubted authority to modify the same as to any future work to be done thereunder. (Ex parte Taylor, 87 Cal. 91.)

On July 27, 1905, Ordinance 1564 was adopted by the Board of Supervisors which is a general ordinance covering the matter of the erection of poles upon the streets of the City. (Ordinance Book, page 340.) This ordinance supersedes the permits above referred to and, until some further action is taken by your Board, such ordinance prescribes the rule under which the permits for the erection of such poles may be obtained.

The views hereinabove expressed are directed to the consideration of the ordinance as a whole and are in response to the contentions made by the attorney for the Gas Company as to the validity of that ordinance. It will be noted that the ordinance referred to purports to grant a right for laying down and maintaining wires and other conductors for purposes other than illumination. For this reason I have not considered the ordinance as if it purported to grant the privilege of lighting streets only.

As far as any rights are claimed under the ordinance for purposes of the transmission of electricity for illuminating purposes, there is another and conclusive reason why the ordinance was not valid in that respect. At the time said ordinance was enacted, Section 19 of Article XI of the State Constitution provided that any person or corporation shall "have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein and connections therewith, so far as may be necessary for introducing into and supplying such City and its inhabitants either with gas light or illuminating light."

This constitutional privilege has been held to be a direct grant of a franchise to any person or corporation who used the same. While it was in effect it was not possible for the Supervisors, by any ordinance, to grant any other privilege than that contained in the Constitution. In other words, under the Constitution, as it formerly existed, lighting companies used the streets of San Francisco under the grant of this constitutional franchise and not under any special franchise granted by ordinance, as the latter could confer no rights in addition to the former.

As far, therefore, as the ordinance refers to the use of electricity for illumination, the ordinance was inoperative and conferred no rights.

As is said by the Supreme Court in re Johnston, 137 Cal. 120:

"The designation of 'damages and indemnity for damages' as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privileges. When the sovereign authority of the State, either in its Constitution or through its Legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such

right is sought to be exercised or enjoyed to impose additional burdens or terms as a condition to its exercise."

You are therefore advised that the Pacific Gas & Electric Company has no existing right to the use of such streets of San Francisco as were unoccupied by it on October 10, 1911, except upon compliance with the conditions specified in Ordinance No. 1564 above referred to; and that the conditions of said ordinance may be modified by your Board whenever you deem such course advisable.

As to such streets as were actually occupied by said company prior to October 10, 1911, I have heretofore advised you that such occupancy, under the provisions of the State Constitution as it existed prior to the recent amendment, conferred upon the company a vested right to the extent of such actual occupancy which right the constitutional amendment cannot impair.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Stable Ordinance.

January 30, 1913.

Gentlemen: I am in receipt of your communication of recent date, submitting a proposed ordinance establishing residence and industrial districts in the City and County of San Francisco, together with your request that the same be arranged in legal form and that I render my opinion as to its constitutionality.

Opinion.

That an ordinance such as that proposed is constitutional was conclusively held in the recent case of *Ex parte Quong Wo*, 161 Cal. 221, which together with the cases there cited and affirmed, is the California law on the subject.

The proviso of Section 3 of the ordinance proposed is of a discriminatory character, and should be stricken out.

The first paragraph of Section 4 is valid. The second, third and fourth paragraphs of Section 4 are invalid, as they constitute an illegal delegation of legislative power. (2 Dillon, Mun. Corp., 5 Ed., Sec. 692, St. Louis vs. Russell, 116 Mo. 248, etc.)

For the same reason, the second sentence of Section 5 should be stricken out.

Section 6 should read "It shall be unlawful for any person, firm, or corporation to use any building for stabling one or more horses, mules, donkeys or other animals within the boundaries of such industrial districts of the City and County of San Francisco, as are now or may be hereafter established, unless such buildings shall be class 'A', 'B' or 'C' mill construction, as such classes are defined in Ordinance 1008 (New Series), Sections 73, 74, 75 and 76, and in accordance with Ordinance 345 (New Series), regulating the construction of stables."

In Section 7, the word "construct" should be stricken out, and the word "use" substituted therefor.

With these changes and amendments, it is my opinion that the ordinance in question is valid and constitutional.

Respectfully,

PERCY V. LONG,
City Attorney.

Hospital and Health Committee,
Board of Supervisors.

Right of Civil Service Commission to Remove Names From Eligible List.

January 30, 1913.

Gentlemen: I am in receipt of your communication requesting my opinion as to whether or not your Commission has the legal right to restore Samuel W. Johnson to the eligible list of policemen. The said Johnson was placed on the eligible list on November 22, 1911, but upon his certification could not be located. On December 4, 1911, you removed his name from the eligible list of policemen. You ask, moreover, if the absence of the said Johnson from the City between March, 1911, and November 18, 1912, is

sufficient to deprive him of his eligibility under Section 3, Chapter I, Article VIII of the Charter.

Rule 13, Section 1 of your Commission provides:

"Any eligible who fails to respond within three days to a notice sent him to report for duty, will be stricken from the eligible register, unless, within thirty days from the date of the notice sent him, he presents reasons satisfactory to the Commission for his failure to report."

This case does not involve the question of a notice to report for duty, but a notice of certification. Under this section Johnson's name cannot be stricken from the eligible list.

Rule 13, Section 2 provides:

"Any eligible, who fails to respond within three days to a notice sent him, requiring an answer, except a notice to report for duty, will be placed at the foot of the eligible list, unless within thirty days from the date of the notice sent him, he presents reasons satisfactory to the Commission for his failure to respond."

Under the provisions of this rule the utmost your Commission can do is to place Johnson's name at the foot of the eligible list, from which neither your rules nor any Charter provisions give you the right to remove him for such an absence as his.

Considering your second question, the Charter section referred to provides that "No person shall become a member of the department unless he shall be * * * a resident of the City and County for at least five years next preceding his appointment."

This does not mean that an applicant after having been examined is thereupon forbidden to leave the City. The question of residence is largely one of intention and in the absence of proof to abandon such residence, or of a rule of your Commission covering the subject, the applicant must be deemed to be still a resident of the City and County under this provision of the Charter.

You are therefore advised:

1. That your Commission place the name of the said Johnson at the foot of the eligible list of policemen, and

2. That in the absence of any rules of your Commission on the subject, the fact of his absence from the City for a period of

months between his examination and his certification is not by and of itself sufficient to deprive him of his eligibility for certification.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Power of Board of Election Commissioners to Modify Contracts For Supplies.

January 31, 1913.

Gentlemen: I am in receipt of your communication of the 24th in which my opinion is requested concerning the power of your Honorable Board to modify a certain contract entered into on August 26, 1912, between the Spencer Street Planing Mill and the City and County of San Francisco for the construction and delivery to the Department of Elections of the frame work for two hundred election tent frames, etc. Also as to what effect the giving of a notice by your Board to the Mayor of this City and County, under and in pursuance of the provisions of Section 3, Chapter I, Article IV of the Charter, that said contract had been violated would have.

Your communication is accompanied by a detailed report from the Registrar of Voters containing a recommendation from him that certain sums be deducted from the contract before final payment or that the contractor be permitted at his option to fully comply with the contract as indicated in said report to the satisfaction of the Registrar of Voters, within a time to be fixed by the Registrar, not to exceed forty days from date. Four questions are propounded by your Board as follows:

"1. Upon the foregoing statement of facts, is the power reposed in the Board of Election Commissioners to make a composition, settlement and adjustment of this matter with the said contractor and determine what sums, if any, ought to be deducted for non-performance or non-compliance with such contract, or any portion thereof, provided the said contractor is willing to accept such composition and adjustment, as the same shall be determined by the Board of Election Commissioners?

"2. If such power of settlement, adjustment and composition of such matter and contract is not vested in the Board of Election Commissioners, where is such power vested? And, what ought the Board of Election Commissioners to do in the matter if it has not the power to adjust, settle and make composition in reference to such matter even though the contractor be willing to accept such composition and adjustment?

"3. Does the fact that such notice has been given to the Mayor, as is required by said Section 3, Chapter I of Article IV of the said Charter, in any way affect or impair the power of the Board of Election Commissioners to proceed to a final adjustment, settlement and composition with the said contractor in payment of such sum as the Board of Election Commissioners shall determine is just and right without the formal approval of such a settlement by the Mayor?

"4. Does the giving of such notice to the Mayor make his formal approval of any subsequent settlement or composition and payment thereunder necessary, and if so, in what manner must such approval of the Mayor be evidenced?"

Opinion.

Having in view said report, the answer to your first question is yes.

Your second question is answered by the answer above.

The answer to your third and fourth questions is no.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Status of Richard L. Ingham in Police Department.

February 6, 1913.

Gentelemen: I am in receipt of a request for an opinion from your Honorable Board as to whether or not Richard L. Ingham, now a member of the Police Department of the City and County

of San Francisco, is legally a member thereof. Accompanying your request was an abstract from the records of the Police Department containing a synopsis of the matters and things leading up to the resignation of said Ingham; the acceptance thereof; his several petitions for reinstatement and his final reinstatement by the Board of Police Commissioners on March 10, 1910.

Opinion.

On September 8, 1911, I rendered an opinion to the Grand Jury of this City and County, holding that the action of the Police Commission in permitting Richard L. Ingham to withdraw his resignation was proper; that Ingham submitted his resignation under circumstances which showed coercion on the part of his superiors; that his resignation was brought about through such coercion and was not voluntary and that under such a state of facts his case came within the rule of the opinion of July 23, 1908. (Opinions of City Attorney, 1908-9, page 152.)

The record in the case of Ingham, presented by the Grand Jury and upon which the above opinion was rendered, was not as complete as the record presented by your Honorable Board at this time. The resignation presented by Ingham to the Police Commissioners on May 21, 1907, specifies, as the reason for his resigning, that on two occasions he broke his left hand in the discharge of his duty as a police officer, incapacitating him from active police duty. While nothing is therein shown that said resignation was made under duress or coercion, his petition for leave to withdraw such resignation sets forth the fact tending to show coercion.

There is nothing, however, in the additional records presented to me by your Honorable Board to cause me to change my opinion as to the status of Richard L. Ingham. In the Esola opinion you were advised that, in accordance with the decision of the New York courts in the case of one John W. Goodman, notwithstanding that the resignation was in terms voluntary, it was the duty of the Board of Police Commissioners to receive, entertain and act upon a petition asking permission to withdraw a resignation based upon the fact that the resignation was obtained through coercion.

In granting the prayer of Ingham's petition for leave to withdraw the Commission acted within its powers and by such action found the averments of the petition to be true. Finding the facts to be true and acting within its powers the holding of the Commission is not in the absence of fraud subject to attack.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Police Commissioners.

Power of Tax Collector to Sell Property For Delinquent Assessment in re Stockton Street Tunnel.

February 7, 1913.

Dear Sir: I am in receipt of your communication of February 6, 1913, enclosing a copy of a notice from J. A. Cooper, plaintiff in the case of Cooper vs. City and County of San Francisco. You desire to be advised as to the effect of this notice and whether it or the fact of the pending action in that case affords a reason for the further postponement for the sale of property in the matter of the Stockton Street Tunnel Assessment. Several suits have been brought against the City in which injunctions are sought restraining you as Tax Collector from selling property assessed for the Stockton Street Tunnel and which property is now delinquent on the assessments. Motions were made in the various actions for a temporary restraining order pending the final determination of the actions. Judge Seawell, before whom the actions are pending, refused to grant a temporary restraining order upon the ground that if the objections alleged in the complaints to the assessments were valid objections those objections would appear upon the face of the certificates of sale or the deeds of the property and, therefore, neither the certificates of sale nor the deeds would amount to a cloud upon the title of the properties involved. For that reason Judge Seawell refused a temporary restraining order.

While the actions are still pending in my opinion Judge Seawell's decision upon the motion for temporary restraining orders is decisive of the suits. Although the judgment has not been finally entered for the City in these actions, in view of

Judge Seawell's decision, said judgment in these actions must necessarily be rendered in favor of the City.

At the present time there are no injunctions against you or the City preventing you from proceeding with the sale of the properties which have become delinquent for failure to pay the assessments thereon. The decision of Judge Seawell, as you know, did not finally determine that the assessments were valid, the decision going no further than holding that at the present time the question of the validity of those assessments could not be brought into question.

I therefore advise you that there are now no legal obstacles preventing you from selling the properties in question. Whether you should again postpone the sales is a question of policy for you and the Board of Supervisors to determine. I can only advise you that there are no legal obstacles in the way of such a sale. So far as the notice of Judge Cooper is concerned, if the opinion of Judge Seawell is correct, and I have no doubt of its correctness, the validity of these assessments cannot be determined at this time but must be determined after the sale has been had on the properties.

I am of the opinion that the assessments are valid, although forceful arguments have been urged against them. For these reasons I know of no reason why the City cannot sell the delinquent properties. The question of the validity of these assessments can only be determined by such a sale.

I would not be justified in advising you to delay the sale in order to afford to the persons complaining of the assessments an opportunity to present further their objections, for the reason, that as a matter of law those objections cannot be raised at the present time and I am not justified in affording to these persons relief that the law itself does not afford.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Continuing Bond Necessary From Companies Opening Public Streets Periodically.

February 7, 1913.

Sir: I am in receipt of your communication of the 5th inst. as follows:

"The enclosed communication from Mr. J. F. Rawie, manager of the American District Telegraph Company, is forwarded to you with the request that you kindly furnish me with your opinion as to the necessity for the renewal of the Bond mentioned therein."

Opinion.

Section 3 of Ordinance No. 658 provides generally that all persons, firms or corporations before they, or any of them can lawfully open any public street or thoroughfare in this City and County shall execute and file with the Mayor an indemnity bond to be approved by him in the penal sum of $5000; said bond to be an indemnity for damages caused this City and County through the neglect or failure of said persons, firms or corporations to fill any openings or make any repairs which they are bound to do properly and in good and workmanlike manner and in accordance with said ordinance and the rules and regulations of the Board of Public Works.

It appears from the letter of the San Francisco Electric Protective Company, accompanying your request, that said company, on June 7, 1912, filed with you, as Mayor, a bond of the National Surety Company in the sum of five thousand dollars in accordance with the requirements of said Ordinance No. 658; that the bond so filed expired by limitation January 30, 1913. The purpose and intent of said ordinance is to require all persons, firms or corporations mentioned therein to save harmless the City and County of San Francisco from any loss or damage which should be sustained by reason of a failure to fill any openings or make any repairs made necessary by the opening of any street or thoroughfare. It is essential in order to carry out said purpose and intention that a bond in the penal sum mentioned be furnished which will at all times protect the City in such cases. A bond such as is mentioned in your communication does not fulfill the requirements of the ordinance in that it expired by limitation on

January 30, 1913, and therefore there is no bond to cover any loss or damage sustained by the City and County for any present or future operations of said company in the matter of opening streets or thoroughfares.

In my opinion said Company should file a new bond to be approved by you in the sum mentioned in the ordinance and that said bond and the bonds of all other companies coming within the terms of Ordinance No. 658 should be a continuing bond to protect the City at all times from any loss or damage occasioned from the failure or neglect to fill any openings or make any repairs in the public streets.

Respectfully,

PERCY V. LONG,
City Attorney.

The Mayor.

Great Highway Is Under Jurisdiction of Board of Public Works.

February 11, 1913.

Gentlemen: I am in receipt of your communication of the 6th inst., as follows:

"This board is in receipt of a communication from Dr. Emma L. Merritt, calling attention to the necessity of constructing bulkheads along the Great Highway adjoining the Sutro Tract, in order to prevent land slides during street grading operations at that point. Grading operations are now being carried on by the employees of the Park Commission at that point, but there is some question, the City Engineer reports, as to whether this portion of the roadway is under the jurisdiction of the Park Commission or of the Board of Public Works.

"In order to settle this matter, will you kindly furnish us with an opinion as to whether the widening of the present roadway from the Sutro Baths to the bottom of the hill on the Great Highway is under the jurisdiction of this Board or of the Board of Park Commissioners. If this matter is found to be under our jurisdiction, the work now being done will be stopped pending the granting of a permit for this work by the Board of Public Works. For your information there is attached hereto petition of Mrs. Emma L. Merritt, dated the 18th ultimo."

Opinion.

On March 27, 1868, the Legislature of the State of California passed an Act to confirm Order No. 800 of the Board of Supervisors entitled "An order for the settlement and quieting titles to land in the City and County of San Francisco situate above high water mark of the Bay of San Francisco and the Pacific Ocean and without the corporate limits of the City of San Francisco." (See Statutes of California 1867-68, page 379.)

Section 9 of Order No. 800 is as follows:

"All that portion of the land described in Section 1 of this Order which lies South of a line drawn due South 81° 35′ East magnetic, through Seal Rock and West of a line easterly not less than 200 feet from ordinary high water mark, is hereby reserved and set apart for public use as a public highway."

The Act of the Legislature of March 11, 1874 (Statutes of California 1873-74, page 333), provides, in Section 1, in part as follows:

"Also, that strip of land bounded on the West by the Pacific Ocean, referred to in the first section of the Act of the Legislature of this State, approved March 27, 1868, entitled 'An Act to confirm a certain order passed by the Board of Supervisors of the City and County of San Francisco,' which is particularly described in the ninth section of the order confirmed by said last-mentioned Act, and which, on said official map, is designated as 'Great Highway', shall be hereafter known and designated by such name."

The Board of Park Commissioners of the City and County of San Francisco, by virtue of Article XIV of the Charter, is given jurisdiction of "that certain highway bounded on the West by the Pacific Ocean, and designated upon said map as 'Great Highway'." The map referred to is the map of the Outside Lands of the City and County of San Francisco, made pursuant to Order No. 800, which was confirmed by the Act of the Legislature of March 27, 1868.

As I have stated, Section 9 of the Act of March 27, 1868, described the Great Highway as commencing at a line drawn due South 81° 35′ East magnetic, through Seal Rock. As is generally known, there are three or more rocks forming the group which is called "Seal Rocks," located in the ocean immediately

west of the Cliff House. It is difficult to determine which one of said rocks is referred to in Section 9.

In order to determine that question it might be possible to discover the meaning and the intent of the Legislature by a reference to other Acts concerning Seal Rock. On March 26, 1868 (Statutes of California, 1865-66, page 445), the Legislature granted authority to certain parties to construct a suspension bridge from the main land or bluff on the ocean shore on which the Cliff House stood to a rock in the ocean about four hundred feet from shore, known as "Seal Rock." Whether or not the Legislature had in mind the particular rock referred to in the Act last cited, is, of course, difficult to determine to a certainty. In lieu of any other information on the subject I am inclined to take the view that the Legislature in passing the Act of March 27, 1868, had in mind the particular rock known as "Seal Rock" named in the Act of March 26, 1866.

A survey would be necessary to determine the northerly boundary line of the Great Highway, making use of the direction contained in Section 9 of the Act of March 27, 1868.

I have examined the map prepared by the Committee on Outside Lands under and pursuant to the provisions of Order No. 800 and find that there is a line commencing at the shore line south of the Cliff House and curving to the east, which line continues in a general southerly direction, marking the westerly boundary line of a portion of the Richmond District, all of Golden Gate Park and practically the entire Sunset District.

Your Honorable Board after having a survey made by the City Engineer of the Great Highway as described in Section 9 of the Act of March 27, 1868, could then report the result of that survey to the Board of Supervisors of the City and County of San Francisco, which said Board has the power to pass an ordinance fixing the boundaries and limits of the Great Highway. If the result of said survey should show that the roadway from the Sutro Baths to the bottom of the hill on the Great Highway be north of the northern boundary line of the Great Highway, as described in Section 9 of the Act of March 27, 1868, and in the event that the Board of Supervisors passes an ordinance setting forth the boundaries and limits of the Great Highway, then you are advised that said road is not under the jurisdiction of the Park Commissioners but is under your jurisdiction and you would be

invested with the same powers and control over said roadway as you now have over any other public street in this City and County under the Charter, and any work upon said road cannot be prosecuted by the Park Commissioners, but the same would have to be prosecuted under the direction and control of your Honorable Board.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Rental For Electric Sign on Lincoln Building.

February 13, 1913.

Gentlemen: I am in receipt of your request of the 11th inst., as follows:

"I am directed by the Board of Supervisors, as well as his Honor the Mayor, to request that you furnish an opinion at the earliest date possible, on the following matter:

"It appears that application has been made to the Board of Public Works for a permit or privilege to construct an elaborate electric sign on the building situate on City property, being the Lincoln School lot at Fifth and Market Streets.

"The question upon which information is desired, is as to whether the conditions of the lease of said premises with the Lincoln Realty Company, and on file at the Board of Education, freely permits of such construction, or whether the City has the right or authority to exact a rental or income from such privilege or concession."

The lease referred to in your communication was one entered into on the 10th day of July, 1908, by and between the Board of Education of the City and County of San Francisco, the party of the first part, and the Wise Realty Company, a corporation, the party of the second part, for the so-called Lincoln School lot at Fifth and Market Streets. Said lease contains the following clause:

"The said party of the second part does hereby promise and agree * * * not to make or suffer any alterations to be made in the building hereafter to be constructed on the said premises as to the exterior architecture of the same, without the consent of the said party of the first part."

I find that on December 27, 1912, the Board of Education adopted the following resolution:

"Resolved, That permission be and the same is hereby granted to the Lincoln Realty Company to erect and maintain, or cause to be erected and maintained, an electric sign on the roof of the building situated on the southeasterly corner of Market and Fifth Streets; said sign to conform to the sign described in the application of the said Lincoln Realty Company filed with the Board of Public Works of this City and County on the 12th day of August, 1912, for a permit to erect the same."

"The permission hereby granted does not in any manner act as a waiver of any rights of the Board of Education of San Francisco under a certain indenture of lease dated July 1, 1908, between said Lincoln Realty Company and the said Board of Education; and the said Lincoln Realty Company hereby, by an acceptance of the privilege hereby granted, agrees that this permit shall not act or tend to act as a waiver of the same and that this resolution is confined solely to grant permission to erect and maintain the sign herein referred to and none other."

The permission granted by the aforesaid resolution was in pursuance of the agreement contained in that clause in the lease to which your attention has been called and, therefore, the Lincoln Realty Company is authorized under the permission given by said resolution to construct the sign referred to in said resolution, and such being the case the City has no right or authority to exact a rental or income therefor.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Duty of Municipality to Repair Sidewalks on Streets Accepted Prior to 1871.

February 14, 1913.

Gentlemen: I am in receipt of your communication of the 11th inst., as follows:

"Will you please advise the Street Committee of the Board of Supervisors whether there is an obligation upon the City to repair sidewalks and reconstruct area walls on streets where sidewalks are being narrowed, which said streets were accepted prior to October, 1871. This is supplemental to your former opinion in re sidewalks. The question now is the sub-area walls."

Opinion.

It appears from your communication and also by reference to the publication entitled "Tables showing changes and names of streets, etc.," published by authority of the Board of Supervisors by Resolution No. 3593 (New Series), that it was the custom prior to October, 1871, for the City to accept streets without any limitation as to the portion of the streets accepted; that is to say, that the City accepted a street in the following form, for example: Eighth Street from Market to Mission. Such an acceptance imposed upon the City the duty of keeping the entire street, roadway and sidewalk in repair and even in cases where the sidewalks were not laid before the acceptance, the obligation to put in new sidewalks rested upon the City. This question came before the Supreme Court of the State of California in Bonnett vs. San Francisco, reported in 56 California Reports, page 230, et seq. In this case the plaintiff sued the City and County of San Francisco on a contract for the construction of sidewalks on Montgomery Street, between Jackson and Pacific Streets, and recovered a judgment in the court below. The Supreme Court held that the City and County, in the acceptance of Montgomery Street, was liable for the cost of the construction of the sidewalks.

Your second inquiry concerns the liability of the City to reconstruct area walls on streets where sidewalks are being narrowed, which said streets were accepted prior to October, 1871. It is to be presumed that all such walls were constructed by the owners of property abutting on the street, or by their tenants; in all events, the City did not construct the same. The use of such

sidewalk sub-area is a privilege which can be granted or refused by the municipality. In this connection I respectfully refer your Honorable Board to two opinions on this subject, one rendered March 28, 1912, and the other on June 10, 1912. Such privilege only exists by reason of Section 13 of Ordinance No. 1008 (New Series). Said section provides for the granting of permits by the Board of Public Works for the use of the space below sidewalks upon application, and I advised your Honorable Board that your Board possessed the right to suspend and annul the privilege now existing under sidewalks and streets by a repeal of said section. It makes no difference for the purpose of this opinion whether streets were accepted prior to October, 1871, or subsequently thereto, the principle is the same. The City in the acceptance of a street, whether of a street in its entirety or only the roadway thereof places itself under obligation to repair and reconstruct only the surface of such part of the street as it accepts. That obligation does not extend downward from the surface of the street to include the walls surrounding any sub-sidewalk area and the duty of reconstructing area walls on streets where sidewalks are being narrowed rests upon the owners of the abutting property who maintain the vaults under the sidewalk.

You are therefore advised as follows:

1. That the duty of repairing sidewalks on streets accepted by the City prior to 1871, where the entire street was accepted and not merely the roadway thereof, rests upon the City;

2. That the obligation to reconstruct area walls rests, not upon the City, but upon the owners of the abutting property where such vaults are being maintained.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Board of Fire Pension Fund Commissioners—Power to Rescind Order Granting Pension.

February 14, 1913.

Gentlemen: I am in receipt of your communication of the 11th inst., as follows:

"We herewith transmit to you the petition of Susan E. Dougherty for the rescission and cancellation of an order of this Board made on the 22nd day of May, 1911, whereby a previous order of this Board granting a pension to the maid of Susan E. Dougherty was rescinded. In this petition you will note that the petitioner requests that this last order of this Board be revoked and rescinded. The contention is made that this last order was made without jurisdiction by this Board, and the cancellation or rescission requested simply to clear the record and enable the petitioner to collect her pension without the necessity for court proceedings to that end.

"We would respectfully request you to advise this Board whether the contention of the petitioner is correctly taken; that is, whether the order rescinding the original order awarding the pension was improperly made, and should properly, in justice to the petitioner, without the necessity of legal proceedings, be formally cancelled and annulled."

Opinion.

I have uniformly held that the finding of a Board of Pension Fund Commissioners, in passing upon an application for a pension, is final and conclusive and neither the same board nor a board constituted of different members can subsequently overturn or set aside such findings.

You are respectfully referred to my opinion in the Brophy case of May 9, 1911, reported at page 322 of the Opinions of the City Attorney for 1910-11-12, and the opinion in the Van Keuren case of March 7, 1912, reported on page 613 of the same volume, also the opinion in the Wolf case of January 18, 1912, on page 518 of the same volume.

In view of the above you are advised that the Board of Fire Pension Fund Commissioners had no power or authority to rescind a previous order of said Board whereby Susan E. Dougherty was granted a pension and that the order made by

you on the 22nd day of May, 1911, whereby the previous order granting the pension was rescinded, should be revoked and rescinded and the petitioner restored to her rights.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Fire Commission Entitled to Certification of Three Names From Civil Service Commission in Making Appointments.

February 15, 1913.

Gentlemen: I am in receipt of your request for an opinion under date of February 14, asking me whether your body is limited to one name from the eligible list furnished by the Civil Service Commission when you desire to make appointments to higher ranks in the Fire Department.

Opinion.

Upon the adoption of the present Charter provision was made for the organization of the Fire Department and the management of such Department was placed with the Board of Fire Commissioners (Sec. 1, Chap. I, Art. IX). After providing for the organization of the Commission, the Charter declared:

"The Board shall organize the Department, create and establish such fire companies as it may deem necessary, prescribe the number and duties of the officers, members and employees of the Department, and the uniforms and badges to be worn by them; have control of all the property and equipments of the Department, and exercise full power and authority over all appropriations made for the use of the Department."

(Sec. 5, Chap. I, Art. IX.)

"All persons appointed to positions in the Department must at the time of their appointment be citizens of the United States, not less than twenty-one nor more than thirty-five years of age, of good character for honesty and sobriety, and able to read and write English; they must have been residents of the City and County at least five years next preceding the date of their appoint-

ment, they must pass a medical examination under such rules and regulations as may be prescribed by the Commissioners, and must, upon such examination, be found in sound bodily health; * * *"

(Sec. 6, Chap. I, Art. IX.)

"The Board of Fire Commissioners shall immediately after their appointment and qualification proceed to reorganize the Fire Department in conformity with the provisions of this Charter. In so doing the Board shall make its appointments of officers and members from the persons constituting the force in the service of the Fire Department at the time this Charter goes into effect. Such officers and members shall not be required to pass any Civil Service examination. All future appointments and promotions shall be made subject to the provisions of Article XIII of this Charter. * * *"

(Sec. 1, Chap. II, Art. IX.)

It will be seen from a reading of the above quoted sections of the Charter that the power of appointment to positions in the Fire Department is vested in the Fire Commission, limited only by the provisions relating to Civil Service. Such being the case it is the theory of Civil Service, and to my mind is contemplated by the Charter, that when promotions are to be made in those Departments subject to Civil Service regulations and under Civil Service classification that the appointing power must be given some measure of selection. If the Charter intended, which it is not necessary to decide, that the Civil Service Commission is empowered to pass a rule requiring the appointive power to select from one name only, certified by it when appointment is to be made in the first instance in the Department, it certainly, in my judgment, is not empowered to pass a rule providing that all certifications shall have the highest name only.

On April 21, 1908, I advised the Police Commission that a rule adopted by the Civil Service Commission providing for the certification of only one name on each eligible list was invalid when applied to promotions and I have not changed my opinion since that time.

You are therefore advised that you are entitled to a certification from the Civil Service Commission of the three highest

names on the eligible list when you are required to fill vacancies which exist in the promotional ranks of your Department.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Construction of Sidewalks on Grant Avenue Between Jackson and Pacific Streets.

February 19, 1913.

Gentlemen: I am in receipt of your communication of the 15th inst., as follows:

"We enclose herewith copy of report from Mr. A. J. Donovan, office deputy of the Bureau of Streets, upon the reason why sidewalks have not been laid on Grant Avenue between Jackson and Pacific Streets.

"The Board desires you to advise the Commissioners concerning the responsibility for sidewalk construction on this block, stating whether the responsibility for laying these sidewalks devolves upon the City or upon the property owners abutting upon that block."

Opinion.

An examination of the publication entitled "Public Streets of San Francisco," published by authority of the Supervisors January 1, 1909, discloses the fact that that portion of Grant Avenue, formerly Dupont Street, from Jackson to Pacific Street was accepted by the City September 10, 1866, by Resolution or Ordinance No. 5967. On page 42 of said publication the following appears:

"Prior to October, 1871, streets were accepted without reference to any particular portion of a block, the name of the street and the streets between which the same was accepted being simply named thus: 'Washington Street from Dupont to Stockton Street.'

"About that time it was claimed that the acceptance in that manner was of such a character that it included not alone the roadway but the sidewalks; that is, the entire width of the street, and that the expense of keeping the same improved and in repair

devolved upon the City. This view led to a different mode of acceptance being adopted, for while the liability of the City was conceded and intended by the acceptance of a street, to extend to keeping improved and in repair the roadway and the curbs, yet it had not been anticipated that the sidewalks were also by this act accepted, as no attention was paid to the condition of the sidewalks when the street was accepted; for in almost all cases the sidewalks were not permanently or uniformly improved, but were of such material as the owner of the property which fronted thereon desired or had constructed."

Whether or not the block on Grant Avenue between Jackson and Pacific Streets was accepted by the City in such a manner that the City would be liable for the construction of sidewalks upon said street I am unable to determine. If it should develop that the acceptance was of the street without any limitation, then the obligation of constructing sidewalks and keeping the same in repair might rest upon the City; otherwise, upon the property owners.

In this connection I will call your attention to an opinion rendered to the Board of Supervisors on the 14th inst., a copy of which I enclose.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Ordinance 2109 (New Series), Money Deposited Under.

February 28, 1913.

Gentlemen: I am in receipt of your communication of the 12th inst., as follows:

"There is enclosed herewith a copy of communication received by the Board of Public Works from its Cashier, stating that deposits aggregating $62.40 had been collected in accordance with the provisions of Ordinance No. 2109 (New Series), of the Board of Supervisors.

"Since this ordinance has been declared defective, but since Section 10 of same has not been specifically passed upon, the Board of Public Works desires to request you to furnish it with

an opinion as to what disposition should be made of this money on deposit with this Board."

Opinion.

On the 15th day of January of this year I rendered an opinion to your Honorable Board advising you that Ordinance 2109 (New Series) was invalid, and such being the case any moneys collected by any department of the Board of Public Works were collected and received under and by virtue of the provisions of an invalid ordinance and the same should be returned to those persons and corporations who deposited the same, notwithstanding the provisions of Section 10 of said Ordinance, which, of course, falls with the entire ordinance.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Conversion of Three-Story Building Into Apartment House.

February 28, 1913.

Gentlemen: I am in receipt of your communication of the 11th inst.. as follows:

"The Board of Public Works at its meeting held the 10th instant considered the application filed with the Bureau of Building Permits for the conversion of a three-story attic and basement frame building, situated at the southwest corner of Baker and Fulton Streets, into an apartment house to contain eleven apartments. There is herewith submitted a communication from the Chief Building Inspector, stating that this is the first instance of a permit of this kind to be applied for. The present building having been erected prior to the passage of the present ordinance regulating the height of frame buildings, we desire to request you to render an opinion as to whether the existing building can be converted into the proposed tenement house, using only the three stories at present existing for living purposes, the owner being allowed to maintain the excess height, or whether he should be compelled to lower the present roof to forty feet."

Opinion.

Section 78 of Ordinance No. 1008 (New Series; the Building Law), limits the height of frame or wooden buildings, which may

be constructed, to a height not exceeding forty feet. This ordinance, by its terms, relates to and affects buildings erected after the enactment of the ordinance and the familiar rule of statutory construction is that statutes operate prospectively and not retrospectively, except when otherwise provided for in the statute itself or when it might be reasonably presumed that the legislative body intended the statute to have such effect.

There is nothing in the ordinance which would lead me to the conclusion that the Supervisors of the City and County, in the passage of said ordinance, intended that it should operate so as to include buildings which were erected before the passage of the ordinance.

It appears from your communication that the building mentioned was erected in conformity with the provisions of an ordinance passed prior to Ordinance No. 1008 (New Series). It being a lawful structure at the time of its construction and since the provisions of Ordinance No. 1008 (New Series) do not apply thereto, the maintenance of said building in its present condition cannot be interfered with.

I have examined the building law in reference to the making of repairs and alterations of buildings and find nothing therein which authorizes the Board of Public Works to refuse a permit for the alteration of a building such as the one in question and it is my opinion that the alterations mentioned in the communication to your Honorable Board, submitted by the Chief Building Inspector, may be made without any reduction in the height of the building, provided that the same comply with the provisions of the present building law and any law relating to the construction of tenement or apartment houses.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Opening of Street Through Relief Home Tract.

March 4, 1913.

Gentlemen: I am in receipt of your communication of February 28, as follows:

"I am directed by the Streets and Sewers Committee to request you to advise the Committee whether or not the Board of Super-

visors would have the power to grant the Newell-Murdoch Company permission to open a street through the Relief Home Tract, being a portion of Rancho San Miguel.

"The Board of Supervisors was authorized by Charter Amendment No. 22 to sell a portion of the Relief Home Tract, being a portion of Rancho San Miguel."

Opinion.

On June 13, 1912, I rendered an opinion to your Honorable Board in which I defined your powers to permit the installation of a pump in the pump-house of the Relief Home upon the application of a private corporation. (Opinions of City Attorney, 1910-11-12, page 790.)

The petition before the Board at this time is for the privilege of constructing a street over that portion of the Relief Home Tract which the Board of Supervisors was authorized by the recent Charter amendment to sell. As I understand the matter the petitioners desire a permit from the City and County of San Francisco to construct the said street; that is, to do all the necessary work in connection therewith and to turn the same over to the City and County; that said petitioners would acquire no vested or any rights by reason of the construction of said street and that in the event of a sale of the said property by the City and County of San Francisco the land included in said street, together with the other land embraced in the tract authorized to be sold, would pass to the purchaser thereof. The tract authorized to be sold by the Charter amendment is generally described as that portion of the Relief Home Tract which lies west of the roadway separating the smaller tract from the main Relief Home property. The construction of a street on the said smaller tract west of the road would in no wise diminish or decrease the quantity of land to be sold and the only consideration is that the construction of said street might have a tendency to decrease the value of the land in the eyes of intending purchasers, and on the other hand it might have a tendency to increase the value of said property. Whether it would have the effect of increasing or decreasing the value of said property is a matter for your Board to determine.

I advise you that in the event that you determine that the salability of said land would not be impaired, you have the power

to grant the Newell-Murdoch Company permission, during the pleasure of the Board, to open a street through said tract, said permission being on condition that said company will not acquire any vested rights in the same and that when the said street work is done it be turned over to the City and County of San Francisco.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Status of Beach Street Between Laguna and Webster Streets.

March 5, 1913.

Gentlemen: I am in receipt of your communication of November 29th concerning the status of Beach Street between Laguna and Buchanan Streets, and between Buchanan and Webster Streets.

Opinion.

In the case of Ellen Dore vs. Mortimer K. Truett, et al., in which the City and County of San Francisco was a defendant, which action was brought for the partition of a tract of land known as the "North Peter Smith Tract," the status of a considerable portion of Beach Street was determined.

The case was decided by Judge Seawell on March 29, 1904. A certified copy of this decree is before me which is endorsed "Filed March 29, 1904, John J. Greif, Clerk, by H. W. Fraser, Deputy Clerk." The original appears to have been recorded April 7, 1904.

In an opinion of this office to the City Engineer dated April 4, 1912, I have stated, in a general way, the status of the North Peter Smith Tract and the general questions which were before the Court and determined by it in Dore vs. Truett, Opinions City Attorney 1910-12, page 688.

Summarizing from the decree in Dore vs. Truett, I will say here that the lands affected by said decree originally lay below high water mark and were the tide lands of the Bay. Upon the admission of California to statehood the title of this land passed to the State; on March 26, 1851, the Legislature granted the use

and occupation of this land to the City of San Francisco for ninety-nine years; on September 6, 1851, Peter Smith obtained in the District Court a judgment against the City of San Francisco for the sum of $13,960 and thereafter, on December 8, 1851, execution issued and the interests of the City in this land were levied upon and on January 30, 1852, the land was sold by the Sheriff to Isaac Thorne; Thorne's grantees claimed the property and partition of the tract between these various grantees was made in the case of Dore vs. Truett. No streets existed, but by the report of the referee, William A. Magee, certain streets were recognized and projected through the property.

A portion of what appears on the maps of the City to be Beach Street between Laguna and Buchanan Streets was distributed to private interests by the decree in Dore vs. Truett in the following language, to be found on page 27 of said decree:

"He has allotted and set off in severalty to J. R. Howell as and for his interest in the estate for years in said tract of land the following parcel of land which is designated on the map accompanying said report as No. 9, viz.:

"Commencing at the southeasterly corner of Jefferson and Buchanan Streets, and running thence Southerly along the westerly line of Buchanan Street three hundred and forty-three and nine-twelfths feet; thence at right angles Easterly two hundred and eighty-seven feet and six inches; thence at right angles Northerly three hundred and forty-three feet nine inches to the Southerly line of Jefferson Street, and thence at right angles Westerly along said Southerly line of Jefferson Street two hundred and eighty-seven feet six inches to the point of commencement."

From the above quoted language it is seen that Beach Street from the easterly line of Buchanan Street to a line drawn parallel therewith and 287 feet 6 inches easterly therefrom is in private interests. This leaves the residue of Beach Street between Laguna and Buchanan Streets and westerly from Laguna Street, a cul de sac, 68 feet 9 inches in width by a uniform depth of 125 feet.

As to that portion of Beach Street lying between Buchanan and Webster Streets, a portion thereof was, by the decree in Dore vs. Truett, distributed to private interests as appears from the following extract from said decree:

"Commencing at a point in the Northwesterly boundary line of the lands conveyed to the City of San Francisco, by the patent of the United States bearing date the 20th day of June in the year 1884 and recorded in Liber No. 1 of Patents at page 91, in the office of the recorder of the City and County of San Francisco, where said line is intersected by the westerly line of Buchanan Street extended Northerly; running thence Northerly along the said line of Buchanan Street to a point therein distant in a Northerly direction from the Northerly line of North Point Street 1031 feet 3 inches and to the Northerly line of Tonquin Street extended; thence at a right angle Westerly 51 feet and 3 inches along said line of Tonquin Street; thence at a right angle Northerly to the center of Lewis Street extended; thence along the center of Lewis Street in a Westerly direction and to the Charter line of 1850; thence Southerly along said Charter line to the Northerly line of Beach Street extended, and thence Easterly along said line of Beach Street and to a point therein which is distant Westerly from said westerly line of Buchanan Street 206 feet and 3 inches; thence at a right angle in a Southerly direction to the said Northwesterly Patent Line of said City, and thence Northeasterly along said Patent Line to the place of beginning; comprising portions of Blocks numbers 254, 255, 256, 257 and 258 and said Streets as the said blocks and streets are laid down and numbered or named on the official map of the City and County of San Francisco in the Western Addition to said City."

All of Beach Street from the westerly line of Buchanan Street to a line drawn parallel therewith and 206 feet 3 inches westerly from the westerly line of Buchanan Street is included in the above description, the remainder of Beach Street between Buchanan and Webster Streets is under the Van Ness Map and the official maps of the City in public ownership, and is a city street.

The decree in Dore vs. Truett only affects the ninety-nine year interest of the City in the streets involved in the North Peter Smith Tract and has no reference to the reversionary interest of the State in said streets.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Changing Wires From Fillmore Street to Webster Street.

March 6, 1913.

Gentlemen: I am in receipt of your communication as follows:

"The Electricity Committee of the Board of Supervisors is considering a proposition requiring the United Railroads to place underground its high tension power wires on Fillmore Street from Turk Street to Broadway, and it is deemed advisable, inasmuch as Fillmore Street has just been restored after the installation of the Auxiliary High Pressure System, to permit the United Railroads to construct conduits in Webster Street for this purpose, rather than have it again tear up Fillmore Street to the detriment of business and the inconvenience of traffic.

"You are therefore requested to advise said Committee, at your earliest convenience, whether or not the City would jeopardize any of its rights and whether or not the United Railroads would gain any franchises, rights, privilege or advantage by its being permitted to use Webster Street for the purpose mentioned.

"You are also requested to draft an ordinance amendatory of Order No. 214 (Second Series) entitled, 'Providing for placing electrical wires and conductors underground in the City and County of San Francisco,' which shall accomplish the purpose sought by the Committee and shall, at the same time, protect the City in all of its rights to Webster Street."

Opinion.

I will assume that the wires referred to in your communication are the property of the United Railroads and were installed and are being maintained by it. The right of the Company to maintain said wires arises out of its right and franchise, granted by the City and County, to operate an electric street railroad over and along Fillmore Street as a necessary incident and corollary thereto. The right to furnish electric power to operate its cars was given when the franchise was granted and the United Railroads is properly exercising said right by transmitting power by means of wires suspended on poles. The municipality, however, has the right, under its police power, to direct that all such wires be placed under ground whenever it becomes necessary for the public safety or welfare. Even had the United Railroads a franchise, under the Constitution, the authorities of the City having control of the streets, have the power to change the position of electric light or power wires.

Under the Charter the Board of Supervisors has the power to regulate and control, for any and every purpose, the use of the streets, highways, public squares, thoroughfares, public places, alleys and sidewalks of the City and County (Sub. 2, Sec. 1, Chap. II, Art. II), and the Constitution and the Charter give the City and County power to make and enforce within its limits all local sanitary, police and other regulations not in conflict with general laws. (Const. Art. XI, Sec. 11, Charter, Sub. 1, Sec. 1, Chap. II, Art. II.)

The power of the municipality in reference hereto is to clearly set forth in the case of Merced Falls Gas etc. Co. vs. Turner, 2 Cal. App., page 720 et seq. That was an action for injunction restraining the Board of Trustees and Superintendent of Streets of Merced from enforcing a resolution of said Board ordering that electric light poles be changed to other positions in a certain street than those previously occupied. The Court held that, even though the Merced Falls Gas Co. was operating under franchise rights authorized by the Constitution of this State, the city of Merced has the right, under its police power, to change the position and location of the poles belonging to said company from one place to another in a certain street in Merced. The opinion of the court contains a full discussion of the powers of the city over the streets thereof and cites many authorities to sustain its conclusion.

The police power of the city to order a change in the position of poles and wires is not limited merely to a change of the position from one location to another in the same street, but includes the right to order such a change to be made from one street to another.

What is said above states my conclusions as to the right of the City and County, under its police power, to compel the removal of the wires in question. I gather from your communication, however, that the company is willing to move said wires without any legislative action on the part of your Honorable Board and your inquiry is confined to the question as to what rights the City would lose and the company gain in respect to Webster Street if such change were made.

As I have already shown, the company has the right to furnish or have furnished to it, electric power to operate its railroad on Fillmore Street, and that right cannot be taken away from it. Therefore, the company, possessing present rights on Fillmore

Street to maintain said wires, it would have the same right on Webster Street. In other words, a transfer or change of said wires could not be enforced (and the same result would flow from a voluntary change pursuant to request of the municipality) without a corresponding transfer of the right to maintain the wires.

It follows then that the United Railroads would have the right to maintain said wires in Webster Street and said right would be coincident with its franchise rights on Fillmore Street, both lapsing at the same time; subject, however, to such other and further regulations as the Board of Supervisors might adopt in the future to compel a change from Webster Street to some other street, but, as stated in the Merced case, "the city authorities would not be allowed to enforce regulations which are tantamount to a denial of the company's right to use the streets, or are arbitrary, capricious, unreasonable or prohibitory in their nature and effect."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Use of the Belt-Line Railroad for the Transportation of Passengers.

March 21, 1913.

Gentlemen: I am in receipt of Journal Resolution No. 617, as follows:

"Resolved, That the City Attorney be asked to furnish this Board of Supervisors an opinion as to the City's right to use the State Belt Railroad for the transportation of passengers; also, whether private lines have the right to operate on the tracks of the Belt Railroad for the transportation of passengers; also, whether the State of California has the right to operate a passenger railway over the Belt Railroad, and whether the Harbor Commissioners now have the right to grant to municipal or private lines the right to operate over such Belt Railroad; and if he find that the Harbor Commission have no such power, that he shall submit to the Board of Supervisors a bill to be submitted to the State Legislature which shall empower the Harbor Commission to grant such right to be exercised until December 31, 1915."

Opinion.

The authority conferred upon the Board of State Harbor Commissioners to construct the so-called "Belt-line Railroad" is contained in Section 2524 of the Political Code, which reads as follows:

"Said Board may, when the wants of commerce require, lay down such number of tracks along and on any portion of said water-front as may be necessary to meet such wants, and permit the use thereof to any corporation or association, or any person or persons, under such rules, regulations and at such compensation as said Board may determine; and make such agreements with persons, firms and corporations owning spur or industry tracks relative to the use by the State of such tracks as said Board may determine to be necessary; provided that no special privileges shall be awarded to any corporation, association, person or persons. * * *"

The purpose and use to which said tracks are to be devoted is fully set forth in the above language and it appears therefrom that such use and purpose is to be confined solely and exclusively to the wants of commerce. No power is granted to the Board of State Harbor Commissioners to devote said Belt-line Railroad to the transportation of passengers and it would be necessary, in order to permit the transportation of passengers thereon, to amend said section.

I have taken the matter of a possible amendment to said Section 2524 up with Honorable J. J. Dwyer, president of the State Board of Harbor Commissioners, and was informed by him that said Board would oppose any bill having for its purpose the amending of said section authorizing or directing the State Board of Harbor Commissioners to devote said Belt-line Railroad to the transportation of passengers. He informed me that the wants of commerce on the water front were so great that the running of passenger trains or cars on said railroad would seriously interfere therewith. He stated, however, that the Board would be in favor of an elevated railroad to be constructed along the water front from the Ferry building to the Exposition grounds.

In view of the above I would respectfully suggest that this matter be referred to the proper Committee of your Honorable Board for consideration and determination of the suggestion of Mr. Dwyer in regard to the elevated railroad along the water

front, it not being advisable, in my opinion, to transmit to your Honorable Board a bill empowering the State Board of Harbor Commissioners to permit the use of the Belt-line Railroad for the transportation of passengers in advance of the consideration of this matter by your Committee.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Contract Offered by Remington Typewriter Company.

March 24, 1913.

Gentlemen: I am in receipt of your communication requesting my opinion on a document purporting to be a contract offered your Board by the Remington Typewriter Company, and on the powers of your Board thereunder.

Opinion.

An examination of this so-called contract will show that the Board of Education has no liability under it, that is, no liability would be created until after the expiration of the three years of the life of the agreement.

In the second place, since the offer of the typewriter company is a purely gratuitous one, no agreement is binding on them until the expiration of the term thereof, nor is there any redress for either party by a violation of the agreement.

There is no subject matter for a valid contract in the proposition submitted your Board and should it be the policy of your Board to accept any such gratuitous offer, you are advised that the acceptance should be made by a resolution of your Board to that effect.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Education.

Right of Position in Fire Department at the Time of Reorganization of Said Department When the Charter Was Adopted.

March 24, 1913.

Gentlemen: I am in receipt of your request for an opinion under date of March 17th as follows:

"When the Charter went into effect in January, 1900, the Fire Commission, in conformity with Section 1, Chapter II, Article IX of the Charter, reorganized the Fire Department and, in doing so, appointed Martin Spellman as a hoseman. Said Spellman held the rank of hoseman in the Fire Department up to February 2, 1911, when the Fire Commission gave him the rank of lieutenant. We respectfully request that you advise us as to whether the Fire Commission's act in making said Spellman a lieutenant on February 2, 1911, without civil service examination, is regular and legal.

"The reasons given by the Fire Commission for its action in the matter are contained in a resolution, a copy of which is hereto attached."

The reasons given by the Fire Commission referred to in said request are set forth in the resolution of the said Fire Commission, a copy of which was enclosed and which said resolution reads as follows:

"It appearing to the Board of Fire Commissioners of the City and County of San Francisco, State of California, that when the Fire Department of said city and county and state was reorganized in 1900, pursuant to the directions for such reorganization contained in Section 1 of Chapter II of Article IX of the Charter of the City and County of San Francisco, Martin Spellman held in said department the rank of fireman of Chemical Engine Company No. 2;

"That the Board of Fire Commissioners, in carrying out such reorganization, ruled that the rank of lieutenant in the reorganized department corresponded to the rank of fireman of a chemical company as organized prior to said 1900;

"That all members of said department save said Martin Spellman, holding therein at the time of the reorganization thereof the same rank as said Martin Spellman, were appointed to the rank of lieutenant in said reorganized department;

"That said Martin Spellman, at the time of said reorganization, was likewise entitled to be appointed to the rank of lieutenant in said reorganized department, or to be appointed to the first vacancy occurring in said rank after said reorganization;

"That in fact, said Martin Spellman was at the time of said reorganization, appointed a hoseman in said department, instead of a lieutenant therein;

"That said Martin Spellman protested to the then Chief Engineer of said department, within two weeks after his appointment as hoseman therein, that he was entitled to and should receive the rank of lieutenant in said department, and kept continuously, until February 2, 1911, protesting to the Board of Fire Commissioners against his appointment as said hoseman, and contending, up to said date, before said Board, for his right to be appointed a lieutenant in said department;

"That on January 26, 1911, said Martin Spellman filed his petition with said Board to be appointed to the rank of lieutenant in said department, claiming then, as he had always theretofore claimed, that said rank, to-wit, that of lieutenant, and not that of hoseman, was the rank in said department to which he was originally entitled;

"That the allegations of said petition are true;

"That City Attorney Long, who was consulted about the case of said Martin Spellman, advised Mr. Dillon, then president of said Board of Fire Commissioners, that said Martin Spellman's contention was correct, and that if said Martin Spellman was given the rank of lieutenant in said department, his appointment thereto would be sustained against legal attack;

"That said Board, on February 2, 1911, granted said petition of said Martin Spellman and gave him the rank of lieutenant in said department, which rank in said department he has ever since held and the duties of which rank he has ever since discharged;

"Now, therefore, be it Resolved, That said action of said Board, of February 2, 1911, giving to said Martin Spellman the rank of lieutenant in said department, be and the same is hereby reaffirmed;

"Be it further Resolved, That in view of the foregoing facts, and to avoid future question as to the rank of said Martin Spellman in said Fire Department, the said Martin Spellman

be and he is hereby appointed to the rank of lieutenant in said Fire Department, in accordance with his standing therein on January 8, 1900, and the provisions of Section 1, Chapter II, Article IX of the Charter of the City and County of San Francisco, State of California."

Section 1, Chapter II, Article IX of the Charter reads as follows:

"The Board of Fire Commissioners shall immediately after their appointment and qualification proceed to reorganize the Fire Department in conformity with the provisions of this Charter. In so doing the Board shall make its appointments of officers and members from the persons constituting the force in the service of the Fire Department at the time this Charter goes into effect. Such officers and members shall not be required to pass any civil service examination. All future appointments and promotions shall be made subject to the provisions of Article XIII of this Charter. * * *"

Basing my opinion on the facts as recited in the resolution of the Fire Commission, I am of the opinion that at the time the Charter went into effect Martin Spellman was entitled to be appointed to the position of Lieutenant in the Fire Department, inasmuch as the above language "the Board shall make its appointments of officers and members from the persons constituting the force in the service of the Fire Department at the time this Charter goes into effect," certainly contemplated that the old fire force should be taken over as far as possible in the new Department, and that holders of positions in the old Department should be given corresponding positions in the new Department, so far as in the reorganization new places were created corresponding to the old ones. The resolution of the Board of Fire Commissioners recites that the position held by Mr. Spellman prior to the adoption of the Charter, to-wit, that of fireman of a chemical company, corresponded to the rank of lieutenant in the reorganized Department and that all members of said Department save said Spellman, holding therein at the time of the reorganization thereof the same rank as said Martin Spellman, were appointed to the rank of lieutenant in such reorganized Department.

On April 8, 1910, I advised the Board of Fire Commissioners, upon the facts which were then before me in this same case, that owing to the delay in making application for appointment as lieutenant, which delay appeared to have been for ten years, that

his application was undoubtedly barred by laches. However, the only facts before me at that time were those referred to in said opinion, whereas the resolution of the Board of Fire Commissioners accompanying your present request for an opinion recites "that in fact said Martin Spellman was at the time of said reorganization, appointed a hoseman in said Department instead of a lieutenant therein. That said Martin Spellman protested to the then Chief Engineer of the said Department, within two weeks after his appointment as hoseman therein, that he was entitled to and should receive the rank of lieutenant in said Department, and kept continuously, until February 2, 1911, protesting to the Board of Fire Commissioners against his appointment as such hoseman, and contending up to said date, before said Board, for his right to be appointed a lieutenant in said Department."

You state in your request that you wish me to advise you "as to whether the Fire Commission's act in making said Spellman a lieutenant on February 2, 1911, without a civil service examination, is regular and legal."

I understand that you wish advice as to the right of the Commission to so assign said Spellman to the position of lieutenant which corresponded to that which he held prior to the adoption of the Charter and that your inquiry is based, not on the question of possible laches, but on the right of a Commission to take such action after the first Commission under the Charter had, in its reorganization of the Department, assigned Spellman to a different and lower position, and that your inquiry goes primarily into the question of whether under those conditions a subsequent Commission could assign Spellman to the position of lieutenant without Civil Service examination. In my opinion, based on the facts recited in the resolution of the Board of Fire Commissioners, and without any consideration of the question of possible laches, the first Commission acted contrary to the direct mandate of the Charter.

You are therefore advised, in accordance with the views hereinabove expressed, that the Fire Commission's act in making said Spellman a lieutenant on February 2, 1911, was regular and legal.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Petition of Joseph E. Finn For Allowance of Credit For Service in the Fire Department.

March 25, 1913.

Gentlemen: I am in receipt of your communication concerning the petition of Joseph E. Finn. Your Board requests that I furnish it with an opinion as to its powers to grant the petition of Finn, assuming that the facts set forth in the petition are true. The petition is as follows:

"I hereby respectfully petition your Honorable Board to cause the records of the San Francisco Fire Department to be changed so as to allow me credit for service therein since January 5, 1892, instead of from December 23, 1893, as now shown by said records, and in support of this petition I respectfully represent as follows:

"That on January 5, 1892, I was assigned to duty in this department as a machinist at the Corporation Yard, and continued to serve in said position until December 23, 1893, when I was appointed as engineer of a fire engine company. That during the time I served as said machinist I was required to perform active fire service on numerous occasions, such as relieving the regular engineers of companies when absent from duty and being subject to calls to take charge of relief engines at third and greater alarms of fire, and in this manner performed actual fire duty during the period of my original assignment and the time of my appointment as an engineer, and without any extra compensation for any additional services thus performed aside from the compensation I received for machinist's work.

"In view of these facts it is my opinion that I am entitled to some recognition for the actual fire service I performed during the one year and eleven months aforesaid, and I therefore request that your Honorable Board grant this petition and allow me credit of service for the time I was connected with the Department Corporation Yard.

"In further support of the facts as herein stated and as a verification thereof I submit the following:

"We, the undersigned members of the San Francisco Fire Department and employees of the corporation yard during the time mentioned in the foregoing petition do hereby state that we

have read the contents of said petition of Joseph Finn and the facts therein stated by him are true and correct.

(Signed) J. W. REILLY, Supt. of Engines,
JOHN KENNY, Asst. Supt. of Engines,
H. H. GORTER, Foreman Machinist."

On September 21, 1900, City Attorney Lane rendered an opinion to the Board of Fire Commissioners as to the status of those employees of the Fire Department who, prior to the adoption of the Charter, occupied the same position in the Fire Department as Finn occupied from the 5th day of January, 1892, until the 23rd day of December, 1893. Mr. Lane held that "all those persons who were subject at any time to call in case of fire and all those who were under the orders of the Chief Engineer were to be regarded as constituting part of the force in the service of the Department and therefore entitled to enjoy the right either to retain their positions or to be held on a waiting list under the reorganization scheme provided for." (See Opinions of the City Attorney 1899-1902, page 355.)

In conformity with this opinion those employees of the Department who occupied the same position that Finn occupied from January 5, 1892, to December 23, 1893, were retained in the Department upon its reorganization without Civil Service examination, in accordance with the provisions of the Charter. Such being the case, if Finn had continued in the same employment as he was engaged in from the 5th day of January, 1892, to the 23rd day of December, 1893, up to and including the reorganization of the Fire Department, he would have been retained as a part of the force of the reorganized Department.

To state the proposition in another way, if the Charter had gone into effect at any time between the 5th day of January, 1892, and December 23, 1893, Finn would have been retained as part of the force of the reorganized Department. At all times, therefore, from the 5th day of January, 1892, up to and including the time of the reorganization of the Department, Finn, under the provisions of the Charter providing for the reorganization of the Department would have been entitled to be retained as part of the force of the Department.

Finn's petition prays that he be allowed credit for service for the period between the 5th day of January, 1892, to the 23rd day

of December, 1893. It is not stated in the petition or in the communication from your Board the object or purpose sought by this allowance of credit. I assume that what you desire to be advised upon is as to what date Finn is entitled to be recognized as a member of the Fire Department. In view of the opinion of City Attorney Lane, it must be taken that Finn became a member of the Fire Department on the 5th day of January, 1892, and at all times since the 5th day of January, 1892, Finn has constituted a part of the force of the Fire Department.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Leaves of Absence in Municipal Departments.

March 26, 1913.

Dear Sir: I am in receipt of your communication under date of March 24, asking me "as to the validity or legality of the proposed ordinance which has been submitted to you, proposing that the adjustment of leaves of absence and vacations for deputies, clerks and employees in municipal departments or offices, be arranged by the Committee of Efficiency through its Advisory Commission, and providing that the time of such leaves of absence or vacations, so granted under permission of the Committee of Efficiency, shall be deemed time in the actual service of the City and County by such deputies, clerks or employees."

Opinion.

On May 4, 1900, City Attorney Lane, speaking of the powers and duties of the Board of Fire Commissioners, advised the Board of Fire Commissioners, that under Section 8, Chapter I, Article IX of the Charter

"The Board is directed to 'make such rules and regulations as may be necessary to secure discipline and efficiency in the Department.'

"If the Board determines that to allow a certain leave of absence is essential to the maintenance of the efficiency of the Department, it has, in my opinion, the power to grant such leave. The power

to make such rules and regulations seems ample to cover this question." (Opinions of City Attorney Lane, page 262.)

This gives the power to those departments which are governed by similar provisions in the Charter to grant vacations in the interest of efficiency in such departments. Where no provision is made in the Charter for the making of such rules in the interest of discipline and efficiency in other departments, the Board of Supervisors has power to declare, by ordinance, the manner and method of allowing vacations to City employees. This authority is to be found in Sub. 1, Sec. 1, Chap. II, Art. II, which reads as follows:

"The Board of Supervisors shall have power: First: To maintain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations."

It is well recognized by all employers that the efficiency of employees is increased by the allowance of reasonable vacations. This can be accomplished by the adoption of an ordinance which shall include regulations declaring how such vacations shall be allowed and that such vacation periods shall, within the limits of the regulations, be considered actual time in the service of the City and County.

In the case of Wood et al. vs. City of Haverhill et al., reported in 55 N. E. Rep., page 381, the Supreme Court of Massachusetts said:

"A reasonable vacation, without thereby subjecting the City to additional expense, might well have been regarded by the city council as calculated to promote the health and efficiency of the police force, and, if so, we think that it was within the power of the city council to adopt the order which it did. It would come fairly within the authority conferred on cities and towns to make such reasonable provisions as they should deem conducive to their welfare, 'for directing and managing the prudential affairs, preserving the peace and good order and maintaining the internal police thereof. It would also come within the power conferred on the Mayor and aldermen of Haverhill to make such regulations for the government of the Police Department, not inconsistent with law, as they deem proper."

You are therefore advised that in my opinion the proposed

ordinance, which has been submitted to me, is valid and that leaves of absence or vacations granted in accordance with the provisions of this ordinance can be deemed time in the actual service of the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Mayor.

Advertising in Municipal Railway Cars.

March 27, 1913.

Gentlemen: I am in receipt of your communication of the 20th inst., as follows:

"The Public Utilities Committee of the Board of Supervisors has pending, proposals for leasing the advertising privileges in the Municipal Railway cars. The Committee desires to be advised if it is legally possible to make a contract for this lease for a longer period than one year.

"Will you please advise by next meeting of the Public Utilities Committee, which will be on Wednesday, March 26th."

Opinion.

The power of a governing board of a municipality to enter into a contract, which is to extend beyond the fiscal year or beyond the term of office of the authorities which enter into it, was considered by the Supreme Court in the case of McBean vs. Fresno, 112 Cal., pages 159 et seq. That was a case involving the validity of a contract by which McBean agreed to take care and dispose of the sewage of the City of Fresno for the period of five years.

The difference between the above contract and the proposed lease of the advertising privileges in the municipal cars is that under the Fresno contract the City agreed to pay a certain amount, while the lease contemplates the payment of money to this City, but such difference is immaterial, as the decision in that case may be taken as controlling in the matter under consideration.

The primary question determined by the Court was that the contract was valid and binding on the City of Fresno, disposing of the objection advanced that it was illegal and void on the ground that the contract operated as a surrender or suspension of the legislative powers of the trustees of the City in the following language:

"Upon the second proposition, namely, whether or not the contract operates as a surrender or suspension of the legislative powers of the trustees of the City, it is to be observed that there is in this State no inhibition against the making of a contract by a municipal board which shall extend for more than one year, or even beyond the term of office of the board which makes it. If the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law such as exists in some other States declaring void any contract upon the part of a municipality which is to extend beyond the current fiscal year, or beyond the term of office of the authorities which enter into it. But even in the absence of such provisions, courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time: 1. Because such contracts in their nature tend to create a monopoly in favor of the other party thereto for supplying the City with the article contracted for; 2. Because they may involve an undue restraint upon the legislative powers of the successors of the board, and prevent those successors from availing themselves of a change in the times, of opposition, of reduced rates, or of other causes operating legitimately to decrease the price of the commodity, of which decrease in price the City by reason of its contract cannot avail itself.

"There is thus by law and reason a well-defined limit set to such contracts. In the absence of any other objection to them, they will not be upheld without a clear showing of a reasonable necessity for their execution. But if, on the other hand, it be made to appear that at the time of its execution the contract was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality at the time it was entered into, then such a contract will not be construed as an unreasonable restraint upon the powers of succeeding boards."

Adopting the reasoning of the Court in the McBean case, it is my opinion that the proposed lease will be upheld unless it can

be affirmatively shown that the contract is not fair or just or reasonable and not prompted by the necessities of the occasion, or not in its nature advantageous to this City and County. It might very well be that this City and County may obtain a higher bid for the advertising privileges mentioned under a lease for a longer period than one year. The determination of that matter is confided to the judgment of your Honorable Board and your decision, should it be in favor of a lease for a longer period than one year, would be held to be proper, for, as the Court said in the case of Riehl vs. San Jose, 101 Cal. 442, "the members of the common council acted as honest men and exercised their honest discretion for the best interests of the City."

You are therefore advised that it is legally possible to make a contract for the lease of such privileges for a longer period than one year.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Right of Lighting Companies to Furnish Service Within One Hundred Feet of Established Mains or Wires.

March 28, 1913.

Sir: You have requested my opinion as to the effect of the provisions of Section 629 of the Civil Code upon the right of lighting companies to extend their mains or wires within one hundred feet of the point at which they may have been lawfully established.

Opinion.

Section 629 of the Civil Code reads as follows:

"Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any gas or steam main, or direct or primary wire of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas, electricity, steam or heat as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas, electricity, steam or

heat required, it must pay to the applicant the sum of fifty dollars as liquidated damages and five dollars per day, as liquidated damages for every day such refusal or neglect continues thereafter."

In the case of Ex parte Russell, 163 Cal. 668, it was held by the Supreme Court of this State that the effect of the amendment of October 10, 1911, to Section 19 of Article XI of the Constitution was to limit the right theretofore acquired by public service corporations for the use of the streets of municipalities to those portions of the streets in which their pipes, mains or wires existed prior to such amendment. It was further held that to the extent that the streets of cities had been occupied prior to the amendment of the Constitution, the companies so occupying the same had acquired a vested right therein which could not be impaired or defeated by the amendment to the Constitution.

To the extent, therefore, that the streets were actually used by lighting companies prior to October 10, 1911, such companies obtained a right which is still in existence. The right so acquired included not only the privilege of maintaining the mains or wires as laid, but also the privilege of furnishing service to customers therefrom. Under Section 629 of the Civil Code, above quoted, it was obligatory upon such corporations to furnish service to any owner or occupant of any building or premises distant not more than one hundred feet from any such main or wire. Refusal to comply with the obligation imposed by the above section subjected the corporation to the penalty prescribed in the above section. This obligation carried with it a corresponding right to install such additional pipes or wires as might be necessary to comply therewith.

I am of the opinion that the above obligation and right still exist as to all mains and direct or primary wires which were installed prior to the adoption of the Constitutional amendment. In other words, Section 629 of the Civil Code has not been repealed by the amendment to the Constitution so far as it relates to mains or direct or primary wires installed prior thereto. Whatever additional installation may be necessary to perform this obligation cannot be regarded as an extension of the system contrary to the amended Constitutional provision, but rather as an incident to the right acquired and existing prior to the amendment.

A more difficult question is presented in those cases where it is sought to make a second extension within a distance of 100 feet of the end of the first extension. The right to make such second

extension will depend upon whether or not the installation necessitated by the first extension can be regarded as an extension of a main or direct or primary wire as designated in Section 629 of the Civil Code. The purpose of that section is to provide for service connections only and not to enable lighting corporations to extend their distributing systems indefinitely, 100 feet at a time, without franchise rights so to do. If the section could be so construed, I am of the opinion that its provisions would then be in conflict with the amendment of the Constitution above referred to, the effect of which is to render all extensions of public service systems subject to such conditions as municipalities may prescribe.

The main distributing systems of lighting companies cannot now be extended except upon permission of the Board of Supervisors. The exception to this rule is the right to make service connections within 100 feet of a lawfully established main or direct or primary wire. This latter right being for the installation of service connections only, it becomes the duty of your department to see that the main system is not extended, except under permission of the Board of Supervisors, under the pretext of making service connections. As I understand the matter, the duty of furnishing service within the 100-foot limit can be discharged by installation of service wires which do not come within the category of mains or direct or primary wires. That being the case, no right would exist under the above section of the Code to make a second extension from the first service connection.

You are therefore advised that lighting companies have the right to make service connections within a distance of 100 feet of any main or direct or primary wire as established prior to October 10, 1911; but that the exercise of such right should be so controlled as to limit the installation made thereunder to the purpose designated; and that, it being possible to make the first service connection without an extension of any main or direct or primary wire, no right to make a second extension is conferred by the section of the Code above referred to.

This opinion is limited to rights acquired under the Constitutional provision and has no reference to rights claimed under lawfully granted special franchises.

Respectfully,

PERCY V. LONG,
City Attorney.

Chief, Department of Electricity.

No Existing Obligation on Spring Valley Water Company to Extend Its Mains.

March 28, 1913.

Dear Sir: I have been requested by the Clerk of the Board of Supervisors to advise you as to whether or not there is any provision of law which obliges the Spring Valley Water Company to make extensions of its system to property owners requesting service who are within 100 feet of any of the mains of said company.

Opinion.

The 100-foot limit above referred to applies to lighting corporations and not to water corporations. (Civil Code, Section 629). The duty of water corporations to furnish service is covered by Section 549 of the Civil Code which reads as follows:

"All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The Board of Supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the State."

This latter section has recently been under consideration by the Court of Appeals for the First Appellate District in the case of Lukrawka vs. Spring Valley Water Company, 15 Cal. App. Dec. 793, decided December 11, 1912. In that case it was held by the Court of Appeals that "a water company committed by its Charter to the public service, is in duty bound to serve the whole public, and when necessary to such service the company's mains must be gradually extended so as to keep pace with the growth of the community which the company has undertaken to serve." It was further held, however, that "since the amendment of October 11, 1911, of Section 19 of Article XI of the Constitution, public service corporations have no longer any legal right to use the streets of a municipality which they did not occupy prior to such amendment, and such corporations may extend their service into new territory in and along the streets of a municipality only upon securing a franchise from the municipality for that purpose."

It was therefore held in that case that the Spring Valley Water Company could not now be compelled to extend its mains in San Francisco for the reason that it was not in possession of any franchise to occupy any streets of the City other than those in which its mains had been installed prior to October 11, 1911.

The plaintiff in the above case filed a petition for a rehearing of the case by the Supreme Court. That petition has been granted and the case is now pending in the Supreme Court on rehearing and probably will be upon the July calendar. Until and unless the Supreme Court shall modify the decision of the Court of Appeals, the law is established to the effect that the Spring Valley Water Company cannot be compelled to extend its mains beyond the points occupied by it on October 10, 1911, except upon the obtaining by that company of an additional franchise.

Respectfully,

PERCY V. LONG,

City Attorney.

Chairman, Water Service and Rates Committee, Board of Supervisors.

Resignation of Charles A. Wolff.

April 7, 1913.

Gentlemen: I am in receipt of your request for an opinion on the petition for reinstatement of Charles A. Wolff, an Experienced Clerk in the Tax Collector's office. The petition recites the following facts: Wolff was regularly appointed an Experienced Clerk in the Tax Collector's office in July, 1909. In June, 1910, he absented himself from his duties without leave and was requested by Mr. Low, then Chief Deputy Tax Collector, to render his resignation, undated, as an assurance that he would not again commit the same offense. Wolff claims that he complied with this request because he believed "that it was necessary for him to do so in order that he might be allowed to return to work."

On June 1, 1912, he again absented himself from his duties without leave and upon returning to the office, Mr. Low, then acting Tax Collector, informed him that his resignation had been accepted and the Civil Service Commission notified of the fact.

The petition further states that "The resignation was illegal and void from the fact that it was given upon request made by a

superior to an inferior and not tendered voluntarily by Mr. Wolff or with his free will and accord."

Opinion.

It is settled law that "a resignation obtained by coercion may be disaffirmed."

23 A. & E. Enc. of L. 421, 422;

People vs. Voorhis, 66 Hun. (N. Y.) 88;

See Long: Opinions 1908-1909, p. 157.

The recent case of State ex rel. Young vs. Ladeen, et al., 116 N. W. 486, held that "to constitute a complete and operative resignation of a public office there must be an intention to relinquish a part of the term, accompanied by the act of relinquishment."

The Court, in the course of its opinion said:

"A written resignation delivered to the board or officer authorized to receive it and to fill the vacancy created thereby would be prima facie evidence of an intention to relinquish the office, but it is not conclusive. A resignation obtained by coercion or fraud, if not void, is at least voidable, and may be repudiated. People ex rel. Goodwin vs. Voorhis, 66 Hun. (N. Y.) 88, 20 N. Y. Supp. 941. Coercion or duress exists where one is by the unlawful conduct of another induced to do or perform some act under circumstances which deprive him of the exercise of his free will. 7 Cyc. 270. * * * * he was intimidated and coerced into signing his resignation, and did so only to avoid what seemed to him impending harm."

The circumstances under which the petitioner was forced to give his undated resignation and under which his resignation was dated and accepted, may have been sufficient grounds for removal from office, but such circumstances cannot be the grounds for the forcing and accepting of a resignation.

This question was fully discussed in People ex rel. Goodwin vs. Martin, reported in 82 Hun. 1. The Court in that case said:

"In every tribunal before which the question as to the validity of this resignation has been brought, it has been found that such resignation was obtained by duress and fraudulently altered, and was of no effect—except by the Board of Police Commissioners; and they have sought to justify the wrong which they did in acting upon this resignation, obtained by duress and fraudulently altered

upon the ground that even if they had not acted upon this so-called resignation they would have removed the relator because of dereliction of duty. Upon this latter charge the relator has never been tried; and it is no defense, when it is established beyond question that the resignation of the relator was obtained by duress and fraudulently altered after he had been prevented from stating upon the resignation the facts in reference thereto, for the respondents to say that if he had not resigned they would have removed him anyhow."

You are therefore advised that the resignation of Wolff was in fact no resignation, and that he is entitled to reinstatement in his position in the Tax Collector's office until such time as charges may be filed and action taken thereon in accordance with Section 12 of Article XIII of the Charter as amended December 10, 1912, and later approved by the State Legislature.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Clement Street, West of Thirty-third Avenue.

April 7, 1913.

Gentlemen: I am in receipt of your communication of the 20th ult. as follows:

"It has been called to the attention of this Board that that portion of Clement Street West of Thirty-third Avenue is not an open public street.

"Will you kindly render an opinion to the Board on this subject so that if it is found not to be a public street necessary procedure be taken to make it such."

Opinion.

Clement Street, commencing from the easterly line of Thirty-third Avenue and running westerly to Forty-eighth Avenue was originally a part of Golden Gate Cemetery, now Lincoln Park. On June 9, 1892, a judgment of condemnation was given to the United States Government against the City and County of San Francisco for that parcel of ground which is now known as Fort Miley. The

land described under said condemnation suit did not include any portion of what is known as Clement Street and Clement Street as described above remained the property of the City and County of San Francisco. Under an agreement between the United States Government and the City and County of San Francisco Clement Street was to be extended from Thirty-third Avenue to Forty-eighth Avenue and Forty-eighth Avenue was to be extended from Clement Street to the northerly line of the United States Military Reservation. On July 18, 1894, the Board of Supervisors of the City and County of San Francisco passed Resolution No. 10,614 (Third Series), which resolution is as follows:

"Resolved, That Clement Street from Thirty-third Avenue to Forty-eighth Avenue and Forty-eighth Avenue from Clement Street to the northerly line of the United States Military Reservation be and are hereby declared open public streets."

In view of the foregoing you are advised that Clement Street West of Thirty-third Avenue to Forty-eighth Avenue is an open public street of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Shipment of Meats From Australia.

April 8, 1913.

Gentlemen: I am in receipt of your communication of the 7th inst., as follows:

"A shipment of Australian meat, consigned to J. Schweitzer & Co., was inspected and passed by the Bureau of Pure Food and Drugs, U. S. Department of Agriculture, on March 27th, and is held in the storage rooms of Schweitzer & Co., pending further orders from this office. The shipment has attached to every carcass a linen tag which reads as follows:

" 'This meat has been examined by me and by anti-mortem and post-mortem veterinary inspection; is found to be free from disease and suitable in every way for human consumption.

Henry Levy, Commonwealth Meat Inspector.'

"The meat inspectors signing these tags are registered as being acceptable to the Bureau of Pure Foods and Drugs, U. S. Department of Agriculture, who has charge of the inspection of meats from foreign countries into the United States.

"After the meat is inspected and passed by a representative of the Bureau of Animal Industry, acting at the request of the Bureau of Pure Foods and Drugs, both of which bureaus are under control of the United States Department of Agriculture, the owner is allowed to stamp such meat 'inspected under the Pure Food and Drug Act June 30, 1906' in accordance with the following provision:

" 'Food Inspection Decision 73, entitled, "Interstate transportation of imported meats and meat food products." Regulation 64 of the Regulations covering the meat Inspection of the U. S. Department of Agriculture (amendment No. 10 to B. A. I. Order 137), provides as follows: Imported meats and meat food products which have not been mixed, or compounded with, or added to domestic meats, may be transported by any common carrier from one State or Territory, or the District of Columbia, to any other State or Territory if the package containing them shall be marked "inspected under the Foods and Drugs Act June 30, 1906," and are so marked when received from transportation.

" 'It is allowed that packing cases, boxes, or other covering containing imported meats or meat food products in the original and true containers which have not been mixed, or compounded with, or added to domestic meats, may be marked with a legend "inspected under Foods and Drugs Act June 30, 1906" by the shipper.

" 'The interstate transportation under this legend of domestic meats and meat products or of imported meat and meat food products which have been mixed, or compounded with, or added to meat will subject both the shipper and the carrier to severe penalty.

Signed by the Bureau of Food and Drugs Inspection,

May 21, 1907.'

"At a meeting of the Sanitation Committee held on the 4th inst. it was regularly moved, seconded and carried that the following be referred to you for your opinion.

"That you inform this office if Ordinance 1265 (New Series)

permits of the sale in this City of Australian meat that has been inspected and passed under the Bureau of Pure Foods and Drugs, U. S. Department of Agriculture.

"Further, whether or not this Department should recognize the stamp of the Bureau of Pure Foods and Drugs, U. S. Department of Agriculture.

"In this connection I am sending copies of communications referring to this matter which have been received at this office."

Opinion.

Section 1 of Ordinance 1265 (New Series) entitled "Providing for the inspection of meat and meat food products offered for sale within the City and County of San Francisco; authorizing the Board of Health to adopt regulations governing such inspection, and penalties for the violation of this ordinance," provides, generally, that no person, firm or corporation shall expose or offer for sale or sell or otherwise dispose of or have in his possession within this City and County any meat of any cattle * * * which does not have upon it the meat inspection brand or other mark of identification of the Board of Health of the City and County of San Francisco or the meat inspection brand or other official mark of identification of Boards of Health of the State of California whose meat inspection standard is equal to and recognized by the San Francisco Board of Health or the meat inspection brand or other mark of identification of the United States Department of Agriculture.

Section 8 of said ordinance authorizes the Board of Health to adopt rules and regulations governing the inspection of meats and provides that the standard of meat inspection shall be that adopted by the United States Department of Agriculture.

You state in your communication that the shipment of meat from Australia has attached to every carcass a linen tag which states that the meat has been examined by Henry Levy, Commonwealth Meat Inspector, and by anti-mortem and post-mortem veterinary inspection; is found to be free from disease and suitable in every way for human consumption and that the meat inspector signing the tag is registered as being acceptable to the Bureau of Pure Foods and Drugs, U. S. Department of Agriculture.

It appears that immediately upon the arrival of the shipment of

meats from Australia the tags upon the same are examined by the Bureau of Pure Foods and Drugs and if the Inspector who signs the tag is one of those recognized by the Bureau of Pure Foods and Drugs and after the meat is inspected and passed by a representative of the Bureau of Animal Industry, acting at the request of the Bureau of Pure Foods and Drugs, and approved by said representative of the Bureau of Animal Industry, the entire shipment is released, or so much thereof as passed the said inspection.

As I understand it the inspection of the meat upon its arrival here is confined solely to determine whether or not the refrigeration has been in all respects proper and sufficient and to see whether or not the meat has deteriorated during transit. Upon the release of said shipment the owner or consignee is allowed to stamp such meat "inspected under the Pure Food and Drug Act, June 30, 1906," in accordance with Food Inspection Decision 73, quoted in your communication above, which decision is contained in a circular issued by the Bureau of Food and Drugs Inspection, May 21, 1907.

It appears then that under the terms of Section 1 of Ordinance No. 1265 (New Series) any meat which has upon it the inspection brand or other mark of identification of the United States Department of Agriculture may be offered for sale in San Francisco. Any meat inspection brand or other mark of identification of the United States Department of Agriculture or any bureau thereof attached to any meat, permits of the sale of said meat in the City and County of San Francisco. This brand or mark may be affixed by the Bureau of Pure Foods and Drugs acting for and by the authority of the United States Department of Agriculture, or by the owner of said meat under Food Inspection Decision No. 73, quoted in your communication above.

Under Section 8 of the ordinance the standard of meat inspection to be observed by the Board of Health of this City and County is that standard adopted by the United States Department of Agriculture and it appears to me that any meat coming from a foreign country to San Francisco, if inspected by any of the bureaus of the United States Department of Agriculture and passed by that bureau and marked or branded for identification either by said Department or any of its bureaus, or by the owner, as provided above, may be offered for sale in this City and County.

There is, however, power and authority conferred upon the Board of Health of the City and County of San Francisco by Section 7 of Ordinance 1265 (New Series) to reinspect and condemn at any and all times all meats or meat food products offered for sale in the City and County of San Francisco. Under that power the Board of Health may reinspect any and all meat shipments from foreign countries to ascertain whether or not said meat when actually offered for sale is suitable for human consumption. That power has been upheld by the United States Supreme Court in the case of the Hannibal and St. Joseph R. R. Co. vs. Hunes, in 24 Law ed., page 527, wherein the Court uses the following language:

"While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

You are therefore advised that Ordinance 1265 (New Series) permits of the sale in this City of Australian meat that has been inspected and passed under the Bureau of Pure Foods and Drugs, U. S. Department of Agriculture.

Your second question has been answered in the answer given to the first.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Legality of Collecting Poll Tax From Seamen.

April 9, 1913.

Sir: I am in receipt of your communication relative to the question as to whether a poll tax on seamen may be collected from their employers under Sections 3840, 3849, and 3850 of the Political Code.

Neither the powers nor the decision in the case of McAsey vs. Steamer Costa Rica are obtainable, but Section 4536, page 874 of Volume 6 of Federal Statutes, Annotated, the text of which is as follows: "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of any attachment, incumbrance, or arrestment thereon; and no assignment or sale of wages, or of salvage, made prior to the accruing thereof, shall bind the party making the same, except such advance securities as are authorized by this Title," would seem to preclude any such collection from the employers of seamen.

It is therefore my opinion that you are unable to collect poll tax from them in the way suggested by your letter.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Premium on Insurance of Public Library.

April 14, 1913.

Sir: I am in receipt of your request for an opinion as follows:

"I am in receipt of two demands for $437.00 each from the Board of Trustees of the Public Library, in payment of fire insurance.

"Will be pleased to have you advise me if under the Charter provisions any Department of the City Government has the privilege of insuring its property against fire."

Opinion.

I will confine myself in this opinion to a determination of the powers of the Board of Trustees of the Public Library and Read-

ing Rooms to insure the property confided to their care under Article VII, Chapter VII of the Charter, which power, of course, includes that of the payment of the premium on said insurance.

Section 2 of Chapter VII provides, generally, that

"The Board of Supervisors shall, for the purpose of maintaining such Library and Reading Rooms and such branches thereof as the Board of Library Trustees may from time to time establish * * * annually levy a tax on all property in the City and County not exempt from taxation * * *. The proceeds of said tax shall be credited to the Library Fund."

Section 6 of Chapter VII provides:

"The Board, by a majority vote of all its members to be recorded in its minutes with the ayes and noes, shall have power:

"1. To make and enforce all rules, regulations and by-laws necessary for the administration, government and protection of the Library and Reading Rooms and branches thereof, and all property belonging thereto, or that may be loaned thereto.

* * * * *

"5. To order the drawing and payment upon vouchers, certified by the President and Secretary, of money from the Library Fund for any liability or authorized expenditure."

While the power to insure the property confided to their care is not, in so many words, granted to the Library Trustees, yet such power is to be implied from the preceding excerpts from the Charter. The Board of Library Trustees is, as is shown above, empowered to make and enforce all rules, regulations and by-laws necessary for the protection of the Library and Reading Rooms and branches thereof and the grant of such power includes that of insuring the said property against fire to protect the same from destruction.

In the case of French vs. Mayor, etc., of Millville, 49 Atl. 465, the Court said:

"The city charter empowers the city to erect and maintain a city hall, school houses and such other public buildings as may be necessary in the city. As incidental to the power thus granted the city acquired the right to contract for indemnity against loss by the burning of such buildings."

Applying the principles laid down in said case it can be said that the Charter of the City and County of San Francisco empowers the City to erect and maintain a public library and reading rooms, and, as incidental to the power thus granted, this City and County acquired the right to contract for indemnity against loss by the burning of said public library and reading rooms.

It is my opinion that the action of said Trustees in insuring the property of the library and the branches thereof is one of the elements of protection in the same way as any other expenditure for the caring and protection of said property. It appears to me that the Library Trustees, in insuring the said property, are carrying into execution one of the duties imposed upon them by the Charter, viz., to protect said property.

Under Subdivision 5 of Section 6, quoted above, the Library Trustees have the power to order the drawing and payment from the Library Fund for any liability or authorized expenditure and payments of premiums on insurance covering the property of the Public Library is one of the authorized expenditures for which the Library Trustees have the power to order the payment of from the Library Fund.

You are therefore advised that the demands referred to in your communication are legal demands against the Library Fund.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Amendment of Ordinance No. 1610 (New Series).

April 15, 1913.

Gentlemen: I am in receipt of your communication under date of April 7th as follows:

"The Police Committee have been asked by the baseball people to amend Ordinance No. 1610(New Series), by inserting the words 'along or upon any public street or highway'—as shown on the copy of the ordinance which we are enclosing, and which has already gone to print, but is held up by the committee pending final passage.

"The baseball people claim that the wording of the present ordinance is ambiguous, and we would greatly appreciate an opinion from you on this point.

"Does the present ordinance affect property within the property lines of adjoining blocks of a hospital, or, does it only affect noises on the streets within a block of a hospital?"

Opinion.

Ordinance No. 1610 (New Series) was designed for the purpose of prohibiting the blowing of any automobile horn or whistle or the making of any loud, unusual or unnecessary noises upon any street in the immediate vicinity of any private or public hospital. It is to be conceded that the language used in the ordinance does not, in so many words, restrict the operation of it to the prevention of noises incident to street traffic, but Section 2 of said ordinance, making it the duty of the Board of Public Works to erect the signs mentioned in said Section 2 upon the lamp-posts or other convenient places on the streets, plainly indicates that the scope of the ordinance does not extend further than to prohibit the noises incident to street traffic.

While it is my opinion that the ordinance is not ambiguous and cannot be construed to include noises other than those incident to street traffic, at the same time, in order to make clearer the scope of the ordinance, it might be well to amend the same in the manner suggested in your communication.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Comerford Street, So Called, in Horner's Addition, Block No. 94.

April 16, 1913.

Dear Sir: I am in receipt of your communication of the 9th inst. with reference to a strip of land 18 feet in width extending from Sanchez to Church Street in Horner's Addition, Block No. 94, and sometimes referred to as Comerford Street.

I find that the ownership of this strip was litigated in the case

of Meyers vs. Kenyon, reported in 7 Cal. App. Rep. at page 112. The Court in its decision goes into the early history of the title thereto and it appears that prior to the year 1883 one Comerford was the owner of Horner's Addition, Block No. 94, in the City and County of San Francisco, bounded by Duncan and Twenty-seventh, Church and Sanchez Streets. He subdivided the land into blocks fronting on Duncan and Twenty-seventh Streets 105 feet deep, which left a strip of land running through the block from Church to Sanchez Street 18 feet wide, cutting the block in the center. He built houses on the block, the back fences of the lots being on the line of the alleyway with gates opening thereon, and afterwards sold the lots with reference to this alleyway and stated to the purchasers of the land that the alleyway would be convenient for the owners.

The alleyway after being so opened, laid out and platted, was at all times used and had been, up to the time of the rendition of said decision, been used continuously by the plaintiff in the action and by all of the other residents of the block as an open alleyway, without let or hindrance, and with no objection from Comerford during his lifetime.

The Court stated, as the law covering the case, that:

"The owner of the block of land having subdivided it into fifty lots, leaving an alleyway through the center, twenty-five lots on each side of it, and having sold the lots with reference to the map and alleyway, and received the money therefor from the purchasers of the lots, would be estopped from afterward asserting title to the alleyway and closing it up as a right of way. Having left it open and upon the map while selling the lots, and receiving the money, he must continue to leave it open afterward. Common honesty would require of such owner that he should not deceive or mislead any purchaser or sell him a lot under false pretenses. If, after the lots were sold, the owner could change his mind and close the ends of the alley, and use it as a stock corral, the owners of the lots would find their back gates opening into the corral. The law will compel the owner to keep the alleyway open for the use of the owners of the lots in such case. It must follow that all subsequent purchasers would purchase with notice. One cannot purchase the land covered by such alleyway, with a line of houses on each side of it, and gates opening into it, it being in continual use every day, without opening his eyes and looking. In such case he cannot claim

to be an innocent purchaser. He would get the title in fee to the land, but subject to the burden imposed upon it by the former owner. It needs no citation of authorities to sustain the principles here stated."

The Court decided that Kenyon owned the portion of the strip involved, and therefore, it being in private ownership, it is not a public street.

The Charter provides that no street may be dedicated which is less than 40 feet in width or which is within 200 feet of any parallel street. Therefore, said strip of land, 18 feet in width and within 105 feet of the streets running parallel with it, can never be made a public street, even if the owner thereof offered the same for dedication.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Proposed Southern Pacific Franchises and Closing of Portion of Fourth Street.

April 17, 1913.

Gentlemen: I am in receipt of your communication of the 9th inst. enclosing two applications of the Southern Pacific Company, one for a franchise for track lay-out, as described therein, and the other for the closing of Fourth Street between Townsend and Berry Streets, and also an offer of said Southern Pacific Company to dedicate to the City and County of San Francisco for street purposes, in lieu of said portion of Fourth Street, a right of way 187½ feet southwesterly from the southwesterly line of Fourth Street and parallel therewith, between Townsend and Berry Streets and across the property owned by the Southern Pacific Company.

I have examined the said petitions and also the draft of an ordinance providing for a grant of franchise to the Southern Pacific Company over and across certain streets, avenues, alleys, places and properties in the City and County of San Francisco, which proposed ordinance is in accordance with the petition filed by said company for the granting of said franchise. The

petition for the franchise is sufficient to confer jurisdiction upon your Honorable Board to consider said application and to grant or deny said franchise in the discretion of your Honorable Board, under the provisions of Subdivision 28 of Section 1 of Chapter II of Article II of the Charter.

I would suggest that Section 2 on page 4 of the draft of the proposed ordinance, if the same should be adopted by your Honorable Board, be changed or amended so as to provide that in the event of the raising or lowering of the present surface of the said streets, as the same now exists, that the tracks constructed under the ordinance be reconstructed so as to conform with such raising or lowering.

The petition filed by the Southern Pacific Company for the closing of Fourth Street between Townsend and Berry Streets is sufficient to confer jurisdiction upon your Honorable Board to consider and determine the question whether the public interest or convenience requires the closing of said portion of Fourth Street; the power to act upon said petition being contained in Chapter III, Article VI of the Charter of this City and County.

The matters of granting franchises and the closing of streets are matters within the jurisdiction of the Board of Supervisors, your Honorable Board being invested under the Charter with the power and the duty to hear and determine questions of this character, involving, as they do, matters of fact and questions of policy, which questions of fact I have no means of determining.

The Charter, as I have pointed out, having clothed your Honorable Board with the power, I can see no legal objections or difficulties to prevent the consideration by your Honorable Board of the petitions in this matter; the question of the advisability of granting said petitions, however, being, as I have said, matters within your discretion.

I have not attempted to pass upon the engineering features in connection with this matter as such questions should be referred to the City Engineer of this City and County, as I believe has been done in this case.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Proposed Extension of Market Street Not a Necessary Acquisition in the Twin Peaks Tunnel Assessment District Plan.

April 17, 1913.

Gentlemen: I am in receipt of your communication of April 10, 1913, in which the Lands and Tunnels Committee requests me to furnish an opinion on the following matter in connection with the construction of Twin Peaks Tunnel:

"If the Board of Supervisors should change the northeast portal of the Twin Peaks Tunnel to a point near Nineteenth and Douglass Streets, could the terminal be built from that point southwesterly to the San Miguel Ranch, and also extend Market Street from Seventeenth and Castro Streets to Nineteenth and Douglass Streets, under the one assessment provided for the construction of the tunnel; and also, if it could be legally construed that the extension of Market Street to this point could be deemed a necessary acquisition to the tunnel construction under the one assessment district."

Opinion.

Section 2 of Chapter VIII, Article VI, as amended at the recent Charter amendment election provides that:

"The Board of Supervisors are hereby empowered to authorize the acquisition, by purchase or condemnation, and to acquire by purchase, or to condemn and acquire, any and all land, or any easement or right of way therein, thereon, thereunder or thereover, and any property *necessary and convenient* for any purpose mentioned in Section 1 of this Chapter, and to levy the damages, costs and expenses thereof upon private property."

Section 1 of the same Chapter provides that:

"The Board of Supervisors are hereby empowered to authorize the construction of and construct any tunnel, * * * over any accepted or unaccepted open public street, avenue, lane, alley, place or court within the City and County, or any other land of the City and County, or in, on, under or over any land or water in which and where the City and County may then have an easement or right of way therefor, and to levy the damages, cost and expense upon private property."

The lands and easements which the Board of Supervisors are authorized to acquire under Section 2 of Chapter VIII are such

lands and easements as are *necessary and convenient* for the construction of a tunnel. The acquisition of such lands is made a part of the expense of the construction of a tunnel and must be necessary and or convenient *for that construction.* The word "convenient" is one of broad significance and not definitely defined by law. In the ordinary acceptance of the word it means suitable, appropriate, fit. However, property which is acquired under Section 2 must be convenient for the purpose mentioned in Section 1 of Chapter VIII, namely the construction of a tunnel. I am inclined to the opinion that lands and easements which are convenient for the construction of a tunnel are those lands and easements that are mentioned in Section 1. That is, Section 1 provides that a tunnel may be constructed in or under any accepted or unaccepted public street, avenue, lane, alley, place or court within the City and County or any other land within the City and County in which the City and County may then have a right or easement therefor, and convenient lands are those lands suitable or appropriate on or under which a tunnel may be constructed. In other words, the lands which the Board of Supervisors are authorized by Section 2 to acquire are such lands or easements under which the Board of Supervisors are authorized by Section 1 to construct a tunnel. It will further be noticed that in Section 2 it is provided that lands, or property which the Board of Supervisors deems necessary to take the place of such portion of the street or streets as may be used in the construction of the tunnel including its portals and approaches and to restore to the street surface travel thereon are declared to be necessary and convenient lands or property for the purposes mentioned in said Section 1.

By these provisions there is added to the lands in or under which by Section 1 a tunnel may be constructed, lands and property necessary to restore surface travel to the street which has been destroyed by the construction of a tunnel. The framers of Chapter VIII evidently deemed that it was necessary to specifically provide that such lands should be deemed necessary and convenient rather than to leave to legislative determination whether such lands are necessary and convenient for the reason that Section 2, which provides generally that the Board of Supervisors are empowered to authorize the acquisition of property necessary and convenient for any purpose mentioned in Section 1 of Chapter VIII, would not of itself include lands and property necessary to restore surface travel to the street.

I am advised that the proposed extension of Market Street is merely to bring Market Street to the portal of the tunnel. The necessity for the proposed improvement on Market Street does not rest upon the fact that it is necessary for the tunnel or convenient for the tunnel that Market Street be extended but upon the fact that it is advisable to extend Market Street to the portals of the tunnel.

The assessment districts for the tunnel are quite extensive. Considering the proposed improvement merely as an extension of Market Street, any assessment district in comparison with the assessment district for the tunnel would be very small. If there was included in the assessment for the tunnel construction an assessment for the cost and expense of extending Market Street, and that extension could not be said to be necessary or convenient for the construction of the tunnel, any aggrieved property owner could resist the assessment.

I am of the opinion that it would be extremely dangerous to include in the assessment for the construction of the Twin Peaks Tunnel the extension of Market Street as proposed, for the reason that it cannot be said that such extension is necessary or convenient for the *construction* of the tunnel.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Interpretation of Ordinance No. 324.

April 21, 1913.

Sir: I am in receipt of your communication with the following request:

"Will you please advise me officially, whether or not Tuesday, April 22nd, is a holiday, on which City printing cannot be published?"

Opinion.

On page 703 of the General Ordinances of the Board of Supervisors of the City and County of San Francisco will be found

Ordinance No. 324 adopted July 19, 1901, which provides as follows:

"Section 1. Every day on which a Primary Election is held within the City and County of San Francisco, and every day on which Municipal Elections are held under and in pursuance of the provisions of the Charter of the City and County of San Francisco, are hereby declared holidays within said City and County, in conformity with the provisions of an Act of the Legislature of the State of California, approved March 23, 1901, entitled 'An Act Authorizing Boards of Supervisors or other Governing Bodies of Municipalities to Declare Holidays'."

You are advised that the election to be held on April 22nd is not a primary election nor is it a municipal election within the provisions of Article XI, Chapter II of the Charter and is therefore not a holiday on which City printing cannot be published.

Respectfully,

PERCY V. LONG,

City Attorney.

Clerk of Board of Supervisors.

Claim for Damage to Automobile.

April 23, 1913.

Gentlemen: I am in receipt of your communication of the 19th inst., concerning a claim for damages resulting from a collision between the ambulance of the emergency hospital and an automobile of a citizen occurring near the intersection of Market and Eighth Streets. You desire to know if this claim is a valid one and if the City is responsible for the act of the ambulance driver.

Opinion.

In the discharge of its purely governmental functions, a municipal corporation, to which has been delegated a portion of the sovereign power of the State, is not liable for torts committed in the discharge of such duties or in the execution of such powers. This is a fundamental doctrine, which has been recognized and enunciated by the courts throughout the United States.

A municipal corporation, in the maintenance of hospitals, exercises discretionary governmental functions and is therefore not

answerable in a civil action for the negligence of its officers and agents in the discharge of the duties pertaining thereto.

You are therefore advised that said claim is not a valid claim against the City and County of San Francisco.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Protection of City Property on Bush Street Near Grant Avenue.

April 24, 1913.

Gentlemen: I am in receipt of your communication of the 22nd inst. enclosing copy of notice filed with your Honorable Board by the Macdonough Estate Company concerning building adjoining city property on Bush Street near Grant Avenue. Said notice was served upon the City by the Macdonough Estate Company, in accordance with the requirements of Section 832 of the Civil Code, notifying the City of the intention of said company to excavate on its property for the purpose of laying foundations.

Opinion.

The case of First National Bank vs. Villegra, reported in 92 Cal., page 96 et seq., explains the purpose of giving notices of this kind and the obligation of the person receiving same in respect to his property. The Court says on page 99:

"The purpose of the notice required was to give the adjacent land owner an opportunity to protect his property from possible damage if he so desired; if he did not so desire, or was willing to assume the risk brought about by the threatened excavation, then, if dire results to his property should follow, the liability for such results would lie at his own door. The purpose of the section, in its broadest scope, was to enable the excavator to relieve himself from liability, not to create liability in favor of himself upon the adjacent owner."

It appears to me that it is the duty of the City and County of San Francisco to take such steps as will be necessary in order to protect its property adjoining the property of the Macdonough Estate Company on Bush Street near Grant Avenue. If the property

of the City at said point is improved, your Honorable Board should properly support the improvements, so that no damage will be done by the excavations made by the Macdonough Estate Company. The steps necessary to be taken to that end are matters to be determined by your Honorable Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Repayment of Money Held by Treasurer Under Section 1184, Code of Civil Procedure.

May 5, 1913.

Sir: I am in receipt of your communication requesting my opinion as to your power to pay out amounts withheld from contractors as temporary deposits held by you in accordance with the provisions of Section 1184 of the Code of Civil Procedure in cases where suit has been brought and judgment secured.

In reply thereto I would advise that you are empowered to pay out these deposits only upon receiving a certified copy of the judgment, with an affidavit attached thereto stating that the time for appeal in such action or actions has expired.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Change in Franchise—Proposed Bridge Over Islais Creek at Kentucky.

May 6, 1913.

Gentlemen: I am in receipt of your communication of the 2nd inst., enclosing application of the Atchison, Topeka and Santa Fe Railway Company and the Southern Pacific Company for change of their franchise privilege to meet the requirements of the proposed bridge over Islais Creek at Kentucky Street, with your request that I advise the Public Utilities Committee as to the legal phases involved and the procedure by which the

said petition can be granted should it be approved as to its engineering features by the City Engineer.

Opinion.

Under Subdivision 28 of Section 1 of Chapter II of Article II of the Charter, the Board of Supervisors has the power to allow any transcontinental or other railroad company having not less than fifty miles of road actually constructed and in operation to enter the City and County with its road and run its cars to the water front at the most suitable point for public convenience.

The Board of Supervisors shall grant said privilege by ordinance adopted in the same manner as is any other ordinance, with the exception that any such ordinance would be subject to the provisions of Section 3 of Chapter IV of Article XI of the Charter, which provides generally that no ordinance passed by the Board of Supervisors granting any public utility franchise or privilege shall go into effect until the expiration of sixty days from the date it becomes final.

Ordinance No. 270, approved April 12, 1901, entitled "Providing for a grant to the San Francisco and San Joaquin Valley Railway Company, a corporation, of a right of way and the right to construct and operate a railroad from a point in Illinois Street near Marin Street, thence southerly on a curve to a point on Kentucky Street on the center line of Q Street South, formerly Tombigbee Street, etc.," granted to the San Francisco and San Joaquin Valley Railway Company a right of way described in Section 1 of said ordinance.

The petition to the Atchison, Topeka and Santa Fe Railway Company, the successor in interest of the San Francisco and San Joaquin Railway Company, asks that Section 1 of Ordinance No. 270 be amended so as to allow the construction of a drawbridge across Islais Creek Channel on a line with the established line of Kentucky street; it being desired to construct the drawbridge at that point at right angles over and across Islais Creek Channel instead of diagonally as required by the present wording of Section 1 of Ordinance No. 270.

There is also the petition of the Southern Pacific Company for a change in its franchise privilege granted to it by Ordinance No. 1095 approved January 7, 1904, entitled "Providing for a grant to the Southern Pacific Company, a railroad corporation, of

a right to construct, maintain and operate a railroad, together with all necessary branches, side-tracks, türnouts, switches, crossings, spur-tracks, yard-tracks, depot-tracks, and terminal-tracks and facilities, etc.," said Southern Pacific Company alleging in its petition that it is necessary to amend Ordinance No. 1095 and more particularly Section 2 "of said tracks, spur-tracks, yard-tracks, terminal-tracks and connecting-tracks," to conform with the lines of the projected bridge.

There is no doubt as to the power of the Board of Supervisors to entertain said petition and to grant or refuse the same as its judgment may dictate under Subdivision 28 of Section 1 of Chapter II of Article II of the Charter. As I have hereinbefore pointed out, this may be done by the adoption of the ordinances proposed by the Atchison, Topeka and Santa Fe Company and the Southern Pacific Company amending Ordinances Nos. 270 and 1095 and it is provided in said proposed ordinances that the same shall take effect sixty days from the date that the said ordinances become final.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim for Taxes—Mrs. W. D. Lambert.

May 8, 1913.

Gentlemen: I am in receipt of your communication of the 6th inst., in reference to the application of Mrs. W. D. Lambert to the Board of Supervisors for a refund of $250.00, plus taxes $16.00 odd, which she paid for a certain piece of land described in a letter from the Tax Collector accompanying your communication, with request to be advised whether or not a refund can be properly allowed to the petitioner.

Opinion.

The piece of land referred to in your communication is sometimes known as Comerford Street, 18 feet in width, running from Church Street to Sanchez Street, in Horner's Addition Block No. 94, 105 feet equidistant from Twenty-seventh and Duncan Streets. The title to this piece of land was litigated in the case of Myers

vs. Kenyon, 7 Cal. App. Reports, pages 112 et seq. The plaintiff in that case claimed to be the owner of a right of way over and upon said Comerford Street.

From the opinion in said case it appears that prior to the year 1883 one Comerford was the owner of Horner's Addition Block No. 94. He subdivided this block into lots, fronting on Duncan and Twenty-seventh Streets, 105 feet deep, which left a strip of land running through the block from Church to Sanchez Street, 18 feet wide, cutting the block in the center. Comerford built houses on this block, the back fences of the lots being on the line of the alleyway, with gates opening thereon, and sold the lots with reference to this alleyway and stated to the purchasers of the lots that the alleyway would be convenient for the owners. The alleyway, after being so opened, laid out and platted, was at all times used, and had been, up to the time of the said decision, used continuously by the plaintiff and all the other residents of the block as an open alleyway, without let or hindrance, and without objection from Comerford during his lifetime.

The Court decided that the owner of the block, having subdivided it into lots leaving an alleyway through the center, and having sold the lots with reference to the map and alleyway and received the money therefor from the purchasers of the lots, would be estopped from afterward claiming title to the alleyway and closing it up as a right of way, and held that the law will compel the owner to keep the alleyway open for the use of the owners of the lots in such case. The Court proceeded further to say:

"It must follow that all subsequent purchasers would purchase with notice. One cannot purchase the land covered by such alleyway, with a line of houses on each side of it, and gates opening into it, it being in continual use every day, without opening his eyes and looking. In such case he cannot claim to be an innocent purchaser. He would get the title in fee to the land, but subject to the burden imposed upon it by the former owner."

Such being the law of the case, as expressed by the Appellate Court, it follows that Mrs. Lambert, the purchaser at the tax sale of the property marked in red on the diagram accompanying your communication, which diagram I herewith return to you, purchased said land with her eyes open and cannot claim to be an innocent purchaser.

The strip of land in question is not now and never was a

public street of the City and County of San Francisco, and under the Charter restrictions pertaining to the opening and dedication of new streets, it can never be accepted by the City and County as a public street, by reason of the fact that it is less than 40 feet in width and lies within 200 feet of a parallel street.

In my opinion and the opinion of the Appellate Court the sale to Mrs. Lambert conveyed to her the title in fee to the land, but subject to the burden imposed upon it by the former owner, Comerford; that is, subject to the rights of the owners of the lots fronting on Duncan and Twenty-seventh Streets to use said alleyway for purposes of ingress, egress, light and air, and in view of the foregoing, the application of the petitioner should be denied.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Firemen as Employees Cannot Resign.

May 13, 1913.

Gentlemen: I am in receipt of your communication requesting an opinion as to "written resignation of a member of this department is self-operative, if in its terms it contains no limitations or conditions, or whether it is necessary for this Board, by proper resolution, or otherwise, to take formal action on the acceptance of the same."

Opinion.

This question is discussed in my opinion in re Hardenedy rendered December 6, 1912, to which I would refer your Board.

The "resignation" of a fireman does not have the effect of the resignation of an officer, but serves merely as a formal notification on the part of the employee of his intention to sever his relations with the department.

On such a communication you are advised that your Board has no legal power to take any formal action.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Lowest Bid Only Can be Accepted by the Board of Public Works.

May 13, 1913.

Gentlemen: I am in receipt of your communication of the 8th inst. as follows:

"We desire to request you to render an opinion to this Board upon its ability under the Charter to award the contract for the furnishing of boilers, breeching and piping in the Relief Home to any but the lowest responsible bidder on such work.

"There is a difference of $1,031.00 between the bid for boilers manufactured in the east and those manufactured in San Francisco, the lowest bid being that submitted for boilers made outside of this City.

"This Board wishes to be informed whether it can award the contract for this work to the second lowest bidder, namely, Wittman, Lyman & Company, whose bid is $1,031.00 higher than that of the lowest bidder, the Pacific Fire Extinguisher Company."

On page 463 of the Opinions of the City Attorney of San Francisco, 1910-11-12, will be found an opinion given to your Honorable Board clearly setting forth the proposition that the Charter provisions prohibit your Honorable Board from accepting any but the lowest regular bid. Said opinion was given with reference to a contract for the furnishing and delivery of street cars for the Geary Street Municipal Railroad, and my advice therein given applies to the matter inquired about in your communication.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Deed to Lands for Widening of Juno Street.

May 17, 1913.

Gentlemen: I am in receipt of your communication of the 16th inst., as follows:

"I am directed by the Streets and Sewers Committee to refer to you copy of Bill No..... approving and accepting deed to lands from Archibald Kains, Fanny George Kains (his wife), and James S. Angus and May B. Angus (his wife), for the widening of Juno Street at its northerly termination, and declaring that portion covered by said deed to be an open public street.

"Request is made that you advise the committee as to whether or not the proposed Bill is in proper form for passage."

Opinion.

I have examined the proposed Bill referred to in your communication and find that the same is in proper form for passage.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Mission Viaduct, Payment for Fill.

May 22, 1913.

Gentlemen: I am in receipt of your communication of the 10th inst. involving the question as to whom the payment should be made for making the necessary earth fill at the approaches to the Mission Viaduct.

As I understand the matter, the facts are these:

The Keystone Construction Company received a contract from the City and County for the construction of one section of the Mission Viaduct and the Healy-Tibbitts Construction Company received a similar contract for the construction of the other or second section of the Mission Viaduct. During the course of construction both contractors moved a certain quantity of earth in order to facilitate the carrying forward of their contracts. The United Railroads of San Francisco paid the sum of $20,000.00

toward the cost of construction of the said viaduct and offered to do work, amounting to the sum of $30,000.00 or thereabouts, upon the same, including the making of a fill and securing and hauling the material for the fill and certain other work upon the roadway of said viaduct. The Keystone Construction Company failed to perform its contract with the City and the work contracted for to be performed by said company was afterward carried forward to completion by the Massachusetts Bonding and Insurance Company, the surety for the Keystone Construction Company, and the contract of the Healy-Tibbitts Construction Company was fully performed by said company.

The matter presenting itself for my immediate determination is the question whether or not the Board of Public Works can retain out of the money due to the Massachusetts Bonding and Insurance Company and the Healy-Tibbitts Construction Company a sufficient sum of money to pay for the fill made by the United Railroads of San Francisco.

I have examined the contracts of the Keystone Construction Company and the Healy-Tibbitts Construction Company for the doing of the work on Mission Viaduct, and it does not appear from said contracts that either of said companies was under any obligation to replace the earth removed by them in order to facilitate the carrying forward of their contracts and therefore said companies were under no obligation to make said re-fills.

It does not appear from the records of the Board of Public Works, or from any other source, that either the Keystone Construction Company, the Massachusetts Bonding and Insurance Company or the Healy-Tibbitts Construction Company ever agreed to pay any money, out of the sums due them, to the United Railroads of San Francisco for making said fill, and even if the Board of Public Works had duly and regularly adopted any resolution to the effect that a certain sum of money would be retained out of the money due to the contractors and paid over to the United Railroads of San Francisco, such resolution would not bind the contractors unless consented to by them, and any verbal agreement made and entered into between the individual members of the Board of Public Works and the United Railroads of San Francisco would be just as ineffective as far as the contractors are concerned.

I can see no reason for the retention by the Board of Public

Works or the City and County of San Francisco of any money due to the contractors on the Mission Viaduct for work performed under their contracts, and therefore you are advised that the Board of Public Works has no legal right to retain any of said money from the Healy-Tibbitts Construction Company or the Massachusetts Bonding and Insurance Company.

An agreement was entered into between the City and County of San Francisco and the United Railroads of San Francisco on the 21st day of February, 1910, with reference to the contribution of the sum of $20,000.00 by the United Railroads of San Francisco toward the cost and expense of constructing the viaduct and approaches on Mission Road between Bosworth and Marshall Streets (commonly called the Mission Viaduct). Said agreement contained the promise of the United Railroads to perform work and labor in and upon said viaduct and approaches thereto to the extent of $30,000.00. Said agreement is incorporated in Resolution No. 5400 (New Series) of the Board of Supervisors, approved February 25, 1910, and Section 3 thereof sets forth in detail the work and labor in and upon said viaduct and the approaches thereto agreed to be performed by the United Railroads of San Francisco.

Subdivision "D" of said Section 3 reads as follows:

"All labor and material which may be furnished by the United Railroads of San Francisco and hauling and delivering material for filling in the approaches to said permanent viaduct or said permanent viaduct proper. It is understood and agreed, however, by and between the respective parties hereto that the United Railroads will make all the fill required by the attached plans and specifications approximating 20,000 cubic yards, regardless whether the total labor and material so furnished by the United Railroads including the cost of securing and hauling material for the fill amounts to $30,000.00 or over as is more fully set out in that certain letter dated February 7, 1910, addressed to Michael Casey, President of the Board of Works, and signed by Charles N. Black as Vice-President and General Manager of the United Railroads, which letter is hereby referred to and made a part hereof."

The letter from Charles N. Black to Michael Casey stated that the United Railroads of San Francisco agreed to make the fill on the first or southerly section of the viaduct, approximately

20,000 cubic yards, regardless of whether the total labor and material furnished by the United Railroads, including the cost to the United Railroads of securing and hauling the material for the fill amounts to $30,000.00 or over. The only difference in the wording between the contract signed by the United Railroads and the City and County, as set forth in Section 3-D of Resolution No. 5400 (New Series) and the said letter, is that the contract does not specify whether the fill is to be made and the letter from Mr. Black specifies that the fill is to be made on the first or southerly section of the viaduct.

The Charter of the City and County of San Francisco prescribes certain conditions under which contracts may be made and entered into by the Board of Public Works. As I understand the facts in relation to the alleged contract between the Board of Public Works and the United Railroads of San Francisco in reference to any additional fill made by the United Railroads for the approaches of the Mission Viaduct, none of the Charter provisions concerning the making of contracts were complied with. The representative of the United Railroads, Mr. B. P. Legare, Engineer Maintenance of Way and Construction, claims that the only authority to perform any work on the Mission Viaduct was a verbal order given by one of the members of the Board of Public Works to go ahead and make the fill and that the United Railroads would receive therefor the sum of 15 cents a cubic yard. In addition to the fact that the formal requisites for the making of a contract were not observed, there is a total absence of any official action of the Board of Public Works in regard to said alleged contract.

The case of Fountain vs. City of Sacramento, reported in 1 Cal. App., pages 461, et seq., holds, citing from the syllabus:

"The city of Sacramento, the charter of which forbids it from entering into any kind of a contract for the expenditure of more than one hundred dollars unless authorized by a vote of the Board of Trustees, given in the manner therein provided, is not estopped to dispute its liability for materials of a greater value than one hundred dollars furnished to the City at the mere request of one of its trustees, although such materials were used by it for a municipal purpose, and it had previously paid for materials of a less value than one hundred dollars similarly ordered and used."

Also the Court holds that—

"One who furnishes materials to a municipal corporation is charged with knowledge of its charter provisions in force at the time."

Therefore, without entering into a long discussion of this proposition, as the alleged contract of the United Railroads was not entered into in accordance with the requirements of the Charter, it is my opinion that the United Railroads had and has no valid claim against the City and County of San Francisco for any work performed or materials furnished by it to complete the approaches to the Mission Viaduct; that any work performed or materials furnished by it were performed and furnished voluntarily and that said company has no recourse against the City.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Land for Opening of Nineteenth Street and Seward Street.

May 22, 1913.

Gentlemen: I am in receipt of your communication of the 21st inst., as follows:

"I am directed by the Streets and Sewers Committee to refer to you the deed from Anglo American Land Company (a corporation) and copy of Bill of Acceptance of Lands for the opening of Nineteenth Street and Seward Street.

"Request is made that you advise the committee as to whether or not the deed and bill are in proper form for acceptance."

Opinion.

I have examined the proposed ordinance accepting and approving the deed therein mentioned and find that the same is in proper form for passage. The form of the deed from the Anglo American Land Company, a corporation, to the City and County of San Francisco is in proper form, but it should be accompanied and have attached thereto a resolution of the Board of Directors of the Anglo American Land Company showing that the

President of the company had authority to make and execute the said deed.

I would suggest, therefore, that the ordinance be not passed by your Honorable Board until you have obtained the resolution of the Board of Directors of the Anglo American Land Company, as suggested above.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Van Ness Avenue From Jefferson Street to Lewis Street, and Jefferson Street From Larkin Street to Van Ness Avenue Are Not Open Public Streets.

May 22, 1913.

Gentlemen: I am in receipt of a copy of Journal Resolution No. 753, by which the City Attorney was requested to advise the Board of Supervisors as to whether or not Van Ness Avenue from Jefferson Street to Lewis Street, and Jefferson Street from Larkin Street to Van Ness Avenue are open public streets.

The lands included within the extended lines of the streets mentioned in the resolution were a portion of the lands partitioned in the case of Ellen Dore, et al., vs. Mortimer K. Truett, et al., by decree of the Superior Court entered March 29, 1904, and recorded in Liber 2046 of Deeds, pages 225 to 246, inclusive.

The included lands above mentioned originally lay below high water mark on the Bay of San Francisco. Upon the admission of the State of California into the Union upon an equal footing with the original states the title in said lands passed to and vested in the State of California. On the 26th day of March, 1851, the Legislature of the State, by Act, granted the use and occupation of this property to the City and County of San Francisco for a term of ninety-nine years from and after said 26th day of March, 1851. On September 6, 1851, Dr. Peter Smith recovered a judgment against the City of San Francisco for moneys owing to him on account of hospital services rendered to the City, in the sum of $13,960. Execution was issued on this judgment on December 8, 1851, and the Sheriff levied upon certain lands of the

City and on the 30th day of January, 1852, sold the leasehold interest of the City in and to the property above described, under such execution, to Isaac N. Thorne. At the time that this sale was made no streets had been projected into the tide lands west of the easterly line of Larkin Street, nor had any dedication for street purposes been made by the City of any of the property lying west of said easterly line of Larkin Street, so that at the time of the sale the City of San Francisco had made no reserve for street purposes for Jefferson Street from Larkin Street west to Van Ness Avenue, nor for Van Ness Avenue north from Jefferson Street to Lewis Street.

The property at the time of the decree in Dore vs. Truett, had passed into the hands of various successors in interest of Isaac N. Thorne. In the partitioning of the property William A. Magee was appointed referee upon the stipulation of all of the parties to the action. Thereafter he rendered his report in which he provided for the extension of certain streets in said tract of land and the Court, by its decree, confirmed said extensions as follows (quoting from the decree):

"That he has continued and extended Laguna Street and Buchanan Street as the same are laid down and designated on the official map of the City and County of San Francisco northerly and parallel to Larkin Street through said tract from their present termini at the southerly boundary of said tract to Lewis Street, the north boundary of said tract; and he has set apart as streets those portions of said tract embraced in the boundaries of said Laguna Street and Buchanan Street, extended, both said streets are of a uniform width of 68 feet and 9 inches and are set apart as public streets to be known by the names of the present streets of which they are continuations or extensions.

"That he has continued and extended Jefferson Street, as the same is laid down and designated on the present official map of the City and County of San Francisco, easterly and parallel to Lewis Street from Buchanan Street extended to the pueblo line and he has set apart as a street that portion of said tract embraced within the boundaries of said Jefferson Street; said Jefferson Street is of a uniform width of 68 feet 9 inches and is set apart as a public street to be known as Jefferson Street."

The Court in said decree, in passing upon the rights of the City and County of San Francisco in and to the land described in said decree, used this language:

"The City and County of San Francisco has no interest in the tract of land described in the interlocutory decree and hereinbefore described, except that portion thereof included in the lines of Lewis Street, Tonquin Street from Larkin to Polk Street, and Polk Street from Tonquin to Lewis Street and no portion of said land, except that portion within the lines of Lewis Street, Tonquin Street and Polk Street above mentioned, has ever been a public street of the City and County of San Francisco and no portion thereof (with the same exception) has ever been laid out or dedicated to the public use and there are no streets now existing on said tract of land or any portion thereof, except Lewis Street, Tonquin Street from Larkin Street to Polk Street, and Polk Street from Tonquin to Lewis Street."

The City and County of San Francisco was a party to the action of Dore vs. Truett and appeared in the action and set forth its claim of title and consequently is bound by the decree. But, if the City and County had not been a party to the action, it would at present have no claim to any rights in the portions of Jefferson Street or Van Ness Avenue mentioned in the Journal Resolution for the reason that it had never made any reserve during its ownership of any property for street purposes, nor had the owners ever made any attempt to dedicate to street purposes and uses any portions of said property.

In my opinion, therefore, the City is without claim of right to an extension of Van Ness Avenue northerly from Jefferson Street to Lewis Street or to the extension of Jefferson Street west from Larkin Street to Van Ness Avenue.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Power of Health Department to Register Births After March 18, 1905.

May 24, 1913.

Sir: I am in receipt of your recent communication requesting my advice as to whether you are empowered to accept at the present time the certificate of birth of a Chinese claiming to have been born in this City on November 20, 1897, and whose birth certificate has never been registered by the Chinese midwife who attended at his birth.

Opinion.

Before 1905 the registration of births was a local matter, certified abstracts of the Register of Births being filed with the Secretary of the State Board of Health. On March 18, 1905, the Political Code sections relative to the registration of births were amended, establishing a Bureau of Vital Statistics for the registration of births at Sacramento and requiring that the local Health Officer of San Francisco forward to the said Bureau the original certificates of birth.

The Legislature, by this Act, abolished the local registry of births and since that time all original certificates of births in San Francisco have been filed with the State Registrar.

The situation at present is this: The local registration of births having been abolished in 1905, there is no procedure by which any birth prior to that time can be registered, there being now in existence no legal body to receive such registration. On the other hand, the State Registry Bureau, having been created after the birth in question, it is of course impossible for the State Registry Bureau to accept any such certificate.

You are therefore advised that you cannot accept for registration the birth certificate of any person born prior to March 18, 1905, and whose birth has never been heretofore registered.

Respectfully,

PERCY V. LONG,

City Attorney.

Health Officer.

Necessity of Bond From Crocker Bank Under Resolution 2752, New Series.

May 28, 1913.

Sir: I am in receipt of your communication with reference to the necessity of your requiring a bond when depositing moneys with the Crocker National Bank under Resolution 2752 (New Series), and inquiring if you would be held entirely free from liability if loss occurred therefrom.

Opinion.

In this connection I would refer you to my communication on this subject transmitted to the Board of Supervisors January 3, 1913. I therein held that a bond from such an institution as the Crocker National Bank was unnecessary.

If loss occurs, however, you would be held liable under your official bond.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Application to Conduct a Moving Picture Exhibition—Interpretation of "Seating Capacity."

June 2, 1913.

Gentlemen: I am in receipt of your recent communication, requesting an interpretation of the phrase "having a seating capacity of 400 or more persons," in Section 187 of the Building Ordinance.

Opinion.

Ordinance No. 1144, approved February 26, 1904 (p. 220, General Ordinances), makes it unlawful for any person, firm or corporation, having control of any theatre, etc., to allow any person during a theatrical or other public performance "to sit or remain standing in any aisle, passageway or stairway in such theatre."

Ordinance No. 862, approved June 26, 1903 (p. 221, General Ordinances), makes it unlawful for any person, firm or corporation, having control of any theatre, etc., "to obstruct, or cause or

permit the obstruction, of any entrance, exit, aisle, stairway, lobby or passageway thereof, during any performance, exhibition, lecture, concert or any public assemblage therein."

These two ordinances restrict the number of people constituting an audience to the number for whom there are seating accommodations; in other words, they limit the seating capacity to the number of seats placed in the theatre or hall, and exclude all others for whom no seats are provided.

In view of the two ordinances, now in full force and effect, you are advised that the phrase in Section 187 of the Building Ordinance "having a capacity of 400 or more persons" is to be interpreted as if it read "containing 400 or more seats."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Power of a Department to Refuse Certifications From the Civil Service Commission.

June 4, 1913.

Gentlemen: I am in receipt of your communication of June second, requesting my opinion on the question as to whether or not your Department "may rightfully refuse to accept from the Civil Service Commission the name of any person for appointment who at some time previous may have been dismissed from the service for good and sufficient cause."

The facts of the case show that at the time the employee in question was dismissed, she was employed as a non-civil service ward-woman in the Isolation Hospital, no Civil Service examination having been held to fill this vacancy. After dismissal in November, 1912, she took the Civil Service examination for Waiters and Pantry-workers, and qualified. On May 1, 1913, she was certified by the Civil Service Commission to fill the vacancy of ward-woman at the Isolation Hospital.

Opinion.

The question was discussed by me at length in an opinion to the Board of Police Commissioners, dated July 23, 1908 (Opin-

ions, 1908-9, page 158), in which I there held that a department or board cannot go behind a certification of the Civil Service Commission.

This question was discussed even more fully in my opinion to the same effect transmitted to the Board of Police Commissioners, November 14, 1912, a copy of which is enclosed herewith.

You are advised, therefore, that your Department has no legal right to refuse to accept from the Civil Service Commission the name of any person for appointment, for any cause whatsoever. Your remedy in such cases is to be found in Section 10 of Article XIII of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Street Flushers.

June 5, 1913.

Gentlemen: My opinion has been asked regarding an alleged infringement of letters patent on three street flushers offered to the City by L. M. Benjamin in response to an advertisement for bids.

The machines offered are alleged to be constructed in infringement of letters patent No. 795,059, granted July 18, 1905, to the assignee of L. F. Ottofy, and the City has been warned by lettergram from the Sanitary Street Flushing Machine Company of St. Louis, sole licensee of the Ottofy patent, and by letter from Messrs. Edwards, Sager and Wooster of New York, attorneys for said licensee, that the purchase and use of said machines by the City will be an infringement of their rights.

Their contention is apparently supported by a decision of the United States Circuit Court of Appeals for the Eighth Circuit enjoining the sale of machines manufactured by William Ratican and his licensee, the St. Louis Street Flushing Machine Company as being an infringement of the Ottofy patent. The machines offered to the City were acquired by Mr. Benjamin from the Ratican people, but I have been unable to learn from him whether or not they are identical with the machines the use of

which was enjoined by the above decision. Mr. Benjamin contends that his machines were constructed under letters patent Nos. 777,053; 788,934; and 830,668, and that the Ottofy licensees were refused an injunction against his machines in the District Court of Ohio. He further offers to furnish a bond to protect the City against infringement suits.

I think it unnecessary to enter into a discussion as to whether the machines offered do or do not constitute an infringement of the Ottofy patent. Indeed only an expert patent lawyer would be able to give you an authoritative opinion on this point.

It is not improbable, however, that if you do accept and use these machines that the Sanitary Street Flushing Machine Company will bring suit against the City to enjoin the use of them, and will incidentally ask for damages. The City may protect itself against expense and loss from such an action by requiring a proper bond from Benjamin. It is of course impossible to say just what the amount of damages that might be awarded would be, but I would not advise fixing the bond at less than five thousand dollars. If such a suit were brought against us, Benjamin should be required to defend the same, as it would be necessary to employ a patent lawyer to represent us. I am unable to hazard an opinion as to the probable outcome of such an action, other than to say that an injunction against the Ratican machine was granted in St. Louis and denied in Ohio.

Benjamin's bid is fourteen hundred ($1400) dollars lower than that of the Sanitary Street Flushing Machine Company's representative. If in your judgment it is worth while taking a chance, a bond should certainly be required with a reliable surety company. I enclose a form of one which I think will afford protection. The amount should be sufficient to protect the City for the purchase price of the machines and possible damages for infringement.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Certain Paving to Be Done by Southern Pacific Company.

June 11, 1913.

Gentlemen: I am in receipt of your communication of the 3rd inst., as follows:

"The Board of Public Works has now under consideration the preparation of an assessment district to defray the cost of paving King Street between Second and Third Streets. In accordance with the attached communication, dated May 23, 1913, from the office deputy of the Bureau of Streets of this department, to which is attached a map of that portion of King Street affected, prepared by the City Engineer in connection with this matter, we desire to request you to inform this Board whether the Southern Pacific Company is liable for the cost of paving King Street between Second and Third Streets between the rails of its spur tracks on that street and for a distance of two feet outside of said rails; also whether the railroad company is responsible for the maintenance of the pavement between the main tracks on both sides of King Street between Second and Third Streets, and also what area of pavement on King Street between Second and Third Streets should be charged to the abutting property owners on that block."

Opinion.

Ordinance No. 1025, granting a steam railroad franchise to the Southern Pacific Railroad Company and the Central Pacific Railroad Company, requires the holder of the franchise to keep King Street between Second and Third Streets for the space of four feet on each side of its tracks and between the rails and tracks thereon for the whole length thereof in good order, condition and repair, at its own expense, when said street shall have been filled in and graded by the owners of adjoining property.

Ordinance No. 719, approved May 15, 1903, requires every holder of a privilege from the Board of Supervisors to operate, maintain or use any spur or sidetrack over and along any street or sidewalk in the City and County whenever notified by the Board of Public Works by written notice, to pave and keep in repair the entire length of the street used by said track between the rails and for two feet on each side thereof and between the tracks, if there be more than one.

Ordinance No. 69 (New Series), approved October 12, 1906,

contains a similar provision in Section 5 thereof. I have been informed that all spur or sidetrack privileges granted to individuals or corporations are granted subject to the provisions of Ordinance No. 69 (New Series).

It is my opinion that even though such grants for sidetrack or spur track privileges made no reference to Ordinance No. 69 (New Series), said grants would, as a matter of law, be subject to the terms thereof and consequently such grants as were made prior to the adoption of Ordinance No. 69 (New Series), are subject to the terms of Ordinance No. 719. Therefore, the Southern Pacific by operating spur or sidetracks on King Street between Second and Third Streets is required by law to pave and keep in repair the space between the rails and for two feet on each side thereof and between the tracks of such spur or sidetracks.

You are advised as follows:

That the Southern Pacific Company is required by law to pay the cost of the pavement on King Street between Second and Third Streets between its tracks and rails and for four feet on each side thereof.

That the Southern Pacific Company is required by law to pay the cost of paving between the tracks and rails of the spurs and sidetracks on the same street between Second and Third Streets and for two feet on each side thereof.

That the abutting property owners are required by law to pay for the balance of the cost of paving said street.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Members of Underwriters' Patrol Not Exempt From Charges Under Section 11, Ordinance 698.

June 19, 1913.

Gentlemen: I am in receipt of your communication of June 12th requesting an opinion as to whether or not Section 11 of Ordinance 698 (approved April 15, 1903), exempting certain persons and organizations from installation and maintenance charges for alarm

bells, includes the *members* of the Underwriters' Fire Patrol, or applies only to the patrol houses thereof.

Opinion.

Section 11 of Ordinance 698 reads as follows:

"The charge of installation, maintenance and use of such installation and each additional part of such installation shall not apply to the members of the San Francisco Fire Department, the employees of the Department of Electricity, the Fire Marshal, the Underwriters' Fire Patrol and Inspection Bureau, the officers of the Pacific States Telephone and Telegraph Company, and the headquarters of the Veteran Volunteer Firemen's Association."

By its wording the ordinance specifically exempts from installation charges the "members of the San Francisco Fire Department" and "the employees of the Department of Electricity." The Fire Marshal is also exempted, and then follow "the Underwriters' Fire Patrol and Inspection Bureau, the officers of the Pacific States Telephone and Telegraph Company, and the headquarters of the Veteran Volunteer Firemen's Association." The clause in question first groups together the organizations whose members or employees are exempted, and then groups together (including the Underwriters' Patrol in that group) those organizations entitled to free installation in their offices or headquarters.

In view of the foregoing, you are advised that "*members*" of the Underwriters' Patrol are not included among those exempt from installation and maintenance charges in Section 11, Ordinance 698 as it now stands.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Competition in re Tuberculosis Group of the San Francisco Hospital.

June 23, 1913.

Gentlemen: I am in receipt of your communication, under date of June 13th, which reads as follows:

"Will you kindly inform this Board, for the information of the entrants in the competition for the Tuberculosis Group of the San Francisco Hospital, whether the program of competition issued by the Board of Public Works constitutes a contract with the competitors, and also whether the law permits the Board of Public Works to pay the sums mentioned in the program issued to competitors by this Board, and oblige."

Opinion.

On May 12, 1913, Ordinance No. 2269 (New Series) of the Board of Supervisors came into force and effect. By this Ordinance the Board of Public Works is authorized to obtain plans, specifications and details for the erection of public buildings for the City and County of San Francisco that are erected under the supervision of the Board of Public Works, and for that purpose the Board is authorized in its discretion to engage the services of architects through competition. The method of competition is left to the Board of Public Works. The Board is further authorized to pay for the plans and drawings and necessary supervision of the work of construction a sum which, including the cost of the preparation of the contract plans and specifications, shall not exceed six per cent of the entire cost of the building to be constructed.

In the matter of the plans and architectural services for the Tuberculosis Group of the San Francisco Hospital, the Board has determined to engage an architect by competition. The program of competition invites certain architects to participate in the competition, and when those architects accept the invitation the program amounts to an agreement that the Board of Public Works will engage the services of the successful architect and will pay him as stipulated in the program. The program provides that only the successful architect shall be paid.

Answering your questions categorically, I advise you that the program of competition issued by the Board of Public Works constitutes a contract with the competitors, and that the law per-

mits the Board of Public Works to pay the successful competitor the sums mentioned in the program issued to competitors by the Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Sale of Relief Home Tract Lands.

June 23, 1913.

Gentlemen: I am in receipt of your request, under date of June 17th, with reference to the sale of the Relief Home Tract, as follows:

"Certain proceedings have been taken by the Board of Supervisors for the sale of real estate owned by the City and County, known as a part of the Relief Home Tract, which sale and proceedings therefor are authorized by Sections 9 and 10 of Chapter II, Article II, of the Charter. The matter of confirming the sale is now before the Board and has been set for July 2, 1913.

"Your attention is called to the language of Section 9 aforesaid, reciting that 'at *such* meeting the Board of Supervisors may by an *ordinance* passed by an affirmative vote of at least fifteen of its members confirm such sale.'

"In this connection your attention is called to the provisions of Section 13, Chapter I, of Article II, requiring the publication for five days of bills disposing of public property.

"Your opinion is respectfully requested as to the procedure in adopting the ordinance referred to, and particularly shall it be published five days prior to final passage.

"I am enclosing a draft of the proposed ordinance confirming the sale of this land, which will be before the Board for passage at the meeting to be held July 2, 1913. Will you also advise the Board of Supervisors as to the sufficiency of this proposed ordinance and as to whether or not it is in proper legal form?"

Opinion.

Section 9, of Chapter II, of Article II of the Charter requires that, when the Supervisors hold their meeting in accordance with

the requirements of said section, to confirm or refuse to confirm the sale of property sold, that "*at such meeting*, if it appears to the Supervisors that the sum bid is not disproportionate to the value of the property sold, and that a greater sum cannot be obtained, or if an increased bid, as hereinbefore mentioned, be made and accepted, the Board of Supervisors may, by an ordinance, passed by an affirmative vote of at least fifteen of its members, confirm such sale, and direct conveyances to be executed by the Mayor. A certified copy of such ordinance shall be recorded in the County Recorder's office in the county in which the property is situated."

The natural construction of the above would seem to mean that the opening words, "at such meeting," are to be read directly in connection with the language which follows, "the Board of Supervisors may, by ordinances," etc. That is, it would thus be read: "At such meeting (if the Board makes the necessary finding thereat as to the reasonableness of the bid) the Board of Supervisors may, by an ordinance, passed by an affirmative vote, of at least fifteen of its members, confirm such sale, and direct conveyances to be executed by the Mayor. A certified copy of such ordinance shall be recorded in the County Recorder's office in the county in which the property is situated."

The question then arises whether this may be considered a final passage of the ordinance, the section thus waiving the necessity of being passed to print for five days as required by Section 13 of Chapter I, Article II, which requires that "every bill or resolution, * * * involving the lease, appropriation *or disposition* of public property * * * shall, after its introduction, be published in the official newspaper, with the ayes and noes, for at least five successive days (Sundays and legal holidays excepted), before final action upon the same."

Of course, any requirement that a certain number of votes are needed for the passage of an ordinance would still leave that ordinance not finally passed until the five days' publication, if the ordinance be one included under the above Section 13. But it might be argued that the above Section 9, of Chapter II, Article II, having been adopted subsequent to the other sections, and dealing with a particular subject, and providing that, "*at such meeting*," the ordinance shall be passed, by a certain vote, that it was intended to make an exception in the case of the sale of lands provided for in this section.

In my opinion, the safest course to pursue in a matter of such great importance, is for the Board of Supervisors to follow both procedures.

That is, first, on July 2nd pass the ordinance finally, with the necessary fifteen votes.

And, second, pass the identical ordinance to print, with the necessary fifteen votes, and then, after five days' publication, pass it finally, again with fifteen votes. And record a certified copy of each of these ordinances. The mere passage to print would not satisfy the section if we assume that but one passage is necessary, as the members of the Board would not then be voting on final passage. They must intend their votes to be on final passage, no matter how we construe the section, before their action can be taken as final.

With reference to the proposed draft of ordinance, which you have submitted, I would suggest that at the end of the first "whereas" clause there be added—"in accordance with Section 9, Chapter II of the Charter"—and that the third paragraph thereof commencing, "Whereas, The Mayor filed" etc., be changed to read as follows:

"Whereas, The Mayor filed a report in regular session of this Board of Supervisors on Monday June 9th, 1913, which session was the next meeting of the Board of Supervisors held after the aforesaid auction sale and which report set forth that an auction sale of the said hereinafter described real property of this City and County was held on Monday, June 2, 1913, in the chambers of this Board and before the Board of Supervisors and that the highest bid offered at said sale was the sum of $120,000 by Walter H. Leimert, and requested that the sale of the said hereinafter described land to said Walter H. Leimert for the sum as hereinabove stated be confirmed subject to the provisions of Section 9, Chapter II, Article II of the Charter."

In the last "Whereas" clause, starting "Whereas ..... this day presented etc." in the third line thereof, strike out the words "and over and above" and insert in lieu thereof "more in amount than."

Add another "whereas" clause—as follows:

"And, Whereas, It appears to this Board of Supervisors that the above sum of $..... so bid by ..... is not dispro-

portionate to the value of the property sold, and that a greater sum cannot be obtained."

At the close of Section 1 change the word "requested," with reference to the request upon the Mayor, to "directed" and after the words "to make" add "and execute."

Also, as there are two Sections 10 of Article II, Chapter II of the Charter, I would suggest that in the first "whereas" clause, line 5, after the words "Section 10, Article II, Chapter II of the Charter of this City and County" you add "which reads as follows:

"'The Board of Supervisors, in the manner provided in the preceding section, may sell a portion of the Relief Home Tract not adapted to public use being a portion of the Rancho San Miguel and generally described as lying southerly and westerly from the lands of the Spring Valley Water Company. The proceeds arising from such sale shall be used exclusively for the purchase of other lands adjoining such Relief Home Tract'."

I give below redraft of the ordinance with the above changes included:

"Bill No. Ordinance No. (New Series)

"An ordinance confirming and ratifying the sale of lands belonging to the City and County of San Francisco, the said lands being a portion of the Rancho San Miguel and a portion of the Relief Home Tract, which sale was authorized and held in conformity with Sections 9 and 10 of Chapter II, Article II of the Charter of the City and County of San Francisco.

"Whereas, An auction sale of the certain hereinafter described lands belonging to the City and County of San Francisco, being a portion of the Rancho San Miguel, and that portion of the Relief Home Tract not adapted to public use and referred to in Section 10, Article II, Chapter II of the Charter of this City and County, which reads as follows:

"'The Board of Supervisors, in the manner provided in the pre-

ceding section, may sell a portion of the Relief Home Tract not adapted to public use, being a portion of the Rancho San Miguel and generally described as lying southerly and westerly from the lands of the Spring Valley Water Company. The proceeds arising from such sale shall be used exclusively for the purchase of other lands adjoining such Relief Home Tract'

and determined not adapted to public use by Ordinance No. 2265 (New Series) approved the fifth day of May, 1913, was held on Monday the second day of June, 1913, by the Mayor of this City and County, in accordance with Section 9 of Article II, Chapter II of the Charter, and in accordance with the Notice of Auction Sale of said real property which Notice was published commencing May 6, 1913, in accordance with Section 9, Chapter II, Article II of the Charter, and

"Whereas, The Mayor filed a report in regular session of this Board of Supervisors on Monday, June 9, 1913, which session was the next meeting of the Board of Supervisors held after the aforesaid auction sale and which report set forth that an auction sale of the said hereinafter described real property of this City and County was held on Monday, June 2, 1913, in the chambers of this Board and before the Board of Supervisors and that the highest bid offered at said sale was the sum of $120,000 by Walter H. Leimert, and requested that the sale of the said hereinafter described land to said Walter H. Leimert for the sum as hereinabove stated be confirmed subject to the provisions of Section 9, Chapter II, Article II of the Charter, and

"Whereas, This day, Wednesday, July 2, 1913, has been fixed by Notice duly published in conformity with Section 9, Chapter II of Article II of the Charter, for consideration of the confirmation of the sale of said hereinafter described real property, and

"Whereas, ... this day presented a written bid in the sum of $....., the said amount being 10 per cent more in amount than the sum of $120,000 heretofore bid by Walter H. Leimert on Monday, June 2, 1913, and the said..... being a responsible person, and

"Whereas, It appears to this Board of Supervisors that the above sum of $..... so bid by..... is not disproportionate to the value of the property sold, and that a greater sum cannot be obtained; therefore,

"Be it Ordained by the people of the City and County of San Francisco, as follows:

"Section 1. The sale of the following described real property belonging to the City and County of San Francisco, to-wit:

(Here include description of property)

to.....for the sum of $.....is hereby confirmed and ratified, and the Mayor is hereby directed to make and execute conveyance of the said described real property of the City and County of San Francisco to said.....in accordance with Section 9, Chapter II, Article II of the Charter.

"Section 2. This ordinance shall take effect and be in force immediately."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Civil Service Employee Prohibited From Bidding on Public Work—Leave of Absence Does Not Sever Relationship With City.

June 24, 1913.

Gentlemen: I am in receipt of your communication of the 9th inst., enclosing a copy of letter received by you from J. J. Smith under date of May 25th, inquiring if a Civil Service employee can bid on public work without losing his position even though he has not been awarded the contract for work so figured and further can the said employee secure a leave of absence for a certain period and during said leave of absence take a public contract.

Opinion.

Section 6 of Article XVI of the Charter is as follows:

"No Supervisor and no officer or employee of the City and County, shall be or become, directly or indirectly, interested in, or in the performance of, any contract, work, or business, or in the sale of any article, the expense, price or consideration of which is payable from the treasury; or in the purchase or lease of any real estate or other property belonging to, or taken by, the City and County, or which shall be sold for taxes or assess-

ments, or by virtue of legal process at the suit of the City and County. If any person in this section designated shall, during the time for which he was elected or appointed, acquire an interest in any contract with, or work done for, the City and County, or any department or officer thereof, or in any franchise, right or privilege granted by the City and County, unless the same shall be devolved upon him by law, he shall forfeit his office, and be forever after debarred and disqualified from being elected, appointed or employed in the service of the City and County; and all such contracts shall be void, and shall not be enforceable against the City and County."

The language of the above section is to the effect that no supervisor, officer or employee of the City shall be or become directly or indirectly interested in or in the performance of any contract work or position or in the sale of any article, the expense, price or consideration of which is payable from the treasury. One offering to perform the services of a contractor or to contract for work or for the sale of any article is not interested in any contract. The mere offer to perform a contract does not place the person making such an offer in the position of being interested in a contract and it is not until he actually enters into a contract for the performance of any work or business or the sale of any article that he can be said to be interested in the contract.

As this section imposes a penalty upon any employee of the City entering into contractural relationship with the City it must be strictly construed and I am therefore of the opinion that until an employee actually enters into contractural relationship with the City, either directly or indirectly, he does not forfeit his position.

In reply to the second inquiry I desire to say that one who is on leave of absence is an employee of the City for the reason that the taking of a leave of absence does not sever the relationship existing between the City and County and its employee, which relationship can only be severed when the incumbent thereof "dies, resigns, is adjudged insane, convicted of felony, or of an offense involving a violation of his official duties, or is removed from office, or ceases to be a resident of the City and County, or neglects to qualify within the time prescribed by law, or within twenty days after his election or appointment, or shall

have been absent from the State without leave of absence for more than sixty consecutive days." (Sec. 10, Art. XVI.)

It therefore follows that an employee on leave of absence is not in a position to accept or become directly or indirectly interested in the performance of any contract work or business or in the sale of any article the expense, price or consideration of which is payable from the treasury, or to do any of the things enumerated in Section 6 of Article XVI of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Civil Service Commissioners.

Status of Operator to Chief Engineer, Fire Department.

June 24, 1913.

Gentlemen: I am in receipt of your request for an opinion as follows:

"This Board is in receipt of a communication as follows:

"'Complaint has been made to this Commission that Jeremiah L. Collins, Captain of Engine Company 29, is detailed as operator to the Chief Engineer. The salary of Chief's operator is fixed by the Charter at $1500 per annum and the salary of Captain is fixed at $1860 per annum. We therefore beg leave to inform your Honorable Board that if Mr. Collins continues to act as a Chief's operator we shall refuse to approve his salary demand for the position of Captain.

Yours respectfully,

CIVIL SERVICE COMMISSION,

Jas. J. Maher, Chief Examiner.'

"The circumstances connected with the case are the following: Jeremiah L. Collins was duly appointed Captain in this Department on December 17, 1912. For many years prior to that time he had been a duly and regularly appointed and qualified Lieutenant in this Department, from which rank he was, on the said 17th of December, 1912, appointed to his present rank. During all of the time he was Lieutenant in this Department, and since

his appointment as Captain, as aforesaid, he has been by the Chief Engineer of this Department detailed and instructed to fulfill the duties of what is known as an 'operator' in the Fire Department. He discharged such duties as would ordinarily be discharged by the 'operator' of the Chief Engineer of the Fire Department. In the judgment of the Chief Engineer it is essential that the duties ordinarily dischargd by an operator should, in the instance of his own operator, be discharged by some member of the Department other than a mere subordinate. There are times when, on his tours with the Chief Engineer, qualities involving the exercise of the highest discretion may be exacted of the officer discharging the duties of the operator to the Chief.

"This Board desires to be advised by you whether the fact that when a superior officer of the rank of Captain is by the Chief Engineer required to discharge the duties of 'operator' to the Chief himself brings such officer within the purview and application of Section 4 of Chapter 3, Article 9 of the Charter, so as to deprive him of the right to the enjoyment of the actual salary of the office held by him in this Department."

Section 4, Chapter III, Article IX of the Charter, which deals with Chiefs' Operators, reads as follows:

"The Chief Engineer may detail for duty as Chiefs' Operators such members of the Department as he may select, not to exceed one such Operator for each Chief, Assistant Chief and Battalion Chief. The members so detailed shall be known and ranked as Chiefs' Operators. Each of said Chiefs' Operators shall receive an annual salary of fifteen hundred dollars. They may be removed from such detail at any time, by the Chief Engineer."

Opinion.

My understanding is that during the entire time that Mr. Collins has been operator to the Chief Engineer of the Department he has received the salary attached to his rank in the Department. That is, when he was lieutenant and assigned as operator he received the salary of a lieutenant, and since being promoted to a captaincy and assigned as operator, he has received the salary of a captain. I also understand that his position in his company as captain is taken by a lieutenant of that company, who does not draw a captain's salary, he being paid the salary attached to his rank, that is, the salary of a lieutenant. In other words, the assignment of Captain Collins as an operator to the Chief Engi-

neer does not result in the City paying an extra captain's salary. In fact the City saves money by assigning a captain, rather than, say, a hoseman, to this position—for a hoseman's salary would be raised, while a captain's is not.

My understanding of the principal duties of a Chief's operator is, first, that he drives the Chief to the fire either in an automobile or buggy, and, second, he must be proficient in the Morse telegraphic code. For, while at the fire, if any messages are sent in of a fire in some other part of the City, one of the operators is detailed to receive such messages at the fire alarm box. Or again, if a Chief desires to send a message from the fire for some apparatus, this is done by the operator. Or, if a Chief is attending to some duty other than actual fire duty—as the inspection of any building—his operator is stationed at a fire alarm box to receive any messages that might be sent of a fire call.

In my opinion it is manifest and perfectly plain that the language of the above Section 4, "The Chief Engineer may detail for duty as Chiefs' Operators *such members of the Department as he may select,*" contemplates that the Chief shall have an uncontrolled discretion in the selection of Chiefs' Operators. The necessity for vesting such discretion in the Chief Engineer is easily seen. The peculiar duties and qualifications of a Chief's operator are such that the Chief Engineer should be allowed to appoint, as the Charter states, any member of the Department, no matter what his rank may be. The Charter intends that the Chief Engineer may select from the different members of the Department such individuals as happen to possess the qualifications of an operator, no matter what their rank may be. If we assume that the best operator to be found in the Department happens to be a captain, drawing the salary of $1,860 per annum, it would be absurd to either deprive the Chief Engineer of his services, or to force the said captain to receive, as the result of his being so selected by the Chief Engineer, a diminished salary, in the amount of $1,500 per annum. This would defeat the very purpose of the above section of the Charter vesting this discretion in the Chief Engineer.

Further, the spirit of the Civil Service provisions of the Charter would require that no power be given to any Board or officer to reduce the salary attaching to any rank in a department subject to Civil Service. If one drawing less than $1,500 per annum be appointed an operator, his appointment would be in the nature

of a promotion. But a member of the department receiving more than $1,500, if detailed as an operator, would simply be assigned to a different class of work, and would still be entitled to the salary received at the time of his assignment.

You are therefore advised that in my opinion it is perfectly clear that when a superior officer of the rank of Captain is by the Chief Engineer assigned to discharge the duties of operator to the Chief, he is required to comply with such order and is liable to discipline at the hands of his superior officers if he does not obey said order. And further, that such assignment of a Captain to the position of Operator to the Chief Engineer does not bring such officer within the purview of Section 4, Chapter III, Article IX of the Charter so as to deprive him of the right and the enjoyment of the actual salary of the rank held by him in the Fire Department.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Permission to Maintain Any Hospital Must Be Obtained From Supervisors.

June 25, 1913.

Gentlemen: I am in receipt of your request of June 19th, asking me to advise your Board whether or not it is necessary for a person to obtain permission from the Board of Supervisors in order to maintain a hospital, although such hospital has accommodations for less than six persons. My attention is called to the provisions of Section 17 of the Building Law and of Section 1 of Ordinance No. 823.

Section 17 of the Building Law (Ordinance No. 1008 New Series) provides:

"For the purposes of this section * * * a 'Hospital or Sanitarium' is a building used for the keeping and care of sick, invalids and infirm people, and having accommodations for more than five such people."

That distinction is merely for the purpose of defining and prescribing the nature and character of the construction of a

hospital, the Building Law requiring special provisions in the way of that construction.

Section 1 of Ordinance No. 823 reads:

"It shall be unlawful for any person to keep, establish or maintain any hospital without permission from the Board of Supervisors."

This ordinance is a police ordinance designed for the protection of the health of the community. The Building Law, prescribing solely the construction of buildings does not attempt to regulate business conducted in buildings although buildings designed for certain classes of business are required by the Building Law to be of a particular construction. A building permit issued by the Board of Public Works for the erection of a hospital would not of itself carry with it permission to conduct a hospital in the building. That permission must be obtained under the provisions of Ordinance 823.

The term hospital as found in Ordinance 823 is used in the ordinary acceptance of the word, viz.: a place for the care of sick or injured people, and it is not the number of the persons accommodated that give it its character. The ordinance by its terms applies to "any hospital."

The Building Law (Ordinance 1008 New Series) and Ordinance 823, are separate and distinct ordinances passed at different dates. The end sought by the building law in requiring special provisions for the construction of a hospital is the protection of the inmates. The end sought in requiring permission from the Board of Supervisors to conduct a hospital is the protection of the health of the community. Apparently the Supervisors in passing the Building Law were of the opinion that special requirements in construction were not necessary for the protection of the inmates where the accommodations were for five or a less number of persons. Obviously it is not the number of the inmates of a hospital which presents the danger to the health of the community. Number influences only the degree of danger and it is not manifest that the Supervisors in passing Ordinance 823 intended only to protect the community to a certain degree from the dangers of hospitals. Considering the diverse purposes of the two ordinances, I am of the opinion that the definition found in Section 17 of the Building Law can not be read into Ordinance No. 823.

I therefore advise you that a person maintaining a hospital must obtain permission therefor under Section 1 of Ordinance No. 823, regardless of the number of people accommodated.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Evidence Necessary to the Granting of a Pension to Parents of a Deceased Fireman—Arata Case.

June 25, 1913.

Gentlemen: I am in receipt of your request for an opinion under date of June 16th as follows:

"I have been instructed by the Board of Fire Pension Fund Commissioners to ask your opinion in the case of petition for pension of Guiseppe and Rosa Arata, parents of John Arata, deceased, formerly a lieutenant in the Fire Department, as follows:

"As to whether or not the Board of Fire Pension Fund Commissioners has the right or the power to exercise its discretion on the facts set forth in the transcript of testimony submitted to you herewith, to determine that John Arata came to his death, or met his death, in the discharge of his duties while a member of the Fire Department; and further, whether the recent Charter Amendment No. 44 is retroactive and has any application to the case of the petitioners, Arata having died before the adoption of the Charter Amendment.

"Transcript of testimony enclosed herewith, also original application for pension of Guiseppe and Rosa Arata, which I would ask you to kindly return."

Opinion.

A reading of the transcript of testimony attached to the said request shows that evidence was submitted at the hearings held before the Commission in support of the following facts:

Mr. Arata, a member of the San Francisco Fire Department, was injured on October 27, 1905, while in the performance of his duties in said Department, at a fire. He died on January 24,

1913, seven years and nine months subsequent to the injuries received. The injuries were very serious; he was confined in a hospital for several months thereafter; he never fully recovered from the said injuries, and though he remained as a member of the Department up to the time of his death he showed, immediately after the said injuries and throughout his continued service in the Department, a complete change in his mental attributes. The evidence introduced was along the line of showing that as a direct and proximate result of his injuries Mr. Arata became insane, finally losing his mind so completely as to result in his committing suicide. At the time of his death he was the sole support of his parents, now living, and he left no wife or children surviving him.

It is not of course for me to pass upon the correctness of the above facts, inasmuch as that is a matter solely for your Commission to determine. However, I assume that you desire that I take the above facts as being established to the satisfaction of your Commission, and that I then advise you as to whether or not your Commission has the right or power to determine that Arata was "killed while in the performance of his duty," as contemplated in the Charter provisions on the pensioning of the family of a fireman so killed. (Sec. 5, Chap VII, Art. IX.)

It was decided in the case of Baker vs. The Board of Fire Pension Fund Commissioners, 18 Cal. App. p. 433, that there was sufficient showing to grant a pension to the family of a fireman of the San Francisco Fire Department on the theory that he was killed while in the performance of his duties, when it was shown that the fireman received a broken back and other bodily injuries while performing fire duties and that as a result of such injuries he suffered such great pain and anguish as to finally become insane, and because thereof he killed himself about two months and a half after the said injuries so received.

The Court at pages 436 and 437 says:

"The injuries which Baker received may justly be said to have been the proximate cause of his death. They set in motion a train of events, operating from cause to effect, that, without the intervention of any outside and independent cause, resulted in his death.

"We say that his death was not brought about by the intervention of any outside and independent cause advisedly, for although

his own hand inflicted the wound of which he died, this was not an act for which he was either legally or morally responsible. Upon this phase of the argument the cases holding that suicide or self-destruction while insane does not exempt an insurer from liability under a policy excepting from the risk a death by suicide or the insured's own hand, where the insured commits suicide while insane, are illuminative. (See Mutual Life Ins. Co. vs. Terry, 82 U. S. 580, 21 L. Ed. 236; Breasted vs. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 482; Newton vs. Mutual Benefit Life Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Accident Ins. Co. vs. Crandal, 120 U. S. 527, 30 L. Ed. 740, 7 Sup. Ct. Rep. 685.)

"It has been said that 'self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose,' and was no more his act in the sense of the law 'than if he had been impelled by an irresistible physical force.' (Accident Ins. Co. vs. Crandal, 120 U. S. 527, 30 L. Ed. 740, 7 Sup. Ct. Rep. 685.)

"So in the case at bar, Baker cannot be said to have been the cause, either morally or legally, of his own death. The primary and efficient cause of his death was the dreadful injuries he received. These injuries set in motion a chain of events that, operating in a direct line from cause to effect and without the intervention of any independent force, resulted in his death. His death resulted without the intervention of any independent force, for the self-inflicted wound was the result of the insanity, which was in turn caused by the injuries. The injuries were thus the efficient and proximate cause of his death. 'An efficient, adequate cause being found, must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result.' (Travelers' Ins. Co. vs. Murray, 16 Colo., 296; 25 Am. St. Rep. 267, 26 Pac. 774.)"

The only question then, is whether the interval of time between the injuries and the death was so long as to bar the survivors from relief.

In the case of Edwards vs. Sweigert, 15 Cal. App. 503, the same Court denied to the widow of a former member of the Police Department of the City and County of San Francisco, a pension

on two grounds, (1) because he had drawn a pension himself during his lifetime on account of the injuries received while in the performance of his duties, and it was held that this barred his widow from drawing a pension, under the wording of the Charter; and (2) because of the length of time that elapsed between the receipt of the injuries and his death. The policeman in that case remained in the Department after the receipt of the injuries for approximately seven years and then he was retired on a pension and died at the end of two years. In discussing this phase of the question the Court, at pages 507-8 says:

"The word 'killed' as used in the statute conveys the idea of a death resulting from violence or external force. The petition of plaintiff nowhere alleges in terms that her late husband was killed while in the performance of his duties. It very properly simply alleges the actual facts, and thus clearly shows that he was injured while in the performance of his duties, and that such injuries resulted in his disability and retirement from service, upon a pension, about seven years later, and his death about two years still later. Do these facts show that he was 'killed while in the performance of his duties' within the meaning of the statute? The word 'while' as used in the section has relation to the time during which the duties are being performed. Doubtless, it is not necessary that both the injuries and death occur while the officer is performing his duty as such officer, for we think that, both in popular language and legal phraseology, one may be said to have been killed while in the performance of his duty who is injured while thus employed and soon thereafter dies from such injury.

" 'In popular language and legal phraseology, for some purposes, a party is said to have killed one on whom he has inflicted a blow of which the wounded person soon dies.' (Martin vs. Copiah County, 71 Mass. 407, 15 South. 73.) But there must be some limit to the time one may survive an injury received while in the performance of his duty, beyond which, if his death result, it cannot be said he was killed while in the performance of his duty.

"Looking to the analogy presented by the law of murder, it is the rule both of the statute of this, and, we believe, of all the states, as well as by the common law, that a person charged with murder cannot be held responsible for the death of his victim unless the death occur within a year and a day from the infliction

of the injury. However, we are not called upon, by the facts of this case, to determine how soon one must die from injuries received while in the performance of his duty to come within the meaning of the words 'killed while in the performance of his duty.' It is sufficient to say that one who is injured while in the performance of his duties, and is not even disabled thereby for approximately seven years, and is then retired on a disability pension, and dies at the expiration of two years more while in retirement on such pension, cannot be said to have been killed while in the performance of his duty."

Of course there is a distinction between this case and the one submitted to me by your Honorable Board in that the Court here says that the policeman was "not disabled thereby for approximately seven years." If your Commission should find from the evidence in the case which you submitted to me that there was an immediate injury which immediately and continuously thereafter seriously affected the mind of the fireman, it is possible that there might be a proper distinction made on that ground. On the other hand, Arata remained in the Department for seven years and nine months, performing his duties as a fireman, and this may be taken into consideration by your Board, on the question of extent of the injuries.

The Charter as now amended fixes the time limit within which death must result as one year after the injuries, but this amendment was subsequent to the death of Arata and therefore does not affect this case. (See Kavanaugh vs. Board of Police Pension Fund Commissioners, 134 Cal. 50.)

You refer in your communication to this amendment as Charter Amendment No. 44. It is, however, Charter Amendment No. 26. It was not necessary for the decision in the Edwards case that the Court go into the question of the length of time between the injuries received, and the death. So far as that point was discussed in the Edwards case the Court held that under the particular facts of that case the policeman not having been even disabled by his injuries for approximately seven years, and then having lived for two years longer, being retired on a pension, that he could not be said to have been killed while in the performance of his duty. It will be seen therefore that in the absence of such a definite rule as we now have in the Charter, it would in each case be a question of fact as to the immediate and con-

tinuous suffering from the injuries, and the direct connection that can be shown between the injuries and the death.

In my opinion therefore it is a question for your Commission to determine from the facts shown; among other things, the elements being:

1. The receipt of injuries in the performance of duty;

2. The immediate or approximately immediate disability therefrom;

3. A reasonable continuance in the duration of said disability;

4. A direct connection between such injuries so received and the insanity of Arata;

5. His suicide being the direct result of insanity;

6. Whether at the time of his death he was the sole support of his parents and that he left no wife or orphan children under the age of sixteen years surviving him.

If in your opinion, the evidence produced before your Board warrants your concluding in favor of the applicant for a pension with reference to each of the above points, then in my opinion your Board would have the right and power to exercise its discretion on such facts and determine that said applicant is entitled to a pension as applied for.

I enclose herewith transcript of testimony as per your request.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Capp Street from Twenty-sixth Street to Serpentine Avenue—Whether an Open Street.

June 27, 1913.

Gentlemen: I am in receipt of your communication of the 5th inst. as follows:

"We are enclosing herewith anonymous communication dated May 10, 1913, received from his Honor, the Mayor, complaining

of encroachments on Capp Street between 26th Street and Serpentine Avenue, together with comment thereon of the City Engineer, and official survey of the locality prepared by the City Engineer's office. Will you kindly render this board an opinion concerning the status of that portion of Capp Street referred to, and whether the same is an open street of this city and county?"

Opinion.

Capp Street, from the southerly line of 26th Street to the northeasterly line of what was formerly Serpentine Avenue, is a public street of the City and County of San Francisco. It was delineated on the Humphrey Map of 1870, which map was made official by Order No. 966 approved October 25, 1870, Section 1 of which is as follows:

"The map made by the City and County Surveyor of the City and County of San Francisco under and by virtue of the contract authorized by resolution of the Board of Supervisors, number nine thousand nine hundred and thirty-one (9931) excepting Nevada (Norfolk) Street in Mission Block No. 9, until its location is determined by the Supreme Court is hereby approved, adopted and declared to be the valid, legal and official map of the City and County of San Francisco."

An examination of the blue print attached to your communication, furnished to your Honorable Board by the City Engineer, discloses the fact that there exist certain illegal encroachments on the sidewalk on the westerly portion of Capp Street herein mentioned, which your Honorable Board has the right to order removed.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

What Conditions May Be Included in Franchise to Southern Pacific Company.

June 30, 1913.

Gentlemen: I am in receipt of the following request for an opinion from the Clerk of your Honorable Board:

"The Board of Supervisors has under consideration at the present time an application of the Southern Pacific Company for a franchise to construct, maintain and operate tracks across certain streets in the City and County of San Francisco.

"I am directed by the Board of Supervisors to ask you for an opinion as to the powers of the Board to write certain conditions or provisions into a franchise. Does the law place any limitations upon the right of the Board of Supervisors to insert into a franchise whatever provisions or conditions that in its opinion are deemed reasonable and necessary?"

The Charter provision covering the grant of a franchise to any transcontinental or other steam railroad company, is found in Article II, Chapter II, Section 1, Subdivision 28, which reads as follows:

" * * * * The Board of Supervisors shall have power:

"To allow any transcontinental or other railroad company having not less than fifty miles of road actually constructed and in operation to enter the City and County with its road and run its cars to the water front at the most suitable point for public convenience. No exclusive right shall be granted to any railroad company; and the use of all such rights shall at all times be subject to regulation by the Supervisors.

"Every ordinance granting such right shall be upon the conditions that said company shall pave and keep in repair the street from curb to curb in such manner and with such material as may from time to time be prescribed by the Supervisors, and that such company shall allow any other railroad company to use in common with it the same track or tracks, each paying an equal portion for the construction and repair of the tracks and appurtenances used by such railways jointly."

In addition to the Charter section, we find in the Civil Code, Section 465, Subdivision 5, it is provided that "every railroad corporation has power to construct their roads across, along or

upon any stream of water, watercourse, roadstead, bay, navigable stream, *street, avenue, or highway.* * * *"

This section of the Civil Code is limited by the provisions of Section 470 thereof, as follows:

"No railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate."

We therefore see that the State has provided (1), in the Civil Code, that a transcontinental railroad company cannot make use of the streets of the city without having first obtained permission from the City to do so, and (2) that in ratifying the Charter the State has granted to the City power to give such franchise rights to any such railroad company.

It is significant that in neither the code provision nor the charter provision has the State expressly granted to the City any authority to exact any conditions from the railroad company which the City might see fit to include in the franchise. The apparent reason for this is that the policy of the State is, for the benefit of all the people of the State, to encourage any such railroad, coming from a distant point, to make its service of real benefit to all the people of the State by utilizing the streets of the different cities, and in that way obtain the necessary facilities for such continuous right of way as may be required for an adequate service to the people of the entire State.

In People vs. Craycroft, 111 Cal. 544, the Court had before it an original application for a writ of mandate applied for by the San Francisco and San Joaquin Railway Company to compel the Board of Trustees of the City of Fresno to take some action upon its petition for leave to extend its railway tracks through the City of Fresno and across and along certain streets and lands of that city. The petitioner was a corporation organized under the laws of this State and authorized to construct and operate a steam railway from a point near the Bay of San Francisco to a point near the City of Bakersfield.

The route of the road as laid out, passed through the City of Fresno and the petitioner had constructed a portion of its road. Application was therefore made for permission from the Board

of Trustees of Fresno to continue its road through that city. The Trustees took the position that instead of passing upon the question as to whether the proposed route was properly located and one that should be granted, that they must, under a certain act of the Legislature, advertise for bids, etc. The Court held that this act had no application in the case of the road starting at a distant point outside of the city and through different cities, and at page 547 the Court says:

"It is the policy of this State to encourage the building of railroads, and a corporation complying with the statutory prerequisites acquires, among other things, the right to construct and operate its road between the termini named in its Articles of Incorporation. In the exercise of this right it may pass through cities and towns along its route, if they are willing to grant the privilege."

The effect of this decision, as well as several others of our Supreme Court, is that a steam railroad company, acting under general authorization from the State, has been granted a franchise by the State over all roads, etc., necessary for the construction of said road. The only limitation upon this principle is that in incorporated cities the consent of the municipality must first be obtained before its streets can be used, but the granting or withholding of this consent is the measure of the municipality's power in the premises.

"The City in granting a street railway franchise is but an agency of the State.* * *"

> Mr. Chief Justice Beatty in Los Angeles Railway Co. v. Los Angeles, 152 Cal., at page 244.

It has been declared by our Supreme Court in a great number of cases that the powers of a municipal corporation are measured strictly by its organic law or by such law of the State as might be looked to for a conclusion as to what those powers are. In the case under discussion this organic law is either the general law, the charter, or both.

The case of South Pasadena vs. Terminal Railway Company, 109 Cal. 315, is in point to the effect that the city, in fixing conditions upon which a franchise is granted, must first look to the powers granted to that city under its organic law or under the law of the State. That is, it cannot view the relationship

between itself and the railway company to which it grants a franchise in the same sense that a private individual might do and treat the matter simply from the standpoint of a contract between two parties.

The Supreme Court held in this case that in granting a franchise the city is doing more than simply making a contract. It is acting in a legislative sense and cannot transcend the powers of the municipality, which powers are measured by its charter or the general law and constitution of the State.

In the South Pasadena case the power of the city was determined by the Court, by reference to the above section, section 470 of the Civil Code which states that "no railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate." And also by the terms of the Municipal Corporation Act (Stats. 1883, pp. 269-70) which authorized a municipality "to permit *under such restrictions as they may deem proper*, the laying of railroad tracks and the running of cars drawn by horses, steam, or other power thereon * * * in the public streets."

It will be noted that the above language of the Municipal Corporation Act is similar to that of Subdivision 28 of Section 1 of Chapter II, Article II of the Charter except that it does not contain the specific references to control, as paving of streets, and so, if anything, gives a greater and more general power to prescribe conditions than is found in the Charter. The Court held that this power given to provide the restrictions under which such a franchise might be granted to a railroad did not permit the city to lay down restrictions which amount to an exercise of power by the city beyond that vested by its organization or by the law of the State. The important question to determine of course is whether the making of any particular condition is such a transcending of the powers of the city.

In the South Pasadena case the Court held that it was beyond the powers of the city to fix the passenger rate to be charged for the taking of passengers beyond the city limits and therefore such a condition included in a franchise was held void.

The language of the Court on the particular question before it is as follows: (pp. 321-322)

"Therefore, we must determine whether the ordinance under view transgresses any of the just and needful restrictions which the general law of the State imposes upon lawful legislation of this nature. A municipal ordinance must consist with the general powers and purposes of the corporation, must harmonize with the general laws of the State, the municipal charter, and the principles of the common law. (Ex parte Frank, 52 Cal. 609; 28 Am. Rep. 642; Ex parte Kearny, 55 Cal. 225.) One of the limitations upon such ordinances is that they have no extra territorial force unless by express permission of the sovereign power; in the nature of things this must be so unless intolerable confusion and evil are to result; and the Constitution of the State recognizing the necessity for such a restriction, has provided (Const. Art. XI, sec. 11) that 'any county, city, etc. may make and enforce within its limits all such local, * * * and other regulations, as are in conflict with general laws.' Here was a road lying partly within the confines of at least three municipalities—Los Angeles, South Pasadena and Pasadena; conceding the right of plaintiff to impose a limitation on the charges to be made for passage between stations within its limits and stations elsewhere, then the other cities named above have, or might have, the same right; but suppose the city of Los Angeles, as a condition of the occupation of its streets by the railroad, had ordained that the round trip fare between stations within its limits and South Pasadena should be more or less than that fixed by the ordinance of the latter city; or that the fare to Pasadena, a place more remote than South Pasadena, should be less than that to the latter point as fixed by its own ordinance, is it not plain either that a conflict must arise and inevitable discrimination between the places ensue—expressly prohibited by the Constitution, article XII, section 21—or that the railroad company must charge only the lowest of the rates thus fixed by jurisdictions of equal authority, and so the ordinance prescribing the *lowest* rate be made operative in and between both places, similar illustrations of possible confusion might be multiplied indefinitely?"

The language of the Court with reference to the general proposition that the city cannot, in providing conditions for the granting of a franchise, reach beyond the limitations of its governmental functions, and that the measure of power is not purely a question of the right to contract, is very instructive. At pages 319-20-21 the Court says:

"It is by statute provided that 'No railroad corporation must use any street, alley, or highway, or any of the land or water within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate.' (Civ. Code, Sec. 470.) By the terms of section 862 of the municipal corporation act (Stats. 1883, pp. 269, 270) plaintiff's board of trustees is given power, '13. To permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam, or other power thereon * * * in public streets.' Somewhat advanced ground is taken on behalf of respondent upon the effect of these enactments. It is claimed by counsel that the 'power thus granted is an absolute one, the franchise to be granted or not in the discretion of the city authorities'; *that 'having this power to grant or refuse, it may annex such terms and conditions to its grant as to its authorities may seem proper, so long as such conditions do not conflict with any law.' With the qualification stated, viz., that such conditions do not conflict with any law, we may accept the statement as correct for the purposes of this decision.* The ruling in Pacific R. R. Co. vs. Leavenworth, 1 Dill. 398, was that the authorities of the city might prescribe in such a case, as conditions of their assent, 'such lawful and proper terms as they deemed expedient.' *The authority of the city board of trustees under the statutes referred to is legislative in its nature; primarily it is of a piece with the power to enact municipal police and other ordinances—local laws* (McCracken vs. San Francisco, 16 Cal. 620)—*and is not referable for its support to the power of making contracts.* San Francisco vs. Spring Valley Water Works, 48 Cal., 529; People's R. R. vs. Memphis R. R., 10 Wall, 51; Dillon on Municipal Corporations, 4th ed. sec. 724; Tiedeman on Municipal Corporations, sec. 302; see Arcata vs. Arcata etc. R. R. Co. 92 Cal. 639; Reagan vs. Farmers' etc. Co., 154 U. S. 397.) If the city could make a valid agreement for rates of fare to Los Angeles, including the charges of a connecting line of street railway, then it might also stipulate for rates over connecting lines to San Francisco or elsewhere. And if, as claimed by respondent, the case is one of mere contract obligation, then we think it clear that some grant of authority immediately through the legislature—and this would be of doubtful constitutionality—or immediately through the Constitution, from the people of the State, either in express terms or by necessary implication, must be exhibited to warrant such a contract; and, since none appears, we think the city was as

destitute of capacity to bargain with a railroad company for rates of transportation to distant points for its inhabitants and other persons to whom it does not stand in *loco parentis* (San Diego Water Co. vs. San Diego, 59 Cal. 517), as it was, for example, to bargain with a purveyor to supply them with entertainment; the city is not the agent of its inhabitants or of the public for such purposes. (Hodges vs. Buffalo, 2 Denio, 110; Love vs. Raleigh, 21 S. E. Rep. 503, N. C., April 16, 1895; and see Wallace vs. San Jose, 29 Cal. 186-88; Herzo vs. San Francisco, 33 Cal. 142; Aberdeen vs. Honey, 8 Wash. 251, 254; Tiedeman on Municipal Corporations, Sec. 169.)"

And at page 322 the Court says:

"Respondent likens the case to one in which an individual grants the right of way for a railroad over his land, and in part consideration thereof receives a free pass on the road for himself and family. But the analogy fails in all essentials; (1. As we have seen, the city, unlike an individual, has no authority to provide free passes or other transportation for anybody, unless a convict or some other person, to whom the city occupies a relation of guardianship; 2. The streets of the city are not held as corporate or municipal property, subject to the power of contractural disposition, like the property of an individual (San Francisco vs. Spring Valley Water Works, supra; in re Philadelphia etc. R. R. Co., 6 Whart. 44; 36 Am. Dec. 202); 3. The ordinance here does not confine its scope to any individual or number of individuals, but attempts to regulate the fares to be paid by the general public—all persons wherever resident; in short, of governmental character.)"

The case of City of Arcata vs. Green, 156 Cal. 759, is practically identical with the South Pasadena case in applying the rule that a municipality is restricted by its charter and the general law of the State in fixing conditions upon which a franchise may be granted.

In the Arcata case the City of Arcata granted a right to construct an electric railroad through such city on condition that the grantee should, within certain periods, commence and complete the construction of their railroad between Arcata and Eureka. The ordinance granting this right provided that "the above rights and privileges are granted upon the express conditions that the

work of constructing and fully equipping an electric railroad between the city of Eureka and the city of Arcata in said county of Humboldt, shall be commenced within nine months after the passage of this ordinance and the same completed and in operation between said Eureka and Arcata and through Arcata, within two years after the passage of this ordinance."

It was provided in the ordinance that an undertaking in the penal sum of $5000 would be required to secure compliance with the above condition. The grantees did not comply with the condition and suit was brought asking judgment for the above penal sum as liquidated damages.

The Court, through Mr. Justice Sloss, assumes that the city trustees had power, under the Municipal Corporation Act, to grant this right to lay tracks and operate a railroad over the streets of the city without first advertising the right for sale or selling it to the highest bidder.

The Court again construes the same section of the Municipal Corporation Act as was considered in the South Pasadena case, which authorizes city trustees to permit the laying of tracks, etc., "under such restrictions as they may deem proper" and held that it was not within the power of the trustees of the city to include a condition that the road must, within certain periods, be commenced and completed between Arcata and another city. The basis of the decision is the same as in the South Pasadena case, that is, the city trustees have no power to include conditions that were operative with reference to a portion of the road outside of the territorial limits of the City of Arcata itself. At page 764 the Court says:

"The condition here imposed was that the grantees should, within certain periods, commence and complete the construction of their road between Eureka and Arcata and through Arcata. So far as this related to the construction between the two cities, it was as clearly extra territorial as the provision in the South Pasadena case. It is equally clear that the condition is not severable, and that it cannot be held good as to that part of it which requires construction through the city of Arcata. What the municipality was seeking to bargain for was a road connecting the two cities. The right to run over the streets of Arcata was a mere incident to this scheme, as is strongly indicated by section 12 of the ordinance, which declares that it was not intended to

grant a franchise for a street railroad in Arcata. We think there can be no doubt, on the whole ordinance, that the construction undertaken, i. e., from Eureka to Arcata and through Arcata, was a single and complete thing, and that the effort of the trustees was to grant a right upon condition that the entire contemplated road be constructed."

It might be argued that if a railroad corporation voluntarily agreed, in return for the grant of a franchise, to perform certain conditions, no matter what those conditions may be, that this is a voluntary act upon the part of the corporation and so enforceable in law, but in the Arcata case the Court disposes of this contention, in the following language: (pp. 762-3)

"In this connection, we do not overlook the allegation that the bond was voluntarily given by the appellants. But, reading the allegation in connection with the averments showing that the giving of such bond was a condition upon which the trustees, by their ordinance, made the grant of the franchise depend, it means no more than that the grantees accepted the franchise upon the only terms available to them. They consented to furnish the undertaking, but their consent was required in order to enable them to take any benefits under the grant. As between private individuals or corporations, having a general power to make contracts, this would undoubtedly have constituted an agreement binding upon the parties to it. Here, however, one of the parties to the alleged contract was a municipal corporation. As such, it had only such powers as were expressly or by necessary implication conferred upon it by the Constitution or by the statutes passed under the Constitution. (Herzo vs. San Francisco, 33 Cal. 134; Ex parte Frank, 52 Cal. 608 (28 Am. Rep. 642); McCoy vs. Briant, 53 Cal. 250; South Pasadena vs. Terminal Railway Co., 109 Cal. 315, 41 Pac. 1093.)"

Akin to the above suggestion of the voluntary act of the railroad corporation is the doctrine sometimes advanced of estoppel, that is, that the railroad corporation would be estopped from denying the validity of a condition which they voluntarily agreed to in return for a franchise. The Court decides as to that point that estoppel does not apply where a city acts clearly without the scope of its powers.

Our Supreme Court in the City of Arcata case, at pages 764-5 says, with reference to this point:

"The appellant urges that the defendants, having received the grant which they sought, are estopped to deny the validity of their undertaking which they gave to consideration of such grant. But we think the doctrine of estoppel has no just application here. A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts entirely beyond the range of the municipal authority. 'If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it * * *. We cannot apply the doctrine of estoppel to such a case as this.' (City Council vs. Montgomery etc. Co., 31 Ala. 76.)"

The above decisions by our California Supreme Court show what, to my mind, is the undoubted rule in this State. A city in granting a franchise, enters into a contract with the grantee. But in doing so, it finds its powers limited as a contracting party, owing to the fact that it is acting in a governmental and legislative capacity. The State, in ratifying the Charter of our City, said, in effect, "we delegate to you a part of the State's sovereignty. You may, by contract, give to a railroad corporation a certain enjoyment of the use of your streets. In doing so, however, you are strictly limited in the terms which you may impose in any such contract, by the language of the Charter and Code, upon which you must rely for any power whatever in the premises. The State permits you to have this control over your streets. You, therefore, are acting in the place of the State. You cannot go beyond the limits laid down by the State, in accepting the State's invitation to exercise this control. Those limits are clearly marked. They forbid your placing any conditions in a franchise except such as are connected with the streets occupied, or reasonable under the circumstances, or such as have a direct relationship with the franchise itself. For the State itself is interested in having these railroads extend from one end of the State to the other, and has not parted with any more control than is expressly stated or necessarily inferred in the Code and in your

Charter." As far as our Charter is concerned, there is nothing therein changing this rule.

The fundamental rule must then be applied that the exercise of a municipal corporation's powers is strictly measured by the grant of powers from the State to that municipality. It is of course apparent that any condition which would insure the proper use of the franchise itself, or equitable treatment to the city in such use, as care of the streets, character of equipment, passenger facilities, method of laying of tracks or of operating the cars, safeguarding property and life, and similar matters might be included as conditions in the grant. That is, we would, in determining whether a condition was lawfully imposed upon the grantee, look to the streets involved, and the actual enjoyment of privileges under the franchise granted, and if the condition is directly and properly related to either the safe and proper use of those streets, or the equitable enjoyment of the rights granted to the railroad corporation, from the standpoint of all the people of the city, then it would follow that such condition was lawfully imposed by the city.

It is also clear that our Supreme Court has laid down the rule that if a condition cannot be supported upon theories as above suggested, no reliance can be placed by the city upon an argument either that the railroad company should be bound by its voluntary act in accepting the franchise, or that it might be estopped from insisting upon the unlawfulness of the condition imposed. The Court has held that the rule in California is that a grantee of a franchise cannot be placed in the position of binding itself by a condition which the city has no power to make, when a refusal to subscribe to such condition might result in being denied any rights whatever.

The Supervisors can, of course, either grant or refuse to grant any such franchise. That is purely discretionary with your body but this does not mean that such discretionary power can be exercised to the extent of inserting in a franchise conditions which it is beyond the power of your Board to make.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Effect of Telegram Revoking Power of Attorney.

July 1, 1913.

Sir: I am in receipt of your communication of June 26th in which you request my opinion as to your duty in the case presented by the following telegram, and inquiring if you can, by virtue of such telegraphic order, refuse the recordation of the power of attorney, if presented:

"Rochester, Nev. Jun. 25, 1913.

County Recorder, San Francisco, Calif:

Know all men by these presents that I Emil Motzkus do hereby revoke the power of attorney given by me to one Sam Soyster for the sale of lot Eighteen, Block G Subdivision Six Thornton and Williams Subdivision S and F City and County of San Francisco. Letter follows explaining. Motzkus."

Opinion.

Sec. 1158 of the Civil Code of California follows:

"Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."

Section 1161 of the Civil Code is in part as follows:

"Before an instrument can be recorded * * * its execution must be acknowledged by the person executing it * * * and acknowledgment and proof certified in the manner prescribed by Article III of this chapter."

Section 4137 of the Political Code is as follows:

"When any instrument, paper or notice, authorized by law to be recorded, is deposited in the recorder's office for record, the recorder must indorse upon the same the time when it was received, noting the year, month, day, hour, and minute of its reception, the amount of fees for recording, and *must record the same without delay,* together with the acknowledgments, proof and certificates, written upon or annexed to the same, with the plats, surveys, schedule and other papers thereto annexed, in the order in which the same were received for record, and must note at the foot of the record the exact time of its reception and the name of the person at whose request it was recorded."

From a reading of the previous sections of the law relating to the recordation of instruments, I am of the opinion that if the power of attorney in question is presented to you properly acknowledged, that it is entitled to recordation by you notwithstanding the receipt by you of the telegraphic order, and that you have no discretion in the matter. The telegraphic notice given you is not such form as to entitle it to recordation and amounts to nothing more than a personal notice to you not to deal with the person holding the power of attorney. Such notice in no manner can excuse you from the plain duty imposed upon you by law to record an instrument affecting the title to real property when presented to you properly acknowledged.

You are therefore advised that you cannot refuse the recordation of the power of attorney if presented, properly acknowledged.

Respectfully,

PERCY V. LONG,

City Attorney.

Recorder.

City Can Sell Only Those Lands Designated in Sec. 9, Chap. II, Art. II of the Charter.

July 3, 1913.

Gentlemen: I am in receipt of the request of your secretary for an opinion, as follows:

"I am directed by the Playground Commission of the City and County to respectfully request your opinion of a proposal that the present unoccupied property at Seventh and Bryant Streets, purchased in the bond issue of September 29th, 1903, to be used as a children's playground, be disposed of by this department in an exchange or sale. The benefit so derived to be invested in property for playground purposes elsewhere in the City and County.

"Shifting of the population following the fire of 1906, has rendered a large portion of the property referred to obsolete for playground purposes, for which it was intended, but has created a congestion of conditions elsewhere that the present finances of the City and County are not able to adjust.

"It has been suggested that a charter amendment, or an ordinance passed by the Board of Supervisors, might permit great benefit from the transaction as above mentioned.

"An explanation of the procedure, if there is any, and the powers of the City and County, in this matter, will be received with enlightenment by this office, in acknowledgment of the above inquiry."

Opinion.

The only authorization found in the Charter for the sale of lands belonging to the City is as follows:

Article I, Section 1, which provides that the City may "receive bequests, gifts and donations of all kinds of property, in fee simple, or in trust, for charitable and other purposes, and do all acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust."

Article II, Chapter II, Section 1, Subdivision 29 authorizes the conveyance of lands in accordance with an act of the Legislature of this State approved March 14, 1870, under which city deeds were issued prior to the fire to clear up titles for the owners of property.

Subdivision 31 thereof provides that the City may transfer from one department of the city government vacant and unused lots of lands to another department.

In 1907 the Charter was amended, Section 9, Chapter II, Article II thereof to provide that the City shall have power to sell certain lands described in said section, which provision does not include the property concerning which you have inquired. Also the amendment provided that the City might sell all lands that might *thereafter* be acquired, excepting lands for parks, squares and children's playgrounds. A recent amendment to the Charter authorizes the sale of other land, not including the playground in question.

I understand that some of this playground property was purchased prior to the Charter Amendment of 1907, and some, after the amendment.

It will be clearly seen from the above that there is no authority in the City to sell any lands except those particularly mentioned in the Charter. The land purchased prior to the amendment cannot be sold for that reason, and also, because acquired for playground purposes. And with reference to the lands which might have been

acquired subsequent to the adoption of the above Charter Amendment of 1907, the amendment itself excepts lands acquired for children's playgrounds.

Former City Attorney Franklin K. Lane, in passing upon this same question, held that the Board of Supervisors had no power to sell any real estate belonging to the City and County except such as above indicated. (Opinions of City Attorney Lane, 1899-1902, p. 690.)

I am therefore of the opinion that there is no power in the City to sell or transfer this property and that the Supervisors cannot, by ordinance, authorize the same. The adoption of a Charter amendment giving such authority would permit of the sale or transfer of said property.

I have not herein considered the possible application of Subdivision 31, Section 1, Chapter II of Article II of the Charter, which authorizes the Board of Supervisors to "transfer from one department of the City government vacant and unused lots of land to another department."

Respectfully,

PERCY V. LONG,

City Attorney.

Playground Commission.

Hemlock Street, Between Van Ness Avenue and Franklin Street, Is an Open Public Street.

July 13, 1913.

Gentlemen: I am in receipt of your communication of the 10th inst. as follows:

"Will you kindly inform this Board whether Hemlock Street between Van Ness Avenue and Franklin Street is an open public street of this city and county?"

Hemlock Street (formerly Walnut Street) in Western Addition Block No. 84, running from Van Ness Avenue to Franklin Street between Sutter and Post Streets, appears upon the map of the Biedeman Tract filed for record in the office of the Recorder on January 31, 1861; it also appears upon the Humphrey's Map of 1870. As far as the record discloses, this street was never

closed by the Board of Supervisors and in my opinion Hemlock Street in Western Addition Block 84 is a public street of this City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Changing Denomination of Municipal Bonds.

July 14, 1913.

Sir: I am in receipt of your communication requesting an opinion, as follows:

"Enquiries have been made of me for city bonds of lower denomination than $1000. All of the city bonds are of the par value of $1000. Is there any way whereby any part or all of any issue could be changed into bonds of smaller denominations?"

Opinion.

The Charter, Article XII, Section 7, provides that "the ordinance calling such special election (for the acquisition of public utilities) shall set forth the purposes for which the election is called, the estimated cost of each utility proposed for acquisition by the city and county, *the proposed method and manner* of payment thereof, * * *; and if it shall be necessary to incur a municipal indebtedness * * * the ordinance shall specify * * * that bonds of the city and county shall issue for the payment of the cost of such utility or utilities, *as in such ordinance set forth* * * *."

Section 8 provides that after ten days' publication of this ordinance the Supervisors shall publish a notice of such election and that "such notice shall specify the purpose for which the indebtedness is to be incurred, *the number and character of the bonds to be issued,* the rate of interest to be paid *and the amount of tax levy to be made for the payment thereof.*"

Section 10 provides that "The bonds issued under the provisions of this article *shall be of such form as the Supervisors, in the ordinance calling the election therefor shall determine.* * * * The bonds so issued * * * shall be issued in *denominations of not less than ten dollars and not more than one thousand dollars.* * * *."

Derby vs. City of Modesto, 104 Cal. 515, was an action brought by a taxpayer of the City of Modesto to enjoin the levy of a tax for the purpose of raising money to pay for bonds which had been issued by the city and sold and paid for. A taxpayer claimed that the bonds were invalid, among other reasons, because the ordinance authorizing the publication of notice of the special election stated the number of bonds proposed to be issued to be fifty, of the denomination of five hundred dollars each. After the people had, by their vote, authorized such an issue, the number was changed by a subsequent ordinance to forty bonds of five hundred dollars each, and twenty bonds of two hundred and fifty dollars each.

Section 3 of the Act of 1889 (Stat. 1889, p. 400), provided, in language identical with that found in Section 8, Article XII, of our Charter, that the ordinance giving notice of the special election shall state "*the number and character of the bonds to be issued.*"

Held that this requirement as to giving notice of the "number and character" of the bonds was not of the essence of the thing to be done; that the *amount* of the bonds was, and it was not changed; that the failure to follow the ordinance giving notice of the election as to number and denomination, did not prejudice the rights of any interested parties; that, therefore, those conditions were not mandatory; that when bonds are sold and are in the hands of a bona fide purchaser, who had no notice of any defect in the proceedings leading up to the issuance, that the bonds in his hands are valid unless it can be shown that they are absolutely void for want of power in the city to issue them.

The next case to be decided by the Supreme Court was Skinner vs. City of Santa Rosa, 107 Cal. 464. Here a taxpayer protested to the city council of Santa Rosa against their delivering to a successful bidder certain city bonds, and he stated that it was his intention to bring injunction proceedings to restrain the collection of any tax levied for the payment of these bonds. Then, prior to any delivery of the bonds, the controversy was submitted to the Superior Court upon an agreed case.

The ordinance calling the special election at which this bond issue was authorized, stated that the principal and interest of the bonds would be payable "in gold coin or lawful money of the United States," and that the interest would be paid annually at the rate of four per cent per annum—that the principal and inter-

est would be payable at the city treasury. Having failed to sell any of the bonds on such a basis the city council passed an ordinance for their issuance, as follows: To be payable "in gold coin of the United States of America of the present standard of weight and fineness"—and that the interest at the rate of four per cent per annum should be "payable *semi-annually* in like gold coin"—and that the bonds would be payable at the Chemical National Bank in the City of New York.

Held—1st. That changing the payment of interest from an annual to a semi-annual payment, in effect, raised the interest rate, and it being required to set forth the interest rate in the ordinance giving notice of election, and this change directly affecting the taxpayers, it was such a change as the city council had no power to make.

2nd. As to the bonds being made payable "in gold coin of the present standard of weight and fineness," this could not be done, first, because the notice of election stated that they would be payable "in gold coin or lawful money of the United States," and although there was no requirement that the notice of election include a statement of what kind of money the bonds shall be payable in, that having done so, the people gave their directions on the subject, and it might be an increased burden on the people to have to pay "in gold coin of the present standard of weight and fineness"; and, second, because a statute expressly provided that such bonds "shall be payable in gold coin or lawful money of the United States," and the City Council violated this statute in providing that the bonds must be paid "in gold coin of the present standard of weight and fineness."

3rd. With reference to changing the place of payment from the city treasury to the City of New York, that, though the law did not require the notice of election to include any reference to the place of payment, that having done so the people's attention was called to this, and so the city council had no right to change the place of payment.

The Court distinguishes the earlier Derby case, supra, on the ground that in that case the bonds had been sold and the money paid into the treasury.

At page 476 the Court says:

"Counsel refer to the case of the controversy between Derby and the City of Modesto. (Derby vs. Modesto, 104 Cal. 515.)

"In that case the bonds had been sold, the purchase money paid into the treasury, and the controversy arose more than a year afterward. One point then urged by the taxpayer was that the bonds provided for the payment of semi-annual interest. In reply to this contention it was said: 'The statute provides that the trustees shall have the right to determine the rate of interest such bonds shall bear, provided that in no case shall it exceed seven per centum per annum. The time at which the interest is to be paid, whether annually or semi-annually, affects the rate of interest, and is within the power conferred upon the board by the statute, and the rate being within the statutory limit the bonds are valid as against this objection.'

"The facts should have been more fully stated upon that point. The ordinance of submission and the notice of election both provided for semi-annual interest, precisely as stated in the bonds, but the statute at that time was silent as to the payment of interest semi-annually, and the contention was that in providing for semi-annual interest the statute had not been followed.

"In the case at bar, where the question arises before the bonds have been delivered, we hold that the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had."

And at pages 474-5, with reference to the same distinction the Court says:

"The question whether the bonds, if issued, would be void in the hands of a holder for value is not the test or measure of the right of a taxpayer of the city to enjoin the issue of them. It may well be that the purchaser is bound to know whether the rate of interest specified in the bond is within the limit fixed by the statute; but the rate being within the statutory limit, it does not follow that he may not rely upon the recitals in the bond as to the *regularity* of the proceedings by the municipality in fixing the rate specified, or that such recitals will not, in favor of the bondholder for value, bind the corporation. The distinction between the question now under consideration and that which would arise in an action by a bona fide holder of one of these bonds is noticed by the Supreme Court of the United States in the leading case of Knox vs. Aspinwall, 21 How. 539, where, after

quoting the recitals of that bond showing that it was issued by authority, it was said: 'The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power;' and afterward further said: 'We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached, but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

While the above Skinner case draws the distinction between an action brought after the bonds are sold and one brought before their issuance, we must note that the Skinner case is to be distinguished from ours, even though, in our case, an attempt were made to restrain the issuance. For the gist of the Skinner case is that unless the issue were restrained the bonds, once getting into the hands of a bona fide purchaser, would impose an additional burden on the taxpayer. This, because the interest rate is changed; the kind of money in which principal and interest is payable is changed, and the place of payment is changed, and as a result, the amount of taxes to be levied each year would be changed. Again, the Court assumes that a statute specifying the kind of money in which the bonds were payable, was violated. In our case, however, by merely changing the number and denomination of the bonds, there would not be any increased burden upon the taxpayer. The amount of tax levy to be made for the payment of the bonds (which the Charter requires shall be stated in the ordinance giving notice of the election) would not be changed, and there would be no statute violated.

Therefore, although we must note the distinction from the earlier Derby case, drawn in the Skinner case, I am of the opinion that the underlying reasoning of the Court in the latter case would permit of the change in denomination of bonds as suggested in your communication.

The next case is Law vs. San Francisco, 144 Cal. 384. Here a taxpayer of San Francisco brought an action to restrain the City from issuing municipal bonds. The bonds were claimed to be invalid on account of several alleged irregularities in the proceedings of the Supervisors.

The ordinance giving notice of the election described the different denominations of the bonds proposed to be issued. After the election the Supervisors, in their ordinance authorizing the issuance of bonds, changed the denomination of some of the bonds. The number of bonds and the total amount were not changed. The Court held that since the denominations were not so changed as to violate the Charter provision requiring that no bonds shall be issued of a less denomination than ten dollars or greater than one thousand dollars, that the change was immaterial.

The Court cites Derby vs. City of Modesto, supra, and relies upon the ruling in that case. The Court did not note the Skinner case, which distinguishes on the ground that in the Derby case the Court was considering bonds that were already sold.

The Law case would be determinative of our question were it not for the fact that, first, the *number* of bonds remained the same after the change, and second, the distinction in the Skinner case was evidently not called to the Court's attention, and third, the Court was in error in assuming (page 394) that the people had been given an opportunity to vote on the question of the change in the denomination of the bonds. The change in denomination was not made until after the election.

However, the Law case is of importance as showing the undoubted frame of mind of the Court to follow the early Derby case, unless it can be shown that an increased burden may be placed on the taxpayer by changing the number and denomination of the bonds.

The District Court of Appeal for the Second Appellate District, has, since the above Supreme Court decisions, rendered a decision bearing on our question. In City of Santa Barbara vs. Davis, 6 Cal. App. 342, mandate was applied for to compel the City Clerk of the City of Santa Barbara to certify and cause to be published an ordinance of that city and to sign his name and affix the corporate seal of the city to certain improvement bonds authorized by the said ordinance. A city bond issue had been authorized by vote of the people. The ordinance calling the special election contained certain recitals not required by law, and among others, the number and the denomination of the bonds. The number was fixed at forty. The denomination was fixed at $1,250 each, payable one each year. This violated a statute which limited the

amount to $1000 each. After the election an ordinance was passed authorizing the issuance of bonds of the denomination of $1,250 each.

It being called to the attention of the city authorities that this was forbidden by statute and no bonds having been issued, that ordinance was repealed and another one passed fixing the number at 80 and the denomination at $625, payable two each year. It was this latter ordinance that the Clerk refused to certify and publish and the bonds provided by that ordinance to which he refused to attach his name and the corporate seal of the city. He placed his refusal on the ground that the city council had no authority to depart from the denomination fixed in the notice of election. The Court held otherwise on the grounds, (1) that there was no necessity for fixing the denomination of the bonds in the notice of election, and so, this may be treated as mere surplusage, and (2) that no hardship could result to the taxpayers from the change.

It may be claimed that, under our Charter, Section 8 of Article XII requiring the notice of election to specify "*the character of the bonds,*" and Section 10, requiring that the bonds "shall be of *such form* as the Supervisors, in the ordinance calling the election therefor, shall determine," makes it mandatory upon the Supervisors to determine the denomination before the election is held. But it would still be true that taxpayers could not show any injury on account of a mere change in the number and denomination of the bonds. And so, the Court's language, at page 345, "there is no difference that can or will in any manner affect the taxpayer to his disadvantage" is of significance.

It is to be noted that in none of the above cases has any objection been raised by a bondholder, who had already purchased bonds of the higher denomination, to the issuance of bonds of a smaller denomination. But the Court having held that such a change does not invalidate the bonds, I cannot see that the rulings would have been any different had such an objection been raised.

I am therefore of the opinion that the denomination of municipal bonds already authorized by vote of the people may be changed so long as the denominations are fixed at not less than ten dollars and not more than one thousand dollars. Also, the bonds should be redeemed at such times and with reference to the principal due on the bonds, in such amounts as may have been

determined by the Supervisors in the ordinance calling the special election at which the people authorized their issuance.

And the amount of the tax levy to be made for the payment of such bonds should remain as it was described in the ordinance giving notice of the election.

Respectfully,

PERCY V. LONG,

City Attorney.

Mayor.

Status of Hyer, Carrell and Henzel in Department of Electricity.

July 21, 1913.

Gentlemen: I am in receipt of your communication under date of July 9, 1913, as follows:

"We send you herewith copies of peremptory writs of mandamus issued in the cases of John J. Hyer, J. W. Carrell and Edward F. Henzel (Nos. 41652, 41673 and 41674), who brought suit against the joint Commission of the Department of Electricity for reinstatement to positions in the Department of Electricity as inspectors. Kindly advise us as soon as possible as to whether or not we should, because of these writs, return the names of these persons to the Civil Service registers from which they have been removed on charges heard by this Commission."

Opinion.

The writs of mandate in the above actions were issued by Judge Murasky of this City and County and directed against the Joint Commission of the Department of Electricity and the members constituting said Commission, and the City and County. These writs command as follows: "That you immediately, after receipt of this writ, admit said plaintiff to the position of inspector of the Department of Electricity and to reinstate said plaintiff in the use and enjoyment of the rights of said position and to the performance of the services and duties thereof."

The undoubted effect of such a judgment is that the plaintiffs in these mandamus actions are recognized, by the judgment, as having the status of regular employees of the Department of Elec-

tricity. While, therefore, the judgment is not directed against your Commission, nevertheless it is incumbent upon your Commission, under the recent Charter amendment, to approve the salary roll of all regular employees in the different departments subject to civil service and, therefore, the ruling of Judge Murasky protecting these employees in their positions, in effect means that they are entitled to the enjoyment of the privileges of said positions, among which is the privilege of receiving the salaries attached to said positions.

I am therefore of the opinion that the plaintiffs in these actions are entitled, under the terms of the Court's judgment, to have their salary demands approved by your Commission.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Extension of Howard Street Sewer Beyond Seawall—Who Pays the Cost?

July 21, 1913.

Gentlemen: I am in receipt of your communication of the 1st inst. as follows:

"The Board of State Harbor Commissioners has transmitted to the Board of Public Works the attached opinion dated June 24, 1913, of the attorney of the Harbor Commission, holding that the extension of the Howard street sewer about 45 feet east of the present wooden bulkhead at the seawall should be extended by the City and County of San Francisco, whereas the City Engineer is of the opinion that the extension of this sewer devolves upon the Board of State Harbor Commissioners, and cites Section 2525 of the Political Code in contention of his claim.

"Will you kindly advise this Board upon whom the responsibility of extending the Howard street sewer beyond the present wooden bulkhead at the seawall would devolve in case the Embarcadero were extended at Howard street 45 feet easterly, and also whether it is obligatory upon the Board of Public Works to extend the Howard street sewer beyond its present terminus?"

Opinion.

Section 2524 of the Political Code, enacted March 12, 1872, declares the jurisdiction of the State Board of Harbor Commissioners over the streets along the water front of the City and County of San Francisco and among said streets is East Street, from Pacific to Folsom Street. The Legislature, in Section 2525 of the same code, enacted on the same day, provided for the extension, to a width not exceeding 150 feet, of any of the streets lying along the water front of said City and County where they had not been already so extended. Said section also provided for the construction and repair of "such streets," and also that "The Commissioners are authorized to construct, across the outer half of 'said streets', an extension of the sewers of the said City and County."

East Street or Embarcadero, as it is now named, is 200 feet in width at the easterly termination of Howard Street. The Howard Street sewer has been constructed by the City and County for a distance of 147 feet easterly across Embarcadero to a wooden bulkhead about 53 feet west from the easterly line of Embarcadero, and it is now proposed by the Board of State Harbor Commissioners to construct a concrete bulkhead along Embarcadero about 8 feet westerly from its easterly line, thus blocking the sewer outfall at that point.

The power to extend the width of all streets along the water front to 150 feet was given to the Harbor Commissioners by Section 2525, as shown above. On March 15, 1878, the Legislature directed the Commissioners by an Act (Stats. 1877-8; p. 263), to establish the width of East Street at 200 feet, and the width of the roadway thereof at 180 feet, and the sidewalk along the westerly line at 20 feet, and also provided that the State Board of Harbor Commissioners should construct and repair the said roadway of 180 feet.

This is a special statute, relating to East Street exclusively and making an exception, in regard to the right of the Commissioners under the general law to establish the width of all streets along the water front to 150 feet, as contained in Section 2525. Nothing need be said, because the general law, Section 2525, already provided that said sewers should be extended across all streets lying along the water front of the City and County of San Francisco, under the jurisdiction of said Board.

There is no inconsistency or repugnancy between Section 2525 and the special Act of March 15, 1878. When we consider the provisions of Section 2525 and the Act of 1878, we find that they both relate to East Street, which street comes within the general scope of the jurisdiction of the Harbor Commissioners. The additional jurisdiction over East Street, given to the Commissioners by the Act of 1878, differs in no degree from that given to them by Section 2524, or Section 2525, except as to its width.

The rule is laid down by the Supreme Court in the case of Talcott vs. Harbor Commissioners, 53 Cal. p. 199-200. It said:

"It may safely be laid down as a rule of statutory construction that where there is a general law prescribing and defining the powers, duties, modes of procedure of a public board, and a special law is passed relating to a particular matter, coming within the general scope of the powers of the Board, the two laws are to be read together, and the general law is applicable to the particular matter, except in so far as provision is made in the special law, conferring powers or prescribing duties or modes of procedure, different from those in the general law."

There can be no question that the streets referred to in Section 2525, across which the sewers of the City and County must be extended by the State Board of Harbor Commissioners, are the same streets particularly mentioned in Section 2524, over which the said Board was granted jurisdiction. We have seen that it is unnecessary to take into consideration the Act of 1878, in respect to the question of the extension of said sewers, as it does not change or alter the obligation of the Board to make extensions of the same.

The language used in Section 2525 is not open to any suspicion of ambiguity. The term "said streets" in the sentence relating to the extension of sewers, means "said streets" mentioned in Section 2524, and the meaning is not to be restricted or limited to only such streets as the Commissioners are authorized to extend to a width of 150 feet. In other words, it means "all streets" along the water front, no matter what the width of the same may be, and it is immaterial whether the Legislature increases the width of any particular street over which the Board has jurisdiction, unless the act so increasing the width provides a different rule respecting the obligation of the Board to extend sewers across the particular street, or relieves said Board from any obligation in respect thereto.

In the matter of the construction and repair of the roadway of Embarcadero, the Act of 1878 imposes that liability on the Harbor Commissioners. This is a departure from the general law contained in Section 2525, which provides that the outer half only of the streets along the water front shall be constructed and repaired by said Board. The Act of 1878 controls in this respect, as it comes within the rule laid down in the Talcott case, holding that a special law is applicable, in so far as provision is made in it, prescribing duties on a public board, differing from those mentioned in the general law.

You are therefore advised that Section 2525 of the Political Code fixes the liability of extending the Howard Street sewer across Embarcadero upon the Board of State Harbor Commissioners.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Interpretation of Sections 1818 and 1840 of the Political Code.

July 22, 1913.

Gentlemen: I am in receipt of your request for an opinion under date of July 19, as follows:

"I respectfully beg to advise you that at a meeting of the Board of Education held May 28, 1913, the following resolution was adopted:

"Resolved, That the City Attorney be requested to advise this Board if Sections 1818 and 1840 of the Political Code of the State of California relate to the School Department of San Francisco, these sections seeming to provide a means of obtaining school buildings by a direct tax."

Opinion.

In reply thereto will state that of the sections you mention, Section 1840 of the Political Code is the only one which, by any interpretation, could be held to provide a means for obtaining school buildings by a direct tax and as to such section would say that it is very doubtful whether this section even provides a

means of obtaining school buildings. To my mind it simply provides a means of maintaining school buildings by means of a direct tax levy by the Board of Education. As a matter of fact, however, it is not necessary for me to pass upon its interpretation in this respect at the present time inasmuch as the section itself plainly does not apply to the City and County of San Francisco.

A reading of the section and its surrounding context convinces me of the fact that it is intended to apply to school districts that are subdivisions of a county. In other words, that it is intended to provide for a tax raised within the district in addition to the tax derived from the county and from the State. The section is intended to create a third fund additional to the county fund and the State fund.

Where the school district is co-terminus with the county, as is the case in San Francisco (if for the purpose of this section San Francisco is to be considered a school district at all), there plainly can be no such fund as all funds must either be county funds or State funds.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Education.

Removal of Tracks on Fifth Avenue Between Fulton and Geary Streets.

July 23, 1913.

Gentlemen: I am in receipt of your communication as follows:

"I am directed by the Commission to request your opinion upon whom the responsibility devolves of tearing up the car tracks on Fifth avenue between Fulton and Geary streets; also as to whether the performance of this work can be included in the claim of the city against the former Geary Street R. R. Company."

Opinion.

On May 1, 1911, I rendered an opinion to the Mayor in which I held that the rails of the Geary Street Railway Company were the property of that company, basing my opinion upon the case

of Cleveland Electric Railway Company vs. Cleveland, reported in 137 Fed., page 111, and approved by the Supreme Court of the United States in 204 U. S. 116; 51 Law Ed. 399, at page 410 (Opinions of City Attorney, 1910-11-12, p. 317). I also advised the Mayor that the maintenance of the tracks upon the public streets by the said railway company was a public nuisance which could be abated by the City acting through its Board of Public Works and that the procedure looking toward such abatement which could be adopted by the City was as follows: demand should be made upon the Geary Street Railway Company to remove the tracks and appurtenances from the streets within a reasonable time; if, at the expiration of said time, the company failed to move and, in the judgment of the Board of Supervisors, no further time was reasonable, then the Supervisors should direct the Board of Public Works to tear up and remove the tracks and obstructions on the streets preserving the property so far as possible for delivery to the company.

The power of the Board of Public Works to remove obstructions from the streets was upheld by the Supreme Court in the case of Nerio vs. Maestretti, 154 Cal. 580, in which the Court approved the method of procedure hereinabove outlined.

Your second inquiry as to whether or not the expense of the removal of the tracks on Fifth Avenue between Fulton and Geary Streets by the City can be included in the claim of the City against the former Geary Street Railway Company is somewhat more difficult of solution. I have examined the decisions and text-books but fail to find therein anything touching upon this particular point. It is my opinion, however, that any expense which the City and County incurs, caused by the refusal or neglect of the Geary Street Railway Company to remove unlawful obstructions from the public streets, after demand made upon it so to do, may be collected from that company, provided it is in a position to respond to a judgment.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Ordinance No. 2297 (New Series) Does Not Apply to Members of the Fire Department.

July 28, 1913.

Gentlemen: I am in receipt of your communication of the 25th inst. as follows:

"This Board respectfully requests that you kindly furnish it with an opinion as to whether or not Ordinance No. 2297 (New Series) of the Board of Supervisors and the rule adopted by the Civil Service Commission in accordance therewith, a copy of which follows, applies to this department; in view of the fact that there is a Charter regulation governing leaves of absence and annual vacations herein:

"RULE 36

Vacations and Emergency Leaves of Absence.

"Vacations and emergency leaves of absence granted at the discretion of the head of any department shall be made in accordance with the provisions of Ordinance No. 2297 (New Series) and shall be reported to the Civil Service Commission as soon as possible after the granting of the same and in any event not later than thirty days after the expiration thereof."

Opinion.

Vacations and leaves of absence for members of the Fire Department are provided for by Section 2, Chapter VIII, Article IX of the Charter which cannot be superseded.

Therefore, you are advised that Ordinance No. 2297 (New Series) does not apply to the Fire Department or to the vacations and leaves of absence of the members thereof.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Eight Hour Law for Nurses Applies to Municipal Hospitals—Supervisors Restricted in Expenditures by Budget.

July 31, 1913.

Gentlemen: I am in receipt of your request for an opinion on the following questions:

"1. Do the terms of the 'Eight Hour Bill for Nurses' (Senate Bill 466) recently passed by the State Legislature, apply to institutions under the control of the Department of Public Health?

"2. Will it be necessary to arrange for meeting its requirements on August 12, 1913?

"3. Must the Board of Supervisors provide funds for the payment of the salaries for positions which may be created through the operation of said law after having fixed the annual budget for all the institutions named herein covering the fiscal year 1913-14?"

Opinion.

The statute reads as follows:

"Section 1. *No* female shall be employed or permitted to work in *any* * * * hospital * * * more than eight hours in any one day," etc.

There is nothing to indicate that any hospital whatsoever, irrespective of its private or public control, is excepted from the provision of this Act, and, in the absence of such excepting words you are advised, in reply to your first inquiry, that the terms of the statute apply to the hospitals under the control of your department. It follows, therefore, that you must meet the requirements of this law on August 12, 1913, at which date it goes into effect.

In reply to your third inquiry, I refer you to Article III, Chapter I, Section 3 of the Charter, which provides for the making of the annual budget. Your department is limited in its expenditures for the fiscal year 1913-14 by such appropriations as have been made for it in the budget.

You are therefore advised that any funds deemed necessary by your Department in excess of the budget allowance must be sought from the appropriation for urgent necessities as provided in Article III, Chapter I, Section 8 of the Charter and I know of

no provision of the Charter which makes it mandatory on the Board of Supervisors to make such extra allowance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Civil Service Standing of Charles M. Stoltz.

July 31, 1913.

Gentlemen: In reply to your communication of June 5, 1913, requesting my opinion as to the Civil Service standing of Charles M. Stoltz, Chief Deputy in the Recorder's office, I desire to say that this request has been fully covered in my communication to you of this date concerning the Civil Service standing of Mr. R. V. Crosky, Chief Deputy in the Assessor's office.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Civil Service Standing of R. V. Crosky.

July 31, 1913.

Gentlemen: I am in receipt of your communication requesting my opinion as to the Civil Service standing of Mr. R. V. Crosky. In accordance with the facts set forth in your communication Mr. Crosky for the past nine months has been Chief Deputy in the Assessor's office and for a long time prior to his appointment as Chief Deputy he was cashier in said office. Both of these positions of Cashier and Deputy in the Assessor's office are by the express language of Section 11, Subdivision A, Article XIII, as amended and approved by the Legislature on March 28, 1913, exempt from the operation of Civil Service.

The language of Section 11, Subdivision A, pertaining to Mr. Crosky's case is as follows:

"Any person who served in any position in the office of the Assessor, Coroner, Recorder, Tax Collector, Sheriff, the office of

the Justices' Clerk, the Board of Supervisors, or the Treasurer for a period of one year continuously prior to the approval of this amendment and who shall be actually employed in any of said offices at such time is hereby declared to be appointed within the provisions of Article XIII of this Charter to the position to which he was assigned and shall be entitled to all the benefits of said article thereafter."

It is obvious from the language above quoted that any person who was actually employed in any of the offices enumerated therein at the time of the adoption of the amendment and who had served therein continuously for one year prior thereto is to be considered as appointed within the provisions of Article XIII to the position to which he may be assigned. The fact that Mr. Crosky was employed in an exempt position at the time of the adoption of the amendment in my mind does not necessarily bar him from the benefits thereof. As stated in my opinion rendered to you this day covering the case of Mr. E. J. McDevitt, the question of assignment to position is one very largely a matter of discretion in the head of the department. Under Section 2, Article XIII, your Commission is authorized to classify "in accordance with the duties attached thereto all places of employment in or under the offices and departments of the City and County not exempted under Section 11 of this article * * *."

It is very evident that the positions in those departments recently brought within the provisions of Article XIII of the Charter will necessarily have to be classified by your Honorable Board and the classifications to be made in these various departments is a matter entirely within the jurisdiction of your Board to be determined from all the facts and circumstances of each case.

I am of the opinion also that the matter of appointment within said departments of the various employees to positions to which they were "assigned" at the time of the adoption of the amendment is also a question of fact to be determined by your Honorable Board from all of the facts and circumstances surrounding each case.

I therefore advise you that whether or not Mr. R. V. Crosky is entitled to a Civil Service standing in the Assessor's office is a matter to be determined by your Board and I further advise you that if you find that Mr. Crosky was performing duties other than those of either Chief Deputy or Cashier at the time of the

adoption of the amendment that you may hold that he was appointed to a position in the Assessor's office, the duties of which he was performing at the time above stated.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Civil Service Standing of E. J. McDevitt.

July 31, 1913.

Gentlemen: I am in receipt of your communication requesting my opinion as to the Civil Service standing of E. J. McDevitt, an employee of the Assessor's office. In your communication you state that Mr. McDevitt has been employed as an assistant deputy for the past four months and that for ten months prior thereto he was a clerk in the Assessor's office.

Opinion.

It is obvious from your statement of fact that Mr. McDevitt has been an employee in the Assessor's office continuously for the period of one year prior to the adoption of the recent amendment to Article XIII of the Charter. The language of Section 11, Subdivision A, Article XIII of the Charter as recently amended fixes the Civil Service status of an employee of any of the offices enumerated therein as being that of the position to which he was assigned at the time of the adoption of the amendment. Under the authority of Section 30 of Article XVI of the Charter the head of a department has the right to require a subordinate to perform "any of the duties pertaining to such department" as may be assigned to him. Prior to the adoption of the amendment to Article XIII of the Charter above referred to, appointments in the Assessor's office were made entirely at the will of the head of the office. Thus as both the appointment of an employee and his assignment of duties were matters solely within the discretion of the head of the department, the employee's status in the department might have been changed at the will of the head of the department several times a year.

It is evident therefore for the determination of what position an employee was assigned to at any time that the various departments of the City and County come under the Civil Service provisions of the Charter was a question of fact which your Commission from the circumstances surrounding each case must determine.

I therefore advise you that from the statement of fact made to me in your communication Mr. McDevitt was appointed to a position in the Assessor's office and is holding the same within the provisions of Article XIII of the Charter. I am further of the opinion that the position to which Mr. McDevitt was assigned at the time of the adoption of this amendment is a question of fact that your Commission must determine.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Stable Permit on Florida Street.

August 7, 1913.

Gentlemen: I am in receipt of your communication of July 7th, as follows:

"Michellari and Longo apply to this Board for permission to repair stable at No. 847 Florida Street. This permit was referred to the Board of Health, which made certain recommendations concerning ventilation and air space required in the building, which requirements were accepted by the applicants for a permit to alter their building; however the Health Officer recommends that a permit to the applicants be denied by the Board of Public Works for the reason that said applicants do not possess a stable permit from the Board of Supervisors.

"This stable has accommodations for six horses, and if reconstructed in accordance with the application and recommendation of the Health Board will fully comply with the building law.

"The parties interested claim that their stable was maintained prior to the adoption of an ordinance requiring a stable permit from the Board of Supervisors. Will you kindly furnish this

Board with an opinion concerning the legal status of this particular case and the law covering the same, in order that this Board may take some definite action in the premises and possess a rule for future guidance upon similar applications."

Section 197 of the Building Law reads as follows:

"It shall be unlawful for any person, firm or corporation hereafter to construct any building or premises to be used as a stable for horses, mules, cows or other animals without first obtaining a permit from the Board of Supervisors and the Board of Health, specifying the name of permittee, and the location of building or premises to be used as a stable and the number of animals intended to be kept therein.

"It shall be unlawful for any person, firm or corporation to maintain as a stable for horses or mules any existing structure not used at the date of the passage of this ordinance for stable purposes without first obtaining a permit from the Board of Supervisors and Board of Health, specifying the name of the permittee, the location of the building or premises to be used as such stables and the number of animals to be kept therein."

The same provisions are also found in Sections 1 and 2 of Ordinance No. 345 (New Series), approved January 17, 1908, those two sections and Section 197 of the Building Law being identical. Section 197 of the Building Law came before the Appellate Court in the case of In re Dondero, 19 Cal. App. Rep., page 66. Dondero was charged with having constructed and maintaining at a time subsequent to the enactment of the ordinance a stable for horses without first obtainining a permit from the Board of Supervisors or the Board of Health, contrary to the provisions of Section 197 of the Building Law. Upon application of Dondero a writ of Habeas Corpus was issued out of the Appellate Court and upon the hearing of the writ it was expressly held by the Court of Appeals that Section 197 of the Building Law was invalid and inoperative, the Court saying:

"It is plain that the purpose of the ordinance is to regulate the maintenance of stables. The mere erection of a building for stable purposes could not injuriously affect the community. It is the maintenance and operation of a stable that might injuriously affect the public health or otherwise create a nuisance. Yet under this ordinance, if a structure was being used as a stable at the enactment of the ordinance, no permit to maintain such stable in

such structure is required, either of the Board of Supervisors or the Board of Health, while such permit is required to maintain a stable in any structure not so used at the time of the enactment of the ordinance."

That decision was handed down on May 16, 1912. The Building Law has not been amended since that time and the only requirement for a permit from the Board of Supervisors and the Board of Health for the right to maintain a stable is by virtue of Section 197, which in the case of Dondero was declared invalid. It therefore follows that there is no law at present requiring a stable permit from the Board of Supervisors. The Building Law, however, makes certain requirements in the matter of the construction of a stable. These requirements are still in existence and a person maintaining or constructing a stable must comply with those provisions.

In the matter of granting a building permit the Board of Public Works has no discretion. A person is entitled to a building permit upon compliance with the requirements of the Building Law as a matter of right. The Board of Public Works being purely a ministerial body has no power other than to examine the application of the applicant and determine whether the building, if constructed in accordance with its plans and specifications, would comply with the Building Law relating to the construction of stables. If the building would so comply, the application for a building permit must be granted and the Board of Public Works has no power to withhold the permit for any reason other than that the building would not comply with the Building Law as to its construction.

It therefore follows that if the application of Michellari and Longo complies with the Building Law as to its construction, the application for a building permit must be granted to them. If it is the policy of the City to regulate the maintenance of stables that policy must be contained in a valid ordinance and unless it is so contained the Board of Public Works has no power in the premises other than to grant the permit for the construction of the stable.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Cemetery Removals.

August 13, 1913.

Gentlemen: In a communication dated June 12, 1913, your Public Welfare Committee has requested my opinion as to the procedure necessary for your Board to follow, in order to effect the abandonment and removal of the cemeteries now within the city limits.

At the outset I wish to reaffirm the position which I took in an opinion rendered to you under date of May 25, 1912 (Published Opinions, page 769), wherein I stated that there was no authority in this State directly upholding the power of a municipality to order the exhumation and removal of bodies and make the same a charge upon the property. Since that opinion was rendered, as you are doubtless aware, a bill designed to confer the power upon cities to enforce such removals and charge the expense thereof to the property was introduced in the Legislature, but failed of passage. In presenting the suggestions contained in this opinion, therefore, I am unable to submit them with the assurance that they are based upon either express legislative sanction or judicial approval of the California Courts.

As I stated to you in my previous opinion, I believe that the Board of Supervisors has the authority under the general police powers granted by the Charter to order the removal of these cemeteries if they constitute a public nuisance. While it was held in Los Angeles County vs. Hollywood Cemetery Assn., 124 Cal. 344, that a cemetery does not per se constitute a nuisance, still if it is so declared by legislative ordinance, the burden of proof is thrown upon the cemetery owners to show that such is *not* the case. Bryan vs. City of Birmingham (Alabama), 129 American State Reports 63; Austin vs. Austin City Cemetery Association (Texas), 47 American State Reports 114. I assume then that on the authority of those cases and with the language of the Court in the Laurel Hill and Odd Fellows Cemetery cases before us, that the removal of these cemeteries is a valid exercise of the police powers delegated by the State Legislature to this Board.

It remains to devise a method for effecting these removals which shall be both practical and not in conflict with other inhibitions of the Constitution or Charter.

If the proposal were to make the exhumations and removals at the City's expense, the problem would be comparatively a simple

one, as the City could, in the exercise of its police power, summarily remove the bodies after non-compliance by the lot owners with a reasonable notice. The title to the lots would then be a matter for settlement between the cemetery associations and the lot owners. Such a procedure, however, would entail more expense than the City is able to bear.

Another method which suggests itself is to pass an ordinance directing the Cemetery Associations or their Trustees to make the removals within a specified time under penalty of fine or imprisonment for non-compliance, each day of non-compliance to constitute a continuing offense. I do not think that such an ordinance would be held valid, however, for this reason: The Cemetery Associations were incorporated under an Act of the Legislature, passed in 1859, and the purposes for which they spend the funds to be acquired by them were specifically limited to the beautification and maintenance of their cemeteries, no mention being made of the expense of disinterments and removals. In my mind it is very questionable whether the courts would uphold a penal ordinance directing these Associations to do something which, under their charters granted by the Legislature, they are not empowered to do.

To my mind a line of procedure suggested by Section 1 of Chapter 577, Laws of 1911, page 1099, is more practicable. This section provides:

"The governing or legislative body of any city, or city and county, in this State may, by ordinance duly passed, and under such lawful rules and regulations which it may accept, provide for the exhuming, taking up and removal from cemeteries within the boundary lines of such city or city and county, or from cemeteries owned and controlled by such city or city and county that may have been located without its boundaries (and in which such cemeteries no interments of human remains have been made for a period of not less than five years), of any or all the human remains interred in such cemeteries."

I am of the opinion that as suggested in the foregoing section, a valid ordinance might be passed empowering the municipal authorities to make the removals and charge the expense thereof to the entire cemetery property. Such an ordinance should recite the adoption of the resolution of intention passed August 29, 1912, and then proceed to order that the removals be made within a

specified time. It should provide for a notice to be prepared and served personally upon the Cemetery Associations and upon such lot owners as have filed notices in the County Recorder's office as provided by the Act of 1911, above mentioned. If such lot owners cannot be found or if they have not filed such statements, notice should be given by publication, giving the names of the lot owners who cannot be reached by personal service. I think it would be wise to have the publication made at least once a week for 60 days as provided for publication of summons at law. The notice should direct the Cemetery Associations and lot owners to remove within a specified period after date of service or completion of publication, all bodies interred within their respective lots, and should provide that if they fail so to do the city authorities will, at the expiration of such time, remove said bodies and sell sufficient land at public auction to pay all expenses connected with the exhumation, removal and reinterment of such bodies. The ordinance should designate the public officers to conduct such removals upon expiration of the aforesaid notice, and should direct the order in which the removals should be made by reference to convenient subdivisions. Provision should be made for a careful record of the transfer of each body which should be filed with the coroner. The officials charged with the removing of bodies should be given general directions as to the cemetery lands now owned or be to acquired for this purpose by the City, in which reinterments are to be made. The cost of these lands should be included in the removal expense and charged by proper apportionment. It should be required that all work be performed in a careful and respectful manner and that the headstone or monument be transferred with each body removed and placed over the new grave.

The ordinance should then provide for a procedure of selling the old cemetery lands to meet the expenses of removal. Sales should be made by the Tax Collector somewhat after the manner and upon some such notice as is required for sales upon delinquent tunnel assessments. As cemetery lots while used for burial purposes are exempt from execution or lien of any kind, such sales could not be made until after the bodies are removed. This will necessitate the City's bearing the first burden of expense of the removals and for this reason I advocate a provision that the cemeteries be subdivided for removal purposes into convenient tracts and that each tract be offered for sale immediately upon completion of the removals therefrom, and the money turned into

the treasury. Surplus moneys remaining after the expense of all the removals is paid should be turned over to the Cemetery Associations.

The foregoing is an outline of what I believe to be the essential elements of such an ordinance. Further details will suggest themselves when it is finally drawn.

I am aware that there will be opposition to this line of procedure from both the lot owners and the Cemetery Associations. As a matter of policy, you are the proper judges as to its advisability. As a matter of law, I am of the opinion that it could be enforced. A cemetery lot owner has only an easement for burial purposes. Kincaid's Appeal, 2 American Reports 377, 380; Went vs. Methodist Protestant Church, 30 New York Supp. 157. This easement dies when the land ceases to be used for burial purposes, and as it will be possible to furnish the lot owners certificates entitling them to the use for burial purposes of the lots in which the bodies are reinterred, I do not think they can raise valid legal objections to the procedure. The Cemetery Associations, of course, have the fee of the land which is to be taken and sold. But as I have heretofore explained, they hold this fee subject to a valid exercise of the police power of the municipality, and if they refuse or are unable to comply with the terms of an ordinance directed to the preservation of the public health, I am of the opinion that you can subject the cemetery lands to a lien for the expense of enforcing such an ordinance. See cases cited supra. Appropriate provisions for redemption can be inserted in the ordinance as a final protection to the land owners.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Ordinance No. 777 Does Not Apply to Unimproved School or Church Property.

August 15, 1913.

Gentlemen: I am in receipt of your communication as follows:

"Ordinance No. 777 of the Board of Supervisors prohibits the granting of a permit by this Board to open a Kinetoscope Parlor

200 feet from the front line of any church or school, or within 100 feet of the property line on the sides or rear of any church or school.

"On June 30, 1913, Samuel Kubey appeared before this Board and asked for a permit to conduct a Kinetoscope Parlor at the premises located at 3456 Sacramento Street. A protest was filed against the granting of this permit, and it was shown that the said premises were located within the prescribed limits of a lot owned by the School Department of the City and County of San Francisco, upon which, however, there was no building.

"The application was denied on account of an opinion of City Attorney William J. Burke, rendered on March 18, 1907, in which a similar question arose as to whether or not this Board could grant a permit to conduct a saloon within 150 feet of a church or school.

"We would like to be further advised in this matter and ask an opinion from you as to whether or not the provisions of Ordinance No. 777 prohibit the granting of a permit to conduct a Kinetoscope Parlor within the prescribed limits of unimproved church or school property."

Opinion.

In my opinion Ordinance No. 777 which, inter alia, provides that kinetoscopes shall not be permitted within a distance of 200 feet from the front line of any church or school or within 100 feet of the property line on the sides or rear of any church or school, applies only to church or school property when used as churches or schools. In other words, that vacant church or school property or property of that character, improved, but used for other purposes, does not come within the prohibition terms of the ordinance.

The reason for my conclusion is that the context of the ordinance clearly indicates the purpose the Supervisors had in view in its enactment. The words "church" and "school," as used therein, immediately call to mind buildings used for church or school purposes and attended by worshippers in the one case and pupils in the other. Again, we find that the ordinance prohibits the conduct of such a business within 100 feet of the property line on the sides or rear of any church or school.

Clearly there must, of necessity, exist church or school buildings before there could exist either sides or rear of a church or school.

You are advised that Ordinance No. 777 applies only to church or school property when used as churches or schools.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Resolution Putting Into Operation Mothers' Pension Law.

August 15, 1913.

Gentlemen: I am in receipt of your communication of August 13, requesting me to pass upon the sufficiency of the following resolution, designed to put into operation the so-called "Mothers' Pension Bill" (Amendments to Secs. 2283, 2285, 2286, 2287, 2289, Pol. Code):

"Whereas, Sections 2283, 2285, 2286, 2287 and 2289 of the Political Code of California, appropriating certain moneys for the support and maintenance of needy minor orphans, half-orphans or abandoned children has been amended, and

"Whereas, no provision has been made in said code sections as amended, for the administration of the provisions contained therein, and

"Whereas, there is great necessity of determining the need of applicants for relief thereunder,

"Therefore be it resolved by the Board of Supervisors of the City and County of San Francisco, That Margaret Nesfield be and she is hereby appointed and selected as the person to make all such investigation in order that this Board may determine the need of the applicants for relief under the hereinbefore mentioned code sections. There is hereby granted to and vested in said Margaret Nesfield full power and authority to make all such investigations as to her seem necessary.

"Be it further resolved, That the result of any investigation made by her as to the need of any applicant for relief under said code sections be reported to this Board in writing and that

thereupon this Board shall take such action as it deems wise and proper; provided, however, that no relief shall be granted except upon the written recommendation of the investigating officer.

"Be it further Resolved, That such relief shall be paid through such institution or person as may be indicated by the Board of Supervisors upon the recommendation of the investigating officer."

Opinion.

The first two clauses of the resolution are in themselves sufficient to carry out the purpose of these code sections.

The third paragraph "That such relief shall be paid through such institution or person as may be indicated by the Board of Supervisors upon the recommendation of the investigating officer" should be stricken out for the following reasons:

Section 2283 of the Political Code provides for a repayment to the City and County by the State of certain moneys expended by the City and County in the maintenance of orphans or half-orphans.

In order to be thus reimbursed, complete records must be submitted to the State Board of Control. In these records it must appear clearly who is actually maintaining the child. If then, it appear on the face of the claim that money is being paid to an institution (to be paid by it to the person having the custody of the child), whereas the Board of Control has knowledge of the actual custodian, it is very doubtful if the City and County would be reimbursed. In view of the fact that the State fund appropriated for this purpose is exceedingly small, and that the sum total of the applications from the various counties is very large, it would be wise to so frame the resolution that there would be no possibility of rejection of claims for inaccuracies on the face thereof.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Permits to Pacific T. & T. Co. to Connect Bell and Automatic Systems.

August 19, 1913.

Gentlemen: I am in receipt of your request dated August 12, 1913, for an opinion as to your power under Ordinance No. 2201 (New Series) to grant a permit to the Pacific Telephone and Telegraph Company to connect automatic and Bell manholes of their telephone system.

Opinion.

I am of the opinion that you have such power under Ordinance No. 2201 (New Series). The question of the validity of this ordinance in its application to public service corporations who have exercised franchises in this City prior to the adoption of the Constitutional Amendment of October 10, 1911, is now before the Supreme Court in the Matter of the Application of Elliott and Keppelmann for habeas corpus. Until a decision is rendered in this case I cannot state authoritatively that the ordinance will be finally upheld, although I feel confident that the Court will support the position taken by the City that the ordinance in question is a valid exercise of the police power. Until the Court speaks finally on the subject, however, you are entitled to consider the ordinance as in effect. The status of the transfer of the Home Telephone property to the Pacific States Telephone Company, as fixed by Judge Ellison's decision, is still unchanged, although an appeal is pending. There are at present, therefore, no legal objections to the connecting of the automatic and Bell manholes.

The scope of your authority is defined by the provisions of the ordinance and it is unnecessary for me to go into the details thereof. It is sufficient to say that subject to such provisions you have the power under this ordinance to grant the permit in question.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Power of Board of Public Works to Grant Vacations to Former Employees.

August 22, 1913.

Gentlemen: I am in receipt of your recent communication requesting my advice as to whether or not your Board has the power to grant non-Civil Service Surveyors' Field Assistants a vacation period, or compensation covering the same, subsequent to their dismissal from the employ of your Board.

Opinion.

The employees in question were dropped on August 4, 1913, at the direction of the Civil Service Commission, there having been provided a list of civil service eligibles for the positions held by them. On August 15, 1913, they jointly filed their application with the Board of Public Works for two weeks vacation.

When the services of these employees were dispensed with by the Board of Public Works all official relations between these employees and your Board were severed. This being so, you cannot grant vacations to the petitioners, they not being in the service of the City.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Status of Silver Avenue Between Quesada and Thomas Avenues.

August 22, 1913.

Gentlemen: I am in receipt of your letter of July 17, 1913, requesting to be informed whether "Silver Avenue" between Quesada and Thomas Avenues is a public street and my reply is:

Opinion.

The portion of Silver Avenue referred to lies in the O'Neil and Haley Tract. The map or plan of this was filed in the office of the Recorder of the City and County of San Francisco on January 31, 1867, and on this plan a lane is delineated, in which the word "Lane" is written, which lane or road extends throughout the tract, and includes the portion of Silver Avenue referred to by you in your communication of July 17th.

On the official map of the City, the Humphrey Map of 1870, adopted and made official three years subsequent to the recording of the O'Neil and Haley Map, this lane is delineated, described and designated "Silver Avenue" and it appears in the same manner and under the same designation on all subsequent official maps of the City.

Silver Avenue joins the Mission Road (the old County road) at a point approximately, a mile and a half north of the county line and extends thence in a general easterly direction at least as far as Oakdale Avenue (formerly Fifteenth Avenue South), near where Oakdale Avenue intersects Railroad Avenue. Silver Avenue may be said to be a short cut from the southerly portion of the City and San Mateo County over comparatively easy grades, to Railroad Avenue. From this point one may reach Islais Creek near where it joins the Bay and thence the City front. The general use of Silver Avenue for a long period of time, probably forty or more years, justifies the position that the public have a prescriptive use thereof as an open public highway or street even if a direct dedication is not shown. It would seem that this avenue should not be closed, but kept open throughout its length.

The organic law of the City at the early period at which the City may claim the use of Silver Avenue as a public street, was the "Consolidation Act." (Statutes 1856, p. 145), the amendment thereto of 1862 provides, as follows:

"* * * and all other streets, lanes, alleys, places or courts now dedicated to public use or which shall be hereafter dedicated to public use * * * are hereby declared to be open public streets, lanes, alleys, places or courts, for the purpose of this law."

Statutes 1862, p. 391.

Again, in 1872, the Consolidation Act was amended and Article VI, Section 1, provides that all streets, lanes, etc., shown on the Humphrey Map and all other streets, lanes, etc., now dedicated or open to public use are declared to be open streets or alleys.

Statutes 1872, p. 804;
Los Angeles vs. McCullan, 156 Cal. 151;
Merritt vs. Barta, 158 Cal. 376, pp. 380-384;
Brook vs. Horton, 68 Cal. 557.

The foregoing maps and legislative acts are a determination that

"Silver Avenue" is a public street or highway and long acquiescence therein, without protest, should be deemed conclusive of the public character of "Silver Avenue."

The legislative acts are a sufficient acceptance even though the street is not named in the acts.

Eureka vs. Armstrong, 83 Cal. 623;
Eureka vs. Gates, 137 Cal. 89.

My conclusion is that Silver Avenue, within the limits named by you, is an open, public, necessary and much-used street of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Reinstatement of Eligibles.

August 25, 1913.

Gentlemen: I am in receipt of your communication of August 12th requesting my opinion as to whether the Civil Service Commission has the power to reinstate an eligible who has been removed from the eligible list for failure to respond within the time required by Rule 13, to a notice of certification, and also whether the Commission has the power to reinstate to his original rank an eligible who has been placed at the foot of the eligible list for failure to respond to a similar notice.

Opinion.

In reply to this request I am of the opinion that, inasmuch as you have discretionary power under Section 3 of Article XIII of the Charter to make rules for the examination, appointment, promotion and removal of applicants for civil service positions, in the exercise of those powers you could reinstate an eligible who has been removed from the list for failure to respond to notice of certification or return an eligible from the foot to his original rank, upon a sufficient showing in excuse of failure to so respond.

I think it would be wise, however, to add a new section to Rule 13 making a general provision for such reinstatements upon reasons

satisfactory to the Commission. This would obviate the possibility of any charge of favoritism, for, of course, the essential feature of your rules is that they should be of general application and that exceptions should not be made therefrom to favor any particular individuals.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Payment of Demand of Grand Jury Expert.

September 6, 1913.

Sir: I am in receipt of your communication under date of September 4, 1913, as follows:

"The following is a copy of a demand presented to me for payment and which I have declined to honor—awaiting your opinion.

"General Fund, San Francisco, Sept. 2, 1913.

"John F. Barry presents this demand on the Treasury of the City and County of San Francisco, for the sum of Two Hundred forty and 00/100 Dollars, being for 24 days' service rendered the Grand Jury of the City and County of San Francisco, during the month of August. That the said sum of $240.00 is the charge allowed by law for the said services rendered said Grand Jury in accordance with Section 928 of the Penal Code.

John F. Barry.

"The above and foregoing demand is hereby approved and it is ordered that the Auditor draw his warrant on the Treasurer of the City and County of San Francisco, in favor of John F. Barry for the sum of $240.00.

Geo. G. Gormley,

Foreman of the Grand Judy.

"Aug. 30, 1913.

"Thos. F. Boyle,

Auditor.

"I hereby desire to say that this is the first time a demand of this character has been presented for payment without the signature of the Presiding Judge of the Superior Court.

"Has the foreman of the Grand Jury the authority to draw funds in this way and for this purpose from the Treasury? An early reply will oblige."

Opinion.

The law giving the right to Grand Juries to employ experts is found in Section 928 of the Penal Code, which, in substance empowers the Grand Jury to employ an expert at an agreed compensation not to exceed $10.00 a day, the employment to be first approved by the Court and also empowers them to employ such assistants to such expert as may be required at a compensation not to exceed $5.00 a day, the employment to be approved by the Court. In my opinion this gives authority to the foreman of the Grand Jury to approve demands in payment of services for these experts and assistants, such demands not requiring the approval of a Judge of the Superior Court. However, in my judgment these demands should be paid, not out of the General Fund, but out of the budget oppropriation for expenses of the Grand Jury. Yesterday I took this matter up with the Finance Committee, the foreman and expert of the Grand Jury being present, and it was agreed that thereafter all demands for expenses of the Grand Jury should be passed upon by the Finance Committee before being sent to the Auditor.

It is desirable that all of these demands should be paid out of the Grand Jury Fund and I suggest that the demand of John F. Barry, above referred to, be paid by you in the form in which it is now presented out of the Grand Jury Expense Fund without the further approval of any other person, but hereafter all demands for expenses of the Grand Jury, in accordance with the understanding had yesterday with the Finance Committee, should come to you in the regular form with the approval of the Finance Committee of the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Installation of Electrical Wires in Public Streets.

September 8, 1913.

Gentlemen: I am in receipt of a communication from your Public Utilities Committee, dated August 29, 1913, in which my opinion is asked as to the legality of a certain proposed ordinance, submitted in form as follows:

"The Universal Electric and Gas Company may establish and operate works for supplying the City and County of San Francisco, and the inhabitants thereof, with electric light and power, upon the same conditions, and under the same regulations, as those to which corporations or persons engaged in supplying the municipality, or its inhabitants, with light and power, prior to October 10, 1911, were subjected.

"Provided, however, that this consent is given upon the express condition that the Municipal Government shall have the right to regulate the charges therefor.

"The consent hereby given, and the rights which may be acquired under and pursuant thereto, are subject to future regulations, to the same extent, and upon the same conditions, as though said rights have been acquired under and in pursuance to the provisions of Section 19 of Article XI of the Constitution of the State of California, as it existed prior to October 10, 1911."

I am further advised that the Universal Electric and Gas Company, desires, under authority to be conferred by this ordinance, to extend its underground conduit system, so as to give electrical service to other sections of the City than that which it is now serving, but has no intention of using and does not ask for a permit for overhead construction.

Opinion.

To make your legal position clear, it will be necessary to give a brief history of the amendment and construction of Article XI, Section 19 of the California State Constitution.

Prior to 1911 this section read as follows:

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State,

shall, under the direction of the Superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, *have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.*"

On October 10, 1911, the people ratified an amendment to said constitutional section, the pertinent portions of which I quote:

"Any municipal corporation may establish and operate public works *for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication.* Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.*"

Prior to the adoption of the above amendment, and at the date on which the Charter of the City and County of San Francisco was ratified, the right to lay conduits in the city's streets to supply gas or other illuminating light was a constitutional prerogative, which was subject only to the restrictions laid down in Section 19 of Article XI, and could not be made dependent upon first obtaining a franchise from the municipality concerned. The City might prescribe damages for injury to the pavement and exercise control over the actual work, as well as regulate the rates charged for service, but it could not arbitrarily refuse permission to any person or corporation to use its streets for the purposes mentioned, or impose any charge for this privilege other than compensation for damages.

In re Johnson, 137 Cal. 115;
Perrari vs. Wallace, 129 Cal. 398;
People vs. Los Angeles Gas Co., 150 Cal. 559.

The adoption of the amendment of 1911, however, operated to place entire control of the city streets in the hands of the munici-

pality, subject to the provisions of its organic law. While those corporations who had already availed themselves of the privilege granted under the old section were protected in the exercise of their rights, wherever pipes or conduits had been actually installed, such privileges in the future became subject to regulation by the municipality *under the provisions of its organic law.*

In re Russell, 163 Cal. 669;

See also cases above cited.

The present application, therefore, is subject to such conditions and regulations as to the municipality may prescribe *under its organic law,* that is to say, under the Charter. The provisions of the Charter must control the grant of this privilege if such a grant is made.

In re Russell, 163 Cal. 668, 674.

The only provisions of the Charter which have possible application in this matter are the following:

Article II, Chapter II—

Section 1, Par. 2: Except as otherwise provided in this Charter, or in the Constitution of the State of California, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County.

Par. 13: Except as otherwise provided in this Charter, to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the City and County, and to acquire, regulate and control any and all appliances for the sprinkling and cleaning of the streets of the City and County, and for flushing the sewers therein.

Par. 14: To fix and determine by ordinance in the month of February of each year, to take effect on the first day of July thereafter, the rates or compensation to be collected by any person, company or corporation in the City and County, for the use of water, heat, light, power or telephonic service, supplied to the City and County, or to the inhabitants thereof, and to prescribe the quality of the service.

Section 5. No exclusive franchise or privilege shall be granted for laying pipes, wires or conduits.

Section 7. The Supervisors shall have no power to grant franchises or privileges *to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway of the City and County except upon all the conditions and in the manner, including competitive bidding and payment of a percentage of gross receipts, hereinbefore set out, and upon the further condition that the Board shall at all times have the right to regulate the charges of any person, company or corporation using, enjoying or possessing such franchise or privilege.*

All the foregoing sections, except Par. 14, Section 1, are original sections of the Charter and were in effect at the time of and prior to the amendment of Constitutional Section 19.

I direct your attention first to the language of Section 7. If the privilege sought is comprehended in the phrase "franchises or privileges to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway," then clearly this Board has no power to grant it except upon compliance with the provisions of Section 7. If, however, Section 7 was intended to and does apply only to overhead construction, there is no prohibition in said section against granting the privilege upon other terms than those therein expressed. I incline to the latter view for the following reasons:

First, the language is unequivocal. "To erect poles or wires for transmitting along or upon." It would require a forced construction of these words to say that they were intended to include underground conduits.

Second, had the framers of the Charter intended to include "underground pipes and conduits," or expressly included them in the above section, it would have rendered the section unconstitutional at the time of its adoption. The above cited cases held as I have stated, that prior to the amendment of the Constitution, a municipality could not impose general conditions (such as are imposed by Section 7), upon the constitutional right to lay pipes and conduits in the streets. The language of Article XI of Section 19 was held on those cases to be self-executing. The city had no power to restrict it further. To follow a common rule of construction, we must give Section 7 such a construction, if possible, as will make it harmonious with the Constitution as the latter read at the time of the Charter's adoption.

Cheseborough vs. San Francisco, 153 Cal. 559, 568.

And there is clearly nothing in the language used by the framers which justifies a construction which would have rendered the section unconstitutional at the date of its adoption. Indeed, the phraseology, "to erect poles or wires" leads one to the conclusion that they were carefully avoiding the inclusion of "pipes and conduits."

There being no prohibition in the Charter against the granting of such a privilege as is here sought (except that it shall not be an exclusive privilege), it remains to determine whether there is any affirmative delegation of power to your Board which will justify such action.

Upon a first reading of paragraphs 2 and 13 of Section 1, Article II, Chapter II of the Charter, hereinbefore set forth, it would seem that the power was conferred under the provisions of said paragraphs, which grant the power "to regulate and control for any and every purpose, the use of the streets, etc." Upon a closer examination, however, and reading them in connection with the other paragraphs of Section 1, it seems more probable that the Charter framers intended these clauses to confer authority to "regulate and control" from the standpoint of the police power, and not to embody the franchise granting power. Whether or not this would be the construction placed upon them by the courts, I am not prepared to say, as that language has never been given judicial interpretation. However, I think it unnecessary to discuss this point further, because the language of the Constitution speaks for itself.

Turning again to Constitutional Section 19, Article XI, we find an express grant of authority to "persons or corporations" to "establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe *under its organic law.*" I am of the opinion that said section is sufficient authority for you to grant this or similar privileges not in conflict with the provisions of the Charter. Any other interpretation would render the Constitution nugatory as to such franchises or privileges not provided for expressly in the Charter. Assume for the moment that there were no gas or electric service in the City of San Francisco, and a corporation should apply for the privilege of supplying the same. Whence could the authority clearly contemplated by the Constitution for the grant of the privilege be

derived, in order that these necessities might be supplied? The Charter is silent. The general law as contained in the Broughton Act is not a part of the "organic law" of the city. The privilege if granted must be done by municipal ordinance, passed by virtue of the authority conferred in the Constitution itself. Justice Shaw says of this section of the Constitution, in his opinion in the Russell case, hereinbefore cited:

"If the taking effect of this constitutional provision in any city depends on the existence of provisions in its organic law giving the city power to make conditions, then these provisions of the Los Angeles charter give that city power to prescribe the conditions expressed in the ordinances above mentioned. *But we think the provision itself, by necessary implication, gives each city power to prescribe conditions.*

"To give the city power to prescribe conditions upon which persons and corporations may establish and operate such works, is to place the entire subject matter within the control of the city and, in effect to provide that no such person or corporation may do so without obtaining the privilege from the city by a grant specifying the conditions it chooses to prescribe. With respect to the mode of imposing and enforcing the conditions, the city is, of course, bound by the provisions of its charter. If conditions are found in the charter itself, the legislative authority of the city will be bound thereby and could not impose inconsistent conditions, nor abrogate those of the charter. In such a case the city would be imposing the conditions by its organic law and all grants by the city legislative body would be required to conform thereto. We need not here determine whether, in the absence of anything in the charter *or city ordinances* forbidding it, such persons or corporations, under their general powers, could go on to establish and operate such works without asking the consent of the city, or whether such action would be unlawful without affirmative permission from the city."

I think the clear effect of the above interpretation of the Constitution is that the municipal legislative body has the power to impose conditions on the grant of these privileges, *not in conflict* with the provisions of the Charter. In other words, the rule that the Board of Supervisors has only such powers as are conferred upon it does not interfere here because the Constitution, which is superior to the Charter, confers the power itself.

I am therefore of the opinion that you have the authority to grant by ordinance the privilege sought by the Universal Electric and Gas Company, of laying pipes and conduits beneath the city streets, and making connections therewith, and that you may insert in said ordinance such conditions as, in your opinion, public policy dictates. Provided, of course, that you may not grant an exclusive privilege, and that you must reserve the rate fixing power.

The ordinance you have submitted to me is, in my opinion, very unsatisfactory in that its terms are too vague and indefinite, and leave too much for future construction. Inasmuch as no exclusive franchises or privileges for laying pipes or conduits can be granted, it would seem far preferable to have a general ordinance passed under which all applications of this class could be handled. If you will submit to me the terms which you wish included in such an ordinance, I shall be glad to confer with your committees and ordinance expert for the purpose of drafting the same. In the meanwhile, if the present application is to be considered separately, I enclose a form of ordinance granting the same and embodying what seem to me essential conditions from a legal standpoint. You will, of course, add such other terms as in your opinion are advisable.

In conclusion, I direct your attention to the referendum provisions of the Charter which prevent any ordinance you may adopt in this matter from becoming effective for a period of sixty days from and after its adoption.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Right of the City Electric Company to Put Up Poles and Wires in the City.

September 10, 1913.

Sir: I am in receipt of your communication under date of September 2, 1913, requesting my opinion as to the right of the City Electric Company to put up poles and wires in this city. I understand from the representatives of the company that they

claim this right by virtue of temporary permits heretofore granted by the Board of Public Works. Upon further investigation, however, I find that the dates of all those temporary permits were prior to the adoption of the constitutional amendment of October 10, 1911, which has been held to limit the right of public service corporations to the use of city streets, to those streets in which their conduits, poles, wires and connections were already installed at the time this amendment was adopted, except upon the grant of permission by the city to make new extensions. Consequently any permits which were granted prior to that date were of no effect as a justification for further extensions.

Since the date of this amendment no corporation has any right to make extensions of its service except by procuring a franchise under the provisions of the Charter. The City Electric Company has not procured any franchise to erect poles or wires. The Board of Supervisors have granted them several temporary permits to erect poles and wires, the legality of which is somewhat doubtful. However, where you find them constructing under authority of such permits granted subsequent to October 10, 1911, I hardly think criminal prosecution would be justified.

With reference to the arrests made on Sutter and Scott Streets, I am not advised that the City Electric Company had any authority whatever to place poles or wires in this neighborhood except by permit from the Board of Public Works, dated August 15, 1907, and a permit from the Department of Electricity, dated July 15, 1911, both of which were, of course, invalidated by the constitutional amendment above referred to.

It thus becomes evident that the dates of the permits submitted to your offices should be carefully noted and action taken in accordance with the views therein expressed.

Respectfully,

PERCY V. LONG,

City Attorney.

Chief of Police.

Filing of Map of Forest Hill Court.

September 11, 1913.

Sir: I am in receipt of your communication of the 10th inst., as follows:

"Will you please advise me if the map of Forest Hill Court, submitted herewith for your inspection, is entitled to filing in this department?

"Will you please inform me, also, whether the filing fee is $5.00; or, by reason of the map being on two sheets, should the charge be $10.00?"

Opinion.

I have examined the map of the Forest Hill Court and find that the same in all respects complies with the Act approved June 11, 1913, in effect August 10, 1913, and known as Chapter 306 of the laws of the State of California, and you areadvised therefore that the same is entitled to filing in your Department.

Section 2 of said Act provides for the size of the sheets of drawing cloth and the marginal lines thereon and for all drawings, affidavits, certificates, acknowledgments, endorsements, acceptances of dedication and notarial seals which must be within said marginal lines. It also provides that "two or more sheets must be used if one does not give sufficient room to accomplish this end. If more than one sheet is used, each sheet must be numbered, connections of one sheet to another clearly given and the number of sheets used in the subdivision must be given in the affidavits."

It is my opinion that if more than one sheet is used, by reason of the fact that one sheet does not give sufficient room to provide for all drawings, affidavits, certificates, acknowledgments, endorsements, acceptances of dedication and notarial seals that the same constitute but one map, and therefore the filing fee provided in Section 4300-C as amended, Statutes 1913, page 678, relating to the fees of recorders, as follows: "for recording each map or plat where the same is not copied in a book of record $5.00," applies to the fees to be collected by you for the filing of any map or a subdivision or plat, irrespective of the fact whether said map is delineated on one or more sheets.

You are therefore advised that your charge for filing the map of the Forest Hill Court should be Five Dollars and not Ten Dollars.

Respectfully,

PERCY V. LONG,

City Attorney.

Recorder.

Board of Health Has No Right to Condemn Part of Structure Unfit for Particular Use.

September 11, 1913.

Gentlemen: I am in receipt of your communication of September 5, 1913, in which you ask for an opinion on the following point:

"Has the Board of Health the right to condemn any portion of a structure (as in this case, the rooms unfit for occupancy) that may only be in part insanitary, and if they have such right, what mode of procedure must be followed in cases of such character?"

Opinion.

If a structure or any portion of a structure is so insanitary as to be unfit for any use whatever or a menace to the public health, the Board of Health may proceed under Ordinance No. 501 (New Series), which provides that such a structure or part thereof is a nuisance and may be abated by the Board of Health and the structure or part thereof destroyed. The procedure to be followed in such a case is specifically laid down in the ordinance and should be carefully followed by the Board at every stage.

However, you say in your communication that "the second story of the premises is devoted to lodging house purposes, many of the rooms being unfit for occupancy owing to lack of proper light and ventilation, while other rooms may be occupied." From this I presume that, while the rooms in question are insanitary when used as lodging or sleeping rooms, they might very properly be devoted to some other use. In such a case it is clear that the destruction of this portion of the structure under the provisions of Ordinance No. 501 (New Series) would be entirely unjustified.

I advise you, therefore, that the Board of Health has no right to condemn a portion of a structure which is insanitary merely for the purpose to which it is being devoted.

I call your attention, however, to Ordinance No. 138, which provides (Section 2 thereof) that "it shall be unlawful for any owner, lessee, occupant or other person in charge or control of any building, or any part thereof, to lease or let or hire out the same, or any portion thereof, to be occupied by any person, or to allow the same to be occupied as a place in which, or for anyone to dwell or lodge, unless such building shall be sufficiently lighted, ventilated, provided and accommodated, etc." And in Section 3 that "it shall be unlawful for any owner, lessee, occupant or person in charge or control of any building or any part thereof, or any other person having the right and power to prevent the same, to cause or permit any person to sleep or remain * * * in any place dangerous or prejudicial to life or health by reason of a want of ventilation or drainage, etc."

Section 4 provides that "any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor," and provides for punishment.

Anyone letting rooms for lodging house purposes which are not properly lighted or ventilated is liable to prosecution under this ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Extension of Vulcan Street.

September 11, 1913.

Gentlemen: I am in receipt of your communication dated the 10th inst., in which you ask to be advised whether or not the proposed resolution in re Extension of Vulcan Street from its present Easterly termination to Horner's Addition, Block No. 201, to a uniform width of 41.67 feet to the Westerly line of Ord Street, etc., is in the proper form for passage.

I have examined the proposed resolution and find that the same is in proper form for passage, and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Taxability of Certain United Railroads Receipts.

September 26, 1913.

Gentlemen: I have before me:

1. The report of Mr. William Dolge, Certified Public Accountant, on the Taxable Receipts from Passenger Fares of the United Railroads of San Francisco for the year ending December 31, 1912, with accompanying map.

2. Letter from Mr. Dolge to my office, dated September 16, 1913, in which he sets forth at great length his views as to the taxability of certain receipts not accounted for by the United Railroads.

3. Letter from Mr. William M. Abbott, Attorney for the United Railroads to my office dated September 24, 1913, setting forth the position of the United Railroads in this matter.

My opinion is asked as to what legal right, if any, the City and County of San Francisco has to an accounting by the United Railroads for taxable receipts in addition to those reported by them.

The principal points of law raised by Mr. Dolge's report are the following:

First: Where the United Railroads acquired, through the consolidation of other companies, two franchises on the same street, one of which franchises overlaps and extends beyond the terminal point of the other, has the United Railroads any right to operate over the portion of the street on which said franchises overlap under one franchise and over the remaining portions under the other franchise, assuming that there is only one set of tracks and wires throughout the whole length?

Second: Where the United Railroads has acquired by succession in interest two franchises, which in part overlap as aforesaid, can they operate one line of cars on said street under one franchise and another line of cars over the same tracks on the same street under the other franchise?

Third: Where one line of cars is being operated over a given line of tracks under a taxable franchise, should a second line which, for a part of its route, is operated over the same tracks and under the same franchise, be exempted from any part of such taxation on the grounds that it detracts in part from the receipts of the first line on the section of track jointly used?

Fourth: On lines where the franchise has expired by limitation has the City a right to demand a percentage of the receipts from the operation of those lines as a condition to permitting further operation?

Fifth: Where the United Railroads has assumed to operate lines without any franchise whatever, can a percentage of receipts be charged as a condition to permitting further operation?

Opinion.

The consideration of the first two of the foregoing questions will be made more clear by a concrete reference to Turk and Eddy, Sacramento and the Mission-Richmond car lines in connection with the operation of which these questions arise.

The United Railroads acquired, through the consolidation of several companies at the time of its organization, the Sacramento Street cable franchise No. 2385, a franchise carrying no provision for the taxation of receipts derived from operation thereunder, and the Turk and Eddy-Sacramento Street franchise No. 2304, a franchise embodying a provision for taxation of receipts from operation thereunder. The route covered by No. 2385

traverses Sacramento Street from Powell to Walnut Street. The route described in No. 2304 turns into Sacramento Street at its intersection with Divisadero Street and runs thence along Sacramento Street past Walnut Street to First Avenue.

In June 1906, Ordinance No. 20 (New Series) was granted, permitting the electrification of all cable lines owned by the United Railroads. There was, however, already an electric line on Sacramento Street from Divisadero Street to First Avenue operating under Order No. 2304, so to my mind all that the United Railroads did in substituting electric cars for cable cars on Sacramento Streets between Divisadero and Walnut Streets was to abandon its cable franchise between those points. It did not string an extra set of wires or lay an extra set of electric tracks. The Company, of course, denies that abandonment was its intention, but I take it that an intent to abandon or not to abandon a franchise is to be construed from the acts of the Company at that time and not from its post-facto declarations.

While I have been able to find no case which embodies a set of facts parallel to the one before me, it appears to me incongruous that a Company can be claiming to operate over one set of tracks, using one set of wires and having one ownership of all the cars running over the line and yet claim that it is operating under two franchises. In explanation, counsel for the Company says that it operates the Turk and Eddy line under No. 2385 and the Mission and Richmond line under No. 2304, but in the next breath he contends that the routing of cars is immaterial in the exercise of a franchise and does not hesitate to declare that both of the above lines operate under one franchise (No. 2304) on Divisadero Street and on Sacramento Street after Walnut Street is passed. I repeat, not only does the foregoing situation seem incongruous, but I believe that a court of law would construe the position of the company as being an illegal attempt to escape payment of percentages through claiming to operate under an abandoned franchise.

The foregoing analysis impels me to answer the first two questions in the negative. The validity of a franchise depends upon its use; the validity of two franchises depends upon their separate use—either by two companies over the same line or by one company over different lines. There cannot be unity of ownership, location, route, tracks, equipment and mode of operation, and

severance of franchises. It would be analogous to say that a man who had received deeds to a piece of real estate from two adverse claimants in fee has two titles thereto. He acquired his title from two different sources perhaps, but he has but one title. It follows that you have a right, which, in my opinion, would be enforceable at law, to demand from the United Railroads payment of a percentage of receipts from all operation on Sacramento Street between Divisadero and Walnut Streets, on Fulton Street between Seventh and Eighth Avenues and on California Street between Presidio Avenue and Maple Street.

Now as to the third question, I understand that the present arrangement of paying a lower percentage on the receipts derived from operation of so-called "secondary" lines over the same tracks and under the same franchise as "primary" lines, than is paid on the receipts from the "primary" line, is the result of a compromise which has been considered equitable and satisfactory by both your Finance Committee and the representatives of the United Railroads. It therefore becomes unnecessary for me to discuss the legal points there involved.

I also understand that the fourth and fifth points of law raised by Mr. Dolge's report have been settled to the satisfaction of your Board and that an opinion on those matters is also unnecessary at this time.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Power of Supervisors to Make Donations to Families of Deceased Employees From City Funds.

September 27, 1913.

Gentlemen: I am in receipt of your communication of even date which reads as follows:

"I am directed by the Finance Committee to request you for a legal opinion on the following matters:

"1. Have the families of Patrick Lynch and James Conlon, employees of the Sewer Cleaning Department, Board of Public

Works, who recently lost their lives in the discharge of their duties, any legal claim against the City?

"2. Has the Board of Supervisors any legal right to draw on the Urgent Necessities Fund for the purpose of making a donation or granting a pension to the unfortunate families of these men?

"3. If the families of these men have no legal claim against the City, and if the Board of Supervisors has no legal right to draw on the Urgent Necessities Fund for the purpose of making a donation or granting a pension to the families of these men, is there a legal way whereby the Board of Supervisors can give financial relief to the families, and can the Auditor and Treasurer honor such a demand?

"The Finance Committee is very anxious to receive your opinion in reply to the above questions in time for its meeting Friday, September 26th, at 2:30 P. M.

"You are therefore requested to give this matter your immediate attention and consideration."

My understanding of the facts of these cases is that James Conlon, an employee of the sewer-cleaning department of the Board of Public Works of this city and county, while in the regular performance of his duties as such, and working on the repair of the Clay Street sewer, was overcome by gases emanating therefrom, and that Patrick Lynch, another regular employee so at work at or near the place where Conlon was operating, did go to the rescue of Conlon and he was himself similarly overcome by the gases, the result being that both men died from asphyxiation; that they left families in destitute circumstances, and that your Committee desires my advice as to the legal liability of the City for any claim that may be filed against the City by the surviving families of said Patrick Lynch and James Conlon.

It will immediately be seen that in your first and second inquiries you seek advice as to the legal liability of the City and that in your third question you ask, even though there be no liability on the part of the City, whether "there is a legal way whereby the Board of Supervisors can give financial relief to the families."

On the first point there are many conflicting decisions in the different states on the liability of a city for such injuries. In the first place I have not a sufficient knowledge of the facts in this case to advise whether, under the rule in some states established, the manner in which the Clay Street sewer was planned and maintained by the City constituted such negligence on the part of the City as to result in a legal liability.

In the second place, if it could be shown that there was such negligence, then the Charter, Article I, Section 5, seems to express an intention that the City shall not be liable anyway.

But the Legislature in 1911 (Stat. 1911, p. 1115) passed an act which attempts to make any "county, city, or city and county" liable, as in ordinary actions for damages, if "any person shall suffer injury to his person or property in consequence of the dangerous or defective condition of any street, highway, public building, public work, or property."

It has always been my policy to resist any claims filed against the City founded on any such statute, unless for good cause it should be recommended by the Board of Supervisors that a settlement be made. This policy I would follow in these cases, if claims are presented.

Under the Workmen's Compensation Act adopted by the last session of the Legislature (Stat. 1913, p. 279), which goes into operation on January 1, 1914, and which provides for the compulsory payment by employers to their employees of certain sums for injuries received, or to their dependents, in case of death, it is stated, in Section 13 thereof, that "the term 'employer' as used in Sections 12 to 35 inclusive of this act shall be construed to mean the state and each county, city and county, city school district and all public corporations therein."

My understanding is that Mr. Conlon, at the time of his death, received $5.00 per day and Mr. Lynch received $4.00 per day. The above Act provides a payment in the case of death to the surviving family in the amount of three times the average annual earnings. My understanding is that the Industrial Accident Commission at present has a rule which would average the year's work in such a case at three hundred days. On this basis then the family of Conlon would be entitled to $4500, and the family of Lynch to $3600 if the Workmen's Compensation Act were at present in operation.

As to the second question, it is of course purely a matter of policy as to whether the Board of Supervisors desires to give this financial relief if some method can be worked out by which it may be legally done. That question, of course, is for the Board of Supervisors to determine. I must assume, in order to consider your third question at all, that if a legal way may be pointed out it will be the desire of the Board of Supervisors to follow such a procedure. You refer in this question to "making a donation or granting a pension to the families of these men." I do not believe that any relief can legally be granted in the form of donation or pension. I am, however, of the opinion that if claims against the City and County were regularly filed by the surviving families of these men, a method may be found which, as a matter of law, would not be set aside by the courts, and would protect the Auditor and the Treasurer in the honoring of any demand approved by the Board of Supervisors. The legal way which I would suggest would be to have claims regularly filed with the Board of Supervisors and then, if the Board determines in the exercise of its discretion to allow these claims, either in the amounts thereof or in any other amounts, as determined by the Board, that such action by the Board would be in the nature of a settlement or compromise of threatened or actual litigation. The safest procedure to follow to protect the Auditor and Treasurer would be for the Supervisors to authorize a judgment to be consented to, in such amount as may be determined upon by your Board.

Regarding your second question as to the power of the Supervisors to draw on the "Urgent Necessities Fund" for the purpose of aiding the unfortunate families of these men, it might be that a finding by the Board of Supervisors that it was in fact an urgent necessity, from the standpoint of the encouragement of efficiency in city work or from that of making a good compromise, would not be reviewed by the courts. However, I am of the opinion that if your Honorable Board determines as a matter of policy to make any payments to these families, the safest procedure to follow would be to order the amounts paid from the Surplus Fund, following a judgment of Court regularly obtained.

The Charter, Article V, Chapter II, Section 2, provides that the City Attorney "shall not settle or dismiss any litigation for or against the City and County under his control unless upon his

written recommendation he is ordered to do so by the Mayor and Supervisors."

I am prepared at the present time to state that in view of the extreme, unusual and unfortunate circumstances of these cases, if the Mayor and the Supervisors shall first determine the question of policy in this matter in favor of granting this relief, I shall consider it a proper exercise of my authority to recommend the settlement of any litigation which may be brought against the City in these cases, in such a way as may be agreeable to the Mayor and the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Finance Committee,
Board of Supervisors.

Employment of Females in Greek and Chop Suey Restaurants.

September 29, 1913.

Gentlemen: I am in receipt of your communication which reads as follows:

"The Board of Health respectfully requests that the City Attorney submit an opinion as to whether or not an ordinance designed to prohibit the employment of females in Greek restaurants and the employment of white women in Chinese Chop Suey houses would be legal, and if it would be legal to attempt the enactment of such legislation, what mode of procedure should be followed."

Article XI, Section 11 of the Constitution of California gives the power to any county, city, town or township "to make and enforce within its limits all such local, police, sanitary and other laws and regulations as are not in conflict with general laws."

The Charter provision authorized by this section and enumerating the powers of the Supervisors is as follows:

Article II, Chapter II, Section 1, Local Laws:

"To ordain, make and enforce within the limits of the City

and County of San Francisco all necessary local, police, sanitary and other laws and regulations."

The matter resolves itself into a question as to whether or not it is possible under the foregoing provisions to enact legislation, having for its purpose the exclusion of women from Greek and white women from Chop Suey or Oriental restaurants. For the purpose of convenience these matters are discussed separately.

Opinion.

First—Greek Restaurants.

Legislation such as contemplated directed against them would be open to two constitutional objections, either of which would render it invalid.

First: Would be an unreasonable and arbitrary discrimination against a class of restaurants not admitting of any separate classification for the purpose of the proposed legislation, hence violative of Section 11, Article I of the State Constitution and Article XIV of the United States Constitution providing for uniform operation and equal protection of the law.

A class discrimination for the purpose of legislation must be founded upon some natural, intrinsic, or constitutional distinction, and under the authorities such a distinction could not be made as to Greek restaurants. Other than the fact that they are maintained, operated or owned by Greeks, there is nothing to distinguish them as a class from all other restaurants. Arbitrary discrimination between persons standing in the same relations to the subject of legislation will not be sustained by the Courts.

Ex Parte San Chung, 11 Cal. App. 511;
Ex Parte Haig, 157 Cal. 161.

Secondly: Would be an arbitrary and unreasonable discrimination against females on account of sex, bringing such proposed legislation under the ban of Article XX, Section 18 of the California Constitution.

"No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or calling."

In construing this section of the Constitution the Supreme Court of California has held that it does not restrict legislation having

for its purpose the regulation of employments by the exclusion of women therefrom in order to prevent sex immorality or disorder. In order that this legislation be constitutional, however, it must clearly appear that a breach of public morality or order is the usual outcome of the pursuit by both sexes of the occupation sought to be so regulated. Disorder and sexual immorality are not the usual or reasonable results to be expected from the pursuit by both sexes of the restaurant business. If the proposed legislation is sought on grounds of insanitary conditions in said places, the same objections will lie.

Ex Parte Felchlin, 96 Cal. 362.

Second—Chop Suey or Oriental Restaurants.

Though the general principles of law as applied to Greek restaurants, govern with equal force those termed Chop Suey, in the case of the latter it would be a debatable question of fact as to whether such legislation could be upheld. The proposed legislation being applicable to white women only, admitting of a racial distinction for the purpose of classification, if it appears that such places as generally operated are against the welfare of the white women, it is more than probable that the constitutionality of the legislation as to them would be upheld on the ground of a reasonable exercise of the police power.

Such legislation would have to follow the usual procedure provided in the Charter for the passing of all ordinances.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Permit to Water Front Realty Company.

October 1, 1913.

Gentlemen: I am in receipt of your communication of the 15th ult., as follows:

"In accordance with the attached recommendation of the Chief Building Inspector we desire to request your opinion upon the authority of this Board to grant a permit to the Water Front Realty Company to erect a one-story class "C" building at the southwest corner of the Embarcadero and Oregon Street, provided the applicant, upon grant of said permit, stipulates that the construction of a portion of the building beyond the street line as delineated upon the maps of the Board of State Harbor Commissioners, will not constitute any relinquishment upon the part of the City and County of San Francisco or the State of California of their claim to said property or rights in the premises."

Opinion.

Your communication was accompanied by an agreement signed by the Mercantile Trust Company of San Francisco, a corporation, as trustee of the residue of the estate of D. Chandler, deceased, and the Water Front Realty Company, a corporation, which agreement after certain recitals contains a provision that neither the issuance of the permit applied for, nor the construction of the addition to the building, nor the failure on the part of the City and County of San Francisco to revoke said permit, shall, in or of themselves, constitute any waiver of, or prejudice any right which said City and County of San Francisco, or the State of California may have, if any, to the easterly thirty-five feet of the real property described in said agreement; nor shall the granting of said permit, or the failure to revoke said permit for the addition to said building estop or prevent the said City and County of San Francisco, or said State of California, from hereafter asserting any claim to, or right in, said easterly thirty-five feet of said real property.

In the event that it shall be hereafter determined that the buildings erected or added to, which now occupy the thirty-five feet referred to in the agreement, constitute an encroachment on the Embarcadero, no rights of the City and County of San Francisco will be infringed upon for the reason that the jurisdiction of the

State Board of Harbor Commissioners extends to the westerly line of the Embarcadero.

Therefore, there will not be any relinquishment of any rights of the City and County of San Francisco by reason of the granting of the permit applied for. It is unnecessary in this opinion to go into the question of the rights of the State of California, or the State Board of Harbor Commissioners, in or to the thirty-five feet referred to in the agreement. That is a matter that concerns the State Board of Harbor Commissioners.

You are advised therefore, that the permit applied for may be granted by you in accordance with the building laws of this City and County, without the waiving, impairment or relinquishment of any rights of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Electroliers on Polk and Mason Streets.

October 2, 1913.

Gentlemen: I am in receipt of the following communication:

"The following Journal Resolution was introduced in the Board of Supervisors and referred to the Committee on Lighting and Rates. The Committee is unable to decide the matter, and respectfully requests your opinion on the legal questions:

Journal Resolution No.....

"Resolved, That the Pacific Gas & Electric Company is hereby instructed to light and maintain the electroliers on Polk Street between Sutter Street and Pacific Avenue, at the locations provided by Journal Resolution No. 759 (adopted May 26, 1913), and on Mason Street between Post and Turk Streets at the locations provided by Journal Resolution No. 684 (adopted March 24, 1913), and to remove the gas lamps provided in said resolutions.

"Journal Resolution No. 684, so far as it applies to the liability of the Board of Supervisors, is as follows:

Journal Resolution No.....

"Resolved, That the Pacific Gas & Electric Company is hereby instructed to supply electric current for eighteen electroliers (220 watts to each electrolier) at the herein mentioned locations, provided that the City and County of San Francisco shall be at no expense for the installation, replacement, upkeep, maintenance or repairs of said electroliers or apparatus connected therewith; eight of said electroliers to be on the all night lighting schedule, and the remainder as herein specified to be extinguished at 12:00 o'clock midnight.

Journal Resolution No. 759 is enclosed.

"After the passing of these resolutions, the property owners on Polk Street and Mason Street purchased and erected the electroliers provided for in the resolutions, and requested the Pacific Gas & Electric Company to make connection with their conduits so that the electroliers could be lighted by the City as provided by Journal Resolutions 684 and 759.

"The Company refused to make the connection, claiming that the property owners should pay for the expense to be incurred (about $5000 for both streets), but offered to make the connections at its own expense if the City would pay the contract price for electrolier service (see Resolution No. 10,184, New Series, copy enclosed), entailing an additional expense to the City of $2419 per year.

"The Committee wishes to know if the Pacific Gas & Electric Company can be compelled to make the installation under its contract for lighting the streets, the City to pay for the current only, as provided by Journal Resolutions 684 and 759."

Opinion.

In accordance with your request I have carefully examined the contract between the Pacific Gas & Electric Company and the City and County of San Francisco for the furnishing of gas and electricity for the lighting of public buildings and public streets during the year ending June 30, 1914. I find that in said contract the Pacific Gas & Electric Company is obliged to furnish electric current for lighting purposes to public buildings at the rate of three cents per kilowatt hour; that no separate provision is made for furnishing electric current for street lighting except as the

same is embodied in the provisions for arc lamps and electrolier service, the rate for electrolier service being seventeen cents per kilowatt hour per night. The specifications for said lighting further provide that "the poles, wires, conductors, lamps, carbon electrodes, and each and every appliance, article or apparatus which may be necessary for electric lighting, to be furnished and erected and kept in good order and condition by the successful bidder." In my opinion, the charges for the above service are covered by the rates allowed for services under the street lighting contract. But I do not think that by any possible construction there could be included in the contract for furnishing light, heat and power to public buildings, which is the only contract in which the three-cent current rate appears, the obligation to furnish current at that rate for street lighting purposes and pay all installation and maintenance charges.

It therefore seems to me conclusive that under no interpretation of this contract could the Pacific Gas & Electric Company be compelled to install and maintain service connections with the electroliers which have been erected on Polk and Mason Streets and receive in return for such service only the three-cent current rate. If electrolier service is to be supplied the contract rate of seventeen cents per electrolier per night must be paid.

In Journal Resolutions No. 684 and No. 759, you have instructed the Pacific Gas & Electric Company to supply electric current for a specified number of electroliers, provided that the City and County shall be at no expense for the installation, replacement, upkeep, maintenance or repair of said electroliers, or apparatus connected therewith.

I advise you that the only conditions upon which compliance with this order by the company could be enforced would be upon payment to them of the seventeen-cent rate.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Flooring of a Building Is a Structure Which May Be Condemned If Insanitary.

October 3, 1913.

Gentlemen: I am in receipt of your communication of the 17th inst., as follows:

"At a meeting of the Board of Health held on September 16th, a resolution was adopted requesting that the City Attorney submit an opinion upon the following point.

"The premises known and designated as the southeast corner of Steuart and Market Streets, where a building formerly stood, is now composed of the flooring of said building which has been allowed to remain. An open air fruit stand is being conducted at the location mentioned and the case was brought before the Board of Health for condemnation proceedings. What this Department would like to be advised upon is this:

"Does the mere flooring of a building remaining after the walls of such building have been removed constitute a 'building' within the terms of Ordinance No. 501 and could condemnation of such fruit stand be enforced under the terms of such ordinance?"

Opinion.

Ordinance No. 501 (New Series), to which you refer, declares (Section 1 thereof) that "all buildings, structures or parts thereof which are insanitary are hereby declared to be and are nuisances," and provides for their abatement by the Board of Health. To come within the operation of this ordinance the flooring in question must fall within the description "all buildings, structures or parts thereof."

As defined by Cyc. a building is "A structure or edifice enclosing a space within its walls and usually covered by a roof." 6 Cyc. 116. This is the common conception of the word and it is clear that it is not broad enough in meaning to include a mere flooring.

The word "structure," however, has a broader meaning. "In the broadest sense a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner." 27 A. M. & Eng. 191. It is true that it has also a narrower meaning in which it is practically synonymous

with "building." But as used in the ordinance here it seems clear that it is intended to supplement the word "building" and to broaden the scope of the ordinance by making it applicable at least to all structures in a similar class with buildings. So a platform, a tent, or any other similar structure built or erected on the land for use and occupancy would fall within its operation. It is my opinion that the flooring in question constitutes a structure within the terms of Ordinance No. 501 (New Series), and that if insanitary the Board of Health may condemn it under the provisions of that ordinance.

In this view of the matter it is unnecessary to determine whether the flooring, being a part of a no longer existing building, comes within the description in the ordinance "or parts thereof."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Ordinance to Prohibit Keeping Dogs in Flats.

October 6, 1913.

Gentlemen: I am in receipt of your communication of September 22nd, in which you ask to be advised as to the validity of a suggested ordinance "making it unlawful to keep, maintain or harbor a dog in the yard attached to any building occupied by two or more tenants, unless an enclosed space is set aside in the yard for the use of each tenant."

Opinion.

It is well recognized that the keeping of dogs, especially in cities and towns, is subject to police regulation. As said by the Utah Court in Jenkins vs. Ballantyne, 30 Pac. 760:

"The police power of the state has been used to regulate and control property in dogs to a greater extent than property in any other class of animals."

Many similar expressions may be found in the reports:

"Dogs have always been held by the American courts to be

entitled to less regard and protection than more harmless and useful domestic animals."

Ex parte Cooper, 30 A. R. 152 (Tex.).

"The nature and habits of dogs make them the special subjects of the police power."

Finchner vs. Collum, 59 S. E. 22 (Ga.).

"The power to regulate the keeping of dogs and to enforce such regulations by forfeitures, fines and penalties is one that has been very generally exercised."

City of Faribault vs. Wilson, 25 N. W. 449 (Minn.).

It is needless to multiply instances. In the case of In re Ackerman, 6 Cal. App. 5, the Appellate Court of California considered an ordinance licensing and regulating the ownership of dogs. In the course of the opinion the Court used the following language:

"No American court has ever questioned the right under the police power to regulate the control, management or use of dogs. * * * Common experience justifies strenuous opposition to (and wisely sanctions the curbing of) unbridled and, it may be added without facetiousness; unmuzzled liberty in the canine species, particularly in urban communities * * *. At common law the dog was classed in the category of animals *ferae naturae* and many of them should be so classed now. We are safe in going further and declaring that the very best of them can, with less effort and in a shorter space of time, make themselves more of a nuisance to the square inch than any other domestic quadruped of which we have any knowledge. Even those having the good fortune to have received the fullest measure of civilized care, nursing, petting and general disciplinary domestication, from puphood to the danger point of maturity, have not had the instincts of savagery inherited from their distinguished ancestral relative and implacable enemy of the human race, the wolf, so mollified as to render them altogether disposed to maintain uniformly peaceful relations with the human family * * *. Many other reasons than those already suggested could be given why the ordinance here is not only reasonable but an important regulation. The dog is subject to hydrophobic fits and the laceration of the flesh of a human by a dog thus afflicted will almost invariably inoculate such person with the poison of the malady, usually with a fatal result."

Ordinarily the statutes and ordinances regulating the keeping of dogs provide for licensing and muzzling, for the impounding and sometimes the summary destruction of unlicensed, unmuzzled or vicious dogs found running at large and for the prosecution and fining of owners of dogs who disobey the other provisions, and I have been unable to find anywhere a record of an ordinance similar in character to the one which you suggest.

However, it seems clear that any regulation which is reasonably necessary to protect health, safety and property may be validly adopted so long as it is uniform in its application.

The validity of such an ordinance then would depend upon the question of its reasonable necessity and uniform application. As we have seen, the main reason for police control over dogs lies in their tendency to annoy and attack persons, to destroy property, and particularly in the danger from hydrophobic fits. Evidently this ordinance is intended to protect the tenants in flats and other buildings where two or more families live under a single roof, from these annoyances and dangers in the use of such buildings and the yards attached to them. It is of course a question of fact whether such protection is so necessary and advisable as to make such a restriction upon the keeping of dogs as the one suggested here a reasonable one. But it is clear that the danger to a man from a vicious dog or a mad one is just as great in his own back yard as upon the public street and I think this ordinance might be held valid as a reasonable exercise of the police power.

It would doubtless also be objected that the suggested ordinance was invalid for class determination. The answer to that objection is found in the language of the Court in Deyoe vs. Superior Court, 140 Cal. 476.

"If the individuals to whom the legislation is applicable constitute a class characterized by some substantial qualities or attributes of such a character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not violative of our constitutional provisions against special legislation."

The tenants of flats and other buildings common to more than one family would seem to constitute such a class for the purpose of the proposed ordinance.

It is my opinion that such an ordinance would probably be

held valid, but in view of its novelty and the difficulties suggested, it is impossible, in the absence of a judicial decision, to state positively whether it would be held valid or not. I would suggest that in drawing this ordinance it should be so framed as only to prohibit the keeping of any dog in any yard used in common with another tenant or other tenants unless an enclosed space is set aside in the yard for the keeping of such a dog or dogs. The language used in your communication would require every tenant to have a separate enclosure before any of them could keep a dog, which would clearly be an unreasonable restriction. It should be sufficient that the tenant wishing to keep a dog should have a separate enclosure in which to place him.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Medical Clinic Not a Hospital—Permit Under Ordinance No. 823 Not Required.

October 16, 1913.

Gentlemen: I am in receipt of your request for an opinion as follows:

"I have been directed by the Public Health Committee of the Board of Supervisors to request you to furnish it with an opinion as to whether a medical clinic which is an adjunct of a medical college, comes under the category of a hospital. Must a permit to conduct said clinic be obtained from the Board of Supervisors?

"A medical clinic is about to be opened in the basement of the medical library building at the southeast corner of Webster and Sacramento Streets and adjoining property owners have entered a protest. They contend that it is a part of the Lane Hospital and that it comes under the ordinance regulating the maintenance of hospitals. On the other hand, claim is made that the proposed clinic is not directly connected with the Lane Hospital, but is a part of the medical college directed by Stanford University.

"The Committee is not certain as to how to deal with the problem and respectfully requests an opinion as to the legal course in the premises."

Opinion.

Ordinance No. 823 provides as follows:

"It shall be unlawful for any person, corporation or association to erect, establish or maintain any hospital without permission from the Board of Supervisors."

"Clinic" is defined as follows in the Century Dictionary:

"In medicine, an examination of a patient by an instructor in the presence of students, accompanied by remarks on the nature and treatment of the case."

Webster's International Dictionary defines "clinic" as

"A gathering of instructors, students, and patients for the study and treatment of disease."

We find "hospital" defined as follows:

Webster's International Dictionary:

"A building in which the sick, injured or infirm are received and treated; a public or private institution founded for the reception and care, or for the refuge of persons diseased in mind or body, or disabled, infirm or dependent, and in which they are treated either at their own expense or often by charity in whole or in part."

Bouvier's Law Dictionary defines "hospital" as

"An institution for the reception and care of sick, wounded, infirm or aged persons."

In the case of In re Curtis' Estate, Vol. 7, New York Supp., at page 208, the Court says:

"The primary meaning of the word 'hospital,' for instance, was an inn (and from which our modern word 'hotel' is derived), where guests were entertained for compensation. Now the word is more commonly applied to a building founded through charity, where the sick and disabled may be treated solely at their own expense, or at the sole expense of the corporation, which receives only indigent patients, and then has all the attributes of an almshouse, and in either case it becomes, as we understand the term, a charitable institution."

In my opinion there is a clear distinction between a clinic and

a hospital, and, if you find that the purpose of the Stanford Medical School is to maintain and conduct a clinic, as above defined, in connection with the medical school, and not to conduct a hospital, then there is no permit required from the Board of Supervisors for the conducting of such a medical clinic.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Playground Commission Not Liable For Damage Caused by Children While in Public Playgrounds.

October 23, 1913.

Gentlemen: I am in receipt of your communication of the 15th inst., in which you ask for an opinion relative to the matter included in the following letter received by your Commission:

"Wish to inform you that passing playgrounds Post and Scott Streets, Saturday at 12 M. a baseball from the grounds hit the large glass in front of my machine and smashed it. I look to you for reparation as the boys are under your care."

I can discover no principle of law upon which your Commission could be held responsible and I advise you that no liability attaches to you because of this accident.

Respectfully,

PERCY V. LONG,

City Attorney.

Playground Commission.

Regrading Harrison Street Between First and Second Streets—Work Should Be Prosecuted Under Ordinance No. 415 (New Series).

October 29, 1913.

Gentlemen: I am in receipt of your communication as follows:

"In accordance with the attached recommendation of the Acting City Engineer, Board of Public Works desires to request your opinion upon the proper method of procedure of regrading Harrison Street between First and Second Streets, and Sterling from Harrison Street southerly.

"On account of previous action taken by this Board in the premises, there exists an uncertainty as to whether proceedings for these improvements may be continued under Ordinance No. 415 (New Series), of the Board of Supervisors, or whether this work may be accomplished under the Street Improvement Ordinance recently enacted by the Board of Supervisors."

Opinion.

Ordinance No. 415 (New Series) was approved April 15, 1908. It appears from the report of the Acting City Engineer attached to your communication that immediately after the approval of said Ordinance No. 415 (New Series) the Board of Public Works entered into a written agreement with Wetmore, Manuel and Wetmore whereby said Company was to excavate Harrison Street from Second Street to the easterly line of Essex Street, and Stanley Place from Harrison Street southerly to the official line and grade, said work to be completed within eighty-two calendar days from the date of the agreement. The Acting City Engineer states also that only a portion of the grading work was performed under said agreement and none of the regrading and repaving required to be done by the Yerba Buena Improvement Company and that there was no money paid to the contractors Wetmore, Manuel and Wetmore.

Chapter VI, Article VI of the Charter provides a complete scheme for the change and modification of the grade of any public street, etc., and the regrading, repaving, sewering, sidewalking, curbing or other improvement to the same. It gives to the Board of Supervisors the power, on the written recommendation of the Board of Public Works, to make any change or modification of

grade and to order to be done thereunder any street work or other improvement, and to define and establish the district benefited and to be assessed for the payment of damages and for the expense of regrading, repaving, sewering, sidewalking, curbing or otherwise improving such street or streets so as to conform with such change or modified grade.

Ordinance No. 415 (New Series) was passed by the Board of Supervisors under the power and the authority conferred upon it by Chapter VI, Article VI of the Charter, and in my opinion the work contemplated by Ordinance No. 415 (New Series) should be prosecuted under said ordinance and in accordance with the provisions of Chapter VI, Article VI of the Charter and not under Ordinance No. 2439 (New Series) approved September 4, 1913, and in effect September 14, 1913, referred to as the Street Improvement Ordinance. Said last-mentioned ordinance provides a method for the improvement of the public streets in this City and County and the assessment of the costs thereof upon private property and the payment of such assessments in installments in certain cases. It does not provide for the doing of the work of the character mentioned in Ordinance No. 415 (New Series).

Therefore, it is my opinion that your Honorable Board may prosecute the work specified in your communication in accordance with the provisions of Ordinance No. 415 (New Series), and not in accordance with the provisions of Ordinance No. 2439 (New Series).

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Electric Apparatus on Geary Street Cars—Conflicting Claims Against City.

November 4, 1913.

Gentlemen: I am in receipt of your communication under date of November 1, 1913, with reference to the claim of the Westinghouse Electric Manufacturing Company, in the sum of $34,625, for electrical apparatus furnished to W. L. Holman Company and installed in the Geary Street cars. This claim arises out of the contract entered into between the City and the W. L. Holman Company for furnishing to the City forty-three cars for the Geary Street Railroad. The electrical apparatus in these cars was furnished by the W. L. Holman Company under a conditional bill of sale by which the title to the electrical apparatus was to be retained by the Westinghouse Company until the apparatus had been paid for. The Westinghouse Electric Manufacturing Company claims that the cars were delivered to the City without the Holman Company paying for the apparatus in accordance with the conditional bill of sale and the Westinghouse Company now makes claim against the City for the contract price of this apparatus. The W. L. Holman Company is now in bankruptcy and a trustee has been appointed. Various stop notices have been filed against the amount of money due the Holman Company from the City on the contract with that company. There are therefore three claimants to the money due from the City, namely, the Westinghouse Electric Manufacturing Company, the trustee in bankruptcy, and the parties filing the stop notices with the Auditor. Such being the case it would be unwise for the City to pay to any of these parties the money due on the Holman contract, but the City should require that a suit be brought to determine to whom the money is due and payable.

I therefore advise that the claim be rejected so that a suit may be brought against the City on this claim, if the Westinghouse Electric Manufacturing Company deems such a suit advisable.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Fire Pensions—Fireman Canty Injured in 1902 and Retired on Pension—Wife Not Entitled to Pension on His Death on June 24, 1913.

November 4, 1913.

Gentlemen: I am in receipt of your communication of October 29, 1913, which reads as follows:

"I have been instructed by the Board of Fire Pension Fund Commissioners to refer to you for your opinion the matter of petition for pension of Mrs. Mary Canty, widow of Patrick Canty, deceased, a former member of the Fire Department who was injured in the discharge of his duties in December, 1902, and retired on a pension of $50.00 per month April 1, 1903. He died on June 24, 1913, and his widow asks for a continuation of the pension.

"If it should be proven to the satisfaction of the Board that said Patrick Canty was injured in the discharge of his duties, and that he died from the effects of said injuries, as alleged, your opinion is requested on the question as to whether or not the Charter amendment adopted December 10, 1912, would bar the granting of this pension, as more than one year has elapsed between the date of the alleged injury and the death of said Patrick Canty."

Opinion.

The death of petitioner's husband, Patrick Canty, occurred after the amendment to Section 5, Chapter VII, Article IX of the Charter took effect. That section now reads as follows:

"The Commissioners shall, out of the firemen's relief fund, provide as follows for the family of any officer, member or employee of the fire department who may be killed or injured while in the performance of his duty, and who shall have died within one year from the date of such injury, and the receipt by such officer, member or employee of any relief under this chapter, during his lifetime shall not bar the said family from the benefits of this section."

The right of petitioner to relief is governed by the aforesaid section as amended in March, 1913, it being evident from the facts stated that no right to relief could vest in petitioner until the death of her husband from an injury received while in the per-

formance of his duty. That section, as applicable to her cause, and so far as discussion is necessary, in effect provides that death must occur within one year after the injury. That the death having taken place within this limitation acceptance of benefits by deceased in his lifetime would not bar his relatives' rights to relief under this section. That is, acceptance of benefits by the deceased for his injury will not bar relief to his relatives for his death provided that takes place within the limitation prescribed, namely, one year after the injury.

As this section was construed prior to the amendment of 1913, though no limitation was therein prescribed for the time within which death must occur after the injury, acceptance of benefits by deceased in his lifetime for the same was a bar to any relief to his relatives for a death occurring thereafter, even though it might be proven that deceased was killed while in the performance of his duty.

Edwards vs. Sweigert, 15 Cal. App. 518.

It was to provide for a reasonable time within which death must occur after an injury and to meet the construction given by this decision as to the effect of acceptance of relief by the deceased in his lifetime that the amendment above cited was passed in 1913. The bar caused by the acceptance of benefits is removed only where deceased dies within one year of the injury.

It appearing from the petition in the present case that deceased died after the amendment took effect and further that his death occurred after the limit of one year from the date of injury, as therein provided, you are advised that petitioner is not entitled, under the Charter provision, to the relief asked for.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Officers and Employees Renting Automobiles to City—Forbidden to Do So by Art XVI, Sec. 6, Charter.

November 7, 1913.

Sir: I am in receipt of your communication of October 8th, in which you inform me that several officers and employees of the City and County are renting automobiles to the City and County, and asking my opinion as to whether this practice is forbidden by Article XVI, Section 6 of the Charter, and whether you should allow such demands.

Opinion.

Article XVI, Section 6 of the Charter provides that "No Supervisor and no officer or employee of the City and County shall be or become, directly or indirectly, interested in, or in the performance of, any contract, work or business, or in the sale of any article, the expense, price or consideration of which is payable from the treasury," and further that "all such contracts shall be void and shall not be enforceable against the City and County."

As I understand it the practice complained of arose substantially as follows: Many of the officers and employees of the City and County are given monthly allowances for transportation. Several of these officers and employees, finding themselves hampered in their work by the time consumed in getting from place to place with a horse and buggy and being unable to pay automobile hire with the amounts allowed them, hit upon the plan of owning and using their own machines and applying their transportation allowances to the necessary cost of fuel and upkeep incurred in using them upon the City's business. It is unquestioned that this has been done in good faith and from a desire to serve the City, and that it has resulted in better and more efficient service without additional cost. However, if this arrangement is prohibited by Article XVI, Section 6 of the Charter, the question of the good faith of those concerned and the desirability of the results obtained become alike immaterial. In this regard, Judge Dillon says:

"The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong, but it is essential to the keeping of all parties filling a fiduciary

character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle."

Dillon on Mun. Corps (5th Ed.), Vol. II, Sec. 772.

The same principle finds repeated expression in the cases. The Indiana Court, in deciding that a contract between a town trustee and the town under which the trustee undertook to supply the town with coal at cost price and without profit to himself was void, used the following language:

"It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. * * * Nor is it necessary to show that any evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit."

McNay vs. Town of Lowell, 84 N. E. 778.

The only question to be determined then is whether this practice falls within the prohibition of the section of the Charter above referred to. That section forbids any officer or employee to be or become directly or indirectly interested in any contract, the consideration of which is payable from the treasury. These officers and employees receiving an allowance from the City for the use of their own automobiles are doing so under a contract, express or implied. This becomes clear if you put the arrangement to the following test: Suppose their demands were not paid, on what theory could they sue the City and County? Only upon an express promise to pay or an implied one arising from the fact that the City and County received the benefit of the use of their automobiles.

Under a Charter provision that "no alderman or other officer or employee shall be a party to, or interested in any job or contract with the city," the Minnesota Supreme Court held that a city poundmaster could not recover for the rent of premises for a city pound either on an express or an implied contract. That Court said:

"In our opinion this section means what it says, and, if the city had, by an express contract, rented these premises of plain-

tiff, he could not recover. If he could not recover on an express contract, he cannot recover on an implied contract."

Macy vs. City of Duluth, 71 N. W. 687.

In McGregor vs. City of Logansport, 79 Ind. 166, it was held that under a similar charter provision a city judge could not recover rent from the city for the use of his offices as a court-room. Many cases may be found to the same effect. Our own Supreme Court in Berka vs. Woodward, 125 Cal. 119, held that the provisions of the Charter of Santa Rosa and of the Political Code, forbidding a member of the city council to be "directly or indirectly interested in any contract" made by the council, applied equally to all contracts, implied as well as expressed.

In McAdam vs. Mayor, etc. of N. Y., 36 Hun. 340, the Supreme Court of New York held that a chief clerk of the bureau of city revenue of New York City could not recover for services as a lecturer in the evening high school. The provision of the New York statute applicable to that case was very similar to the section of our Charter under consideration. In the course of their opinion that Court said:

"Perhaps it might be said that the Legislature never contemplated excluding payment for services as rendered by the plaintiff herein, though connected with one of the bureaus. But the language of Section 59 is very broad and indicates a determination on the part of the Legislature to prevent any person from receiving compensation from the city in two modes or by two methods, thus preventing by any possibility, the use of official position for personal aggrandizement, by interest in any contract other than that which exists directly between the official and the city for the services to be rendered directly by him to it."

The provision of the New York statute there in question was almost identical with our own Charter provision, and the language of that Court would be equally applicable to the present case.

In the light of the decisions I am satisfied that officers and employees are forbidden by Article XVI, Section 6, to receive compensation from the City and County for the use of their automobiles and I advise you that such demands are invalid under that Charter provision.

Respectfully,

PERCY V. LONG,

Auditor. City Attorney.

Destruction of Condemned Buildings—In Destroying Building as Public Nuisance, Board of Health and Board of Public Works Act at Their Peril.

November 8, 1913.

Gentlemen: I am in receipt of your request for an opinion embodied in the following resolution of your Board:

"Resolved, That the City Attorney be requested to advise this Board as to whether the ordinances of this City are sufficient to justify the demolition of a building that has been condemned as a nuisance by the Board of Health and Board of Public Works; and if not sufficient to suggest such further proceedings as will accomplish the end desired."

Opinion.

Section 3494 of the Civil Code reads as follows:

"A public nuisance may be abated by any public body or officer authorized thereto by law."

The Charter of the City and County of San Francisco provides (Art. X, Sec. 3) that the Board of Health "may determine the nature and character of nuisances and provide for their abatement," and Ordinance No. 501 (New Series) declares all buildings, structures or parts thereof which are insanitary, to be nuisances and empowers the Board of Health to abate the same.

The Charter (Art. II, Chap. II, Sec. 1) reads:

"Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power:

"6. To provide for the abatement or summary removal of any nuisance and to condemn and to prevent the occupancy of unsafe structures."

And Art. VI, Chap. I, Section 9:

"The Board of Public Works shall have charge, supervision and control, under such ordinances as may from time to time be adopted by the Supervisors:

"5. Of the supervision of any and all building construction in the City and County."

Section 299 of Ordinance No. 1008 (New Series), known as the Building Law, empowers the Board of Public Works to order and

cause to be torn down any building, etc., which, in the judgment of the Board is so dangerous, defective or unsafe as to make its destruction necessary. Section 299 applies to all buildings, whether within the fire limits or outside of them.

If the Board of Health, acting under Ordinance No. 501 (New Series), or the Board of Public Works, acting under Section 299 of the Building Law, determine that a building is a public nuisance and should be destroyed, then they are within their authority in destroying the building.

However, it is well settled law that where municipal officers are given authority to abate public nuisances they are only authorized to abate that which actually constitutes a public nuisance. In other words, the determination of the Board of Health or the Board of Public Works that a given building is a public nuisance is not conclusive of the matter, and the owner of the building may later recover damages from them in a court of law for the destruction of his property if it be proved that it was not in fact a public nuisance. Without an authorization by law to abate a public nuisance the Board of Health or the Board of Public Works would have no right to destroy a building even if it did constitute a public nuisance. Being authorized by law they are protected in destroying a building if, and only if, it in fact is a public nuisance. I cite a few of the many authorities on this point:

Smith vs. Irish, 55 N. Y. S. 837;
People vs. Board of Health, 35 N. E. 320;
Stone vs. Heath, 60 N. E. 975;
Hartman vs. City of Wilmington, 41 A. 74;
Hennessy vs. St. Paul, 37 Fed. 565;
Sings vs. City of Joliet, 86 N. E. 663.

In the last cited case the Illinois Supreme Court said:

"The power to declare and abate a nuisance is not final, but the question may be adjudicated in an action for damages for its destruction."

And in People vs. The Board of Health, supra, the New York Court said:

"It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of

the board, and all persons acting under this authority in abating the alleged nuisance act at their peril, and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance, or not, the board should proceed by action, to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do."

In destroying a building as a public nuisance, then the Board of Health or the Board of Public Works do so at their risk. However, Section 731 of the Civil Code provides:

"A civil action may be brought in the name of the people of the State of California to abate a public nuisance * * * by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney of any county or city in which such nuisance exists must bring action whenever directed by the Board of Supervisors of such county or whenever directed by the legislative authority of such town or city."

Your Board may at any time proceed under this section to direct the District Attorney or the City Attorney to bring an action to abate anything which you may consider a public nuisance.

I also direct your attention to Section 372 and Section 373a of the Penal Code, making the maintenance of a public nuisance a misdemeanor and providing for prosecution therefor.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Appointment of Health Inspectress of Schools—Where Classifications for Appointment Are Changed, Eligibles on Old Classification Must Be Preferred for Positions Formerly So Classified.

November 11, 1913.

Gentlemen: I am in receipt of your communication, requesting my opinion on the following point:

A former employee of your department was appointed by you from the list of eligibles in the class of "Health Inspectress of Schools" on August 29, 1911. On October 7, 1912, she resigned from your department under the conditions of Civil Service Rule 24.

Rule 24 reads as follows:

"Resignation from Position. An appointee who resigns from a position may, with the consent of the Civil Service Commission given at the time the resignation is accepted, be returned to the list of eligibles; but such person shall not be eligible for any appointment for a period of sixty days thereafter and shall not, for a period of one year from the date of such resignation, be eligible for appointment from such list to any position in the department from which he resigned."

Since that time the said rule has been abolished. On October 16, 1913, your Board was informed by the Civil Service Commission that in accordance with the provisions of said Rule 24, said employee had been returned to the eligible list of Health Inspectress of Schools, and that she should be preferred for such employment over graduate nurses who were examined under the classification "Graduate Nurse" on December 19, 1908, and May 13, 1911.

Your department now desires to know whether, under this statement of facts it must requisition for a Health Inspectress of Schools, or for a Graduate Nurse, no further examinations under the classification "Health Inspectress of Schools" being held by the Civil Service Commission, such Inspectress being now taken from the general classification of "Graduate Nurse."

Opinion.

Art. XIII, Sec. 2 of the Charter reads as follows:

"The Commissioners shall classify all the places of employment in or under the offices and departments of the City and County mentioned in Section 11 of this Article, with reference to the examinations hereinafter provided for. The places so classified by the Commissioners shall constitute the classified civil service of the City and County, and no appointment to any such place shall be made except according to the rules hereinafter mentioned."

The classification under which examinations are held and appointments made remains as long as there is a person in the service of the City and County appointed under such classification. Even though no further examinations ever be held under such classification, persons on the eligible list as a result of an examination held under it will be preferred for positions formerly so classified to eligibles examined under another classification, even though the classifications later be combined. If this were not so, an eligible would be in the anomalous position of being eligible to a position which no longer exists.

In view of the foregoing your Board is advised that it must make requisition for a *Health Inspectress of Schools* to fill vacancies, so long as there remains on the eligible list any persons so classified.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Use of "Bitulithic" Pavement on Public Streets—Patented Pavement Cannot Be Used on Public Streets Unless All Rights Are Transferred to City to Use It Thereon.

November 14, 1913.

Gentlemen: I am in receipt of your communication requesting my opinion as to whether or not "bitulithic" pavement, a patented pavement, can be used on the public streets in the City and County of San Francisco.

Opinion.

Your question is answered in Section 26 of Chapter II of Article VI of the Charter. The portion of that section which concerns the question is as follows:

"The word 'paved' shall include any pavement of stone, iron, wood, or other material which the Supervisors may by ordinance order to be used; but no patented pavement shall be ordered during the existence of the patent therefor, until the owner of such patent shall have transferred to the City and County all right to the use of the same therein, with the privilege to any person to manufacture and lay the same upon its streets under any contract that may be awarded to him, or entered into by him with the City and County."

The purpose of this section is two-fold: (1) to prevent a combination between the owner of the patent and the bidder by which free competition would be prevented in bidding, and (2) to prevent what would be a virtual monopoly in a favored contractor if the owner of the patent were not to transfer to the City and County the right to use the patent in the City with the privilege to allow any person to manufacture and lay the same upon its streets under any contract that may be awarded to him. Of course the whole object is to secure to the City and County the lowest possible price for street paving and at the same time permit the City and County to use patented pavements.

It is obvious that if the owner of a patent is permitted to retain the rights which the law confers upon a patentee and the City was to prescribe a patented pavement, the holder of the patent would be in a position to demand any price that he might see fit or enter into a combination with a contractor by which that contractor would virtually have a monopoly upon all street paving.

Therefore, with the objects of the section in view, if the City desires to use the bitulithic pavement it should require that the owner of the patent transfer to the City and County all right to the use of the patent therein with the privilege to any person to manufacture and lay the same upon any of its streets under any contract that may be awarded to him or entered into by him with the City and County, and in order to safeguard the objects of the section, such a transfer should contain stipulations by which the owner of the patent agrees not to enter into any agreement or combination with a bidder by which the bidder shall receive more favorable terms than those contained in the transfer to the City, or receive any rebate or consideration from the owner of the patent. The assignment should also contain the price that the City or the contractor must pay to the owner of the patent for the right to use the patented article.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Sealer of Weights and Measures Not Subject to Civil Service Provisions of Charter.

November 15, 1913.

Gentlemen: I am in receipt of your communication of October 22, 1913, which reads as follows:

"At the meeting of the Board of Supervisors held Tuesday, October 14, 1913, Supervisor Murdock presented the following resolution:

"'Resolved, That the Board of Civil Service Commissioners be requested to hold at the earliest date feasible, an examination for the office of Sealer of Weights and Measures established by Ordinance No. 2442 (New Series), that the appointment may be made by the Board of Supervisors in accordance with the provisions of Section 2 of Article XIII of the Charter.'

"This resolution was referred to the Judiciary Committee. I am directed by the Judiciary Committee to request you for an opinion as to whether or not the office of Sealer of Weights and

Measures, created by Ordinance No. 2442 (New Series), is subject to the Civil Service provisions of the Charter."

Opinion.

The office of Sealer of Weights and Measures was created by an Act of the Legislature of the State, approved June 16, 1913. Section 14 of which Act provides that "the *office* of Sealer of Weights and Measures is hereby created." Section 17 of the same Act provides that "the legislative body of any county or city and county or of any city or town may appoint a Sealer of Weights and Measures." The Act fully prescribes the duties and powers of the Sealer of Weights and Measures and is a complete law covering weights and measures.

The power of the Legislature to create additional county officers for a city and county is unquestioned. It is also unquestioned that the City and County of San Francisco has a dual political character, that of a municipality and that of a county.

In Nichol vs. Koster, 157 Cal. 416, the Court said:

"The consolidated City and County of San Francisco partakes of the nature of a city and county. It has the powers and performs the functions of both."

The office of Sealer of Weights and Measures is therefore a county office created by the Legislature, and the officer of Sealer of Weights and Measures is a county officer. The function of the Supervisors in appointing a Sealer of Weights and Measures is purely that of an appointing power. The Bureau of Weights and Measures is not a bureau under the control or jurisdiction of the Board of Supervisors and is not a part of that department. The duties of the Sealer of Weights and Measures are not prescribed by the Board of Supervisors, but by the legislative act.

The question whether or not the office of Sealer of Weights and Measures comes under the Civil Service provisions of the Charter depends upon the Charter. Section 11 of Article XIII, as amended, provides "that the provisions of this article shall apply to the following offices and departments of the City and County," among which is the Board of Supervisors. As pointed out, the Legislature has created the office of Sealer of Weights and Measures which becomes an office of the County. That office is not enumerated in Section 11. The evident intent of that

section is to place the employees of the different enumerated offices and departments under the provisions of Civil Service.

As pointed out, however, the office of Sealer of Weights and Measures is not a part of the Board of Supervisors and the officer of Sealer of Weights and Measures is not an employee or part of the force of the Board of Supervisors. It is an independent office and department of the City and County government and the Sealer is the officer who occupies that office.

The office of Sealer of Weights and Measures not being one of the offices enumerated in Section 11, Article XIII, and the Sealer of Weights and Measures not being an employee or a part of the force of the Board of Supervisors, it follows that the office does not come under the Civil Service provisions of the Charter. It would require an amendment of the Charter to bring it under these provisions.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Inside Inn—Exposition Grounds—Exposition Has Power to Operate or Permit Hotel on Its Grounds.

November 19, 1913.

Gentlemen: I am in receipt of your communication of November 12th, which reads as follows:

"I am directed by the Board of Supervisors to request you to advise the Board as to its powers to amend Section 11 of Ordinance No. 2261 (New Series) by striking out therefrom the word 'Hotels' and thereby preventing the erection within the grounds of the Panama-Pacific International Exposition of a hotel or 'Inside Inn,' it being understood that said Exposition Company has already granted a concession for such a building."

Opinion.

Section 11 of Ordinance No. 2261 (New Series), reads as follows:

"The Exposition Company may maintain and operate conces-

sions for hotels, restaurants, sales of curios, pictures and any and all classes and kinds of goods, wares and merchandise."

Ordinance No. 2261 (New Series), was passed under and by virtue of Subdivision 37 of Section 1 of Chapter II, Article II of the Charter, which reads as follows:

"The Board of Supervisors shall pass such ordinances governing the use and closing of streets, the erection, use, alteration, demolition and control of buildings and structures of every nature and description; the installation, use and control of plumbing, water, gas, steam, sewerage and other pipes and instrumentalities; the use and control of electric light, power and other wires, conduits, generating, transmitting and other apparatus; the erection and maintenance of steam boilers, steam, gas and other engines and apparatus; the maintenance and control of fire and police protection, and governing any and every other matter necessary, proper or expedient for the safety, convenience and welfare of the public within that portion of the City and County of San Francisco which has been or may be selected as the site for the holding of the Panama-Pacific International Exposition. The provisions hereof, and the ordinances adopted hereunder, shall supersede all conflicting provisions of this Charter, and all conflicting provisions of any ordinance heretofore passed, so far as the same apply to the site herein specified, until the first day of January, 1917; provided, that no ordinance passed by virtue of any provision herein contained shall be operative outside of the limits of the site hereinabove specified."

The Panama-Pacific International Exposition Company is a corporation organized under the laws of the State of California on March 22, 1910, and not only possesses the powers of an ordinary private corporation, but also powers public in character, conferred upon it by the Constitution of the State and the Charter of the City and County of San Francisco.

The purpose of adding Subdivision 37 of Section 1, Chapter II, Article II of the Charter was to confer upon the Board of Supervisors the power to pass special ordinances governing the site of the Exposition and conferring special privileges upon the Exposition Company, which, in the absence of the Charter amendment, could not legally have been passed or conferred upon that Company. As far as the Company is concerned, it was not necessary to confer upon the Board of Supervisors power to

pass ordinances which the Board of Supervisors under its general authority had power to pass, nor was it necessary to confer upon the Exposition Company powers and rights possessed by ordinary corporations under the laws of this State. It was only those powers which are not possessed by ordinary corporations that had to be specially conferred and it was only the power to pass special ordinances concerning solely the site of the Exposition which had to be specifically granted to the Board of Supervisors.

The point that I am desiring to make clear is that no right or privilege possessed by an ordinary corporation is denied to the Exposition Company by any of the amendments to the Constitution concerning the Exposition Company or by any of the acts of the Legislature of the State or by any of the Charter amendments of the City and County of San Francisco.

So far as maintaining and operating a hotel is concerned, it is not necessary under the law for any person or corporation to obtain a permit to do the same. Every person and corporation has, subject to the general police power of the State, the natural right to maintain and operate a hotel. That is a lawful, necessary business and while, of course, it is subject to police regulation, it is a business which cannot be prevented either by the Legislature or by the Supervisors of a municipality. It was, therefore, unnecessary to confer upon the Exposition Company the right to maintain and operate a hotel. The Exposition Company possessing, as already pointed out, the rights and privileges of an ordinary private corporation, has the right to maintain and operate a hotel without obtaining the right to do so from the Board of Supervisors. The mere fact that the Exposition Company is conducting an exposition held to commemorate the opening of the Panama Canal does not alter the case so as to require obtaining from the Board of Supervisors the power to conduct a hotel.

The language of Section 11 is that the Exposition Company may maintain and operate "*concessions*" for hotels. Maintaining and operating a hotel, however, is not a concession as concessions are ordinarily spoken of. A concession is a grant by the Government of a privilege or right to do something. But, as pointed out, it is not necessary to obtain a grant to maintain or operate a hotel. That right is a natural right possessed by every person or corporation, subject to the police regulations of the State. The Exposition Company has the right to maintain and

operate a hotel itself or the right to lease to others a hotel or to permit any person, firm or corporation to erect a hotel upon the land owned or controlled by it.

I am therefore of the opinion that striking out the word "Hotels" from Section 11 would not thereby prevent the erection within the grounds of the Exposition Company of a hotel or "Inside Inn." Section 11, so far as it applies to hotels, does not confer any right upon the Exposition Company not possessed by it, irrespective of Section 11, and striking out the word "Hotels" would simply leave the Exposition Company in possession of rights possessed by the Company irrespective of any ordinance attempting to grant to it that right. Of course that right is subject to the police power of the municipality, the extent of which I need not here discuss, since I am only requested to advise you as to your powers to amend Section 11 of Ordinance No. 2261 (New Series), by striking out therefrom the word "Hotels" and thereby preventing the erection within the grounds of the Panama-Pacific International Exposition of a hotel or "Inside Inn."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Whether Bluxome Street, Between First and Japan Streets, Is an Open Public Street.

November 19, 1913.

Gentlemen: I am in receipt of your communication which reads as follows:

"The Southern Pacific Company has questioned the right of the City to assume that Bluxome Street between First and Japan Streets is an open public street.

"The question has arisen in connection with the work proposed to be done on First Street between Brannan Street and the Embarcadero.

"Bluxome Street between First and Japan Streets is shown on the official city map and on all the maps of the Board of Public Works as a public street, but the Oriental Warehouse occupies

this street up to a point within four (4) feet of the southerly line of this block.

"You are respectfully requested to inform the Board of Public Works whether Bluxome Street between First and Japan Streets is an open public street."

Opinion.

Bluxome Street between First and Japan and Brannan and Townsend Streets in this City and County was first laid out as dividing South Beach blocks 7 and 8 and on the 8th day of July, 1851, said blocks 7 and 8 were sold by the Sheriff on an execution sale in the case of Peter Smith vs. the City of San Francisco, judgment in which was rendered in the Superior Court on February 25, 1851, for the sum of $19,239.00; that at said sale, as appears from "Wheeler's Land Titles in San Francisco," Peter Smith was the purchaser of both blocks.

On November 25, 1863, a map of the South Beach water property was filed for record in the office of the Recorder of the City and County of San Francisco at the request of T. R. Morgan; said map appears in Map Book No. 2, and A and B, page 219 and it shows blocks 7 and 8 South Beach with Bluxome Street dividing the same. At that time and up to the year 1869 Japan Street was not in existence. In said last named year Japan Street was declared a public street by the Board of Supervisors of this City and County by Order No. 871.

In the year 1870 William P. Humphreys, the then City and County Surveyor, prepared a map of the City and County of San Francisco which was made official by Order No. 966 of the Board of Supervisors, approved October 26, 1870. On said map so approved and declared to be the official map of the City and County of San Francisco, Bluxome Street between Brannan and Townsend Streets, from First Street westerly, was delineated.

An examination of the records discloses the fact that the portion of Bluxome Street under consideration was never closed or abandoned by the City and County of San Francisco.

You are therefore advised that Bluxome Street between First and Japan Streets is a public street of this City and County.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Creation of Industrial Zones by Supervisors Is Proper.

November 19, 1913.

Gentlemen: I am in receipt of your communication of October 22nd, asking me to outline the procedure to be followed in enacting an ordinance providing for industrial zones within which it would be unnecessary to secure permits for laundries, stables, etc.

Opinion.

It is within the legislative power to classify subjects of regulation and to pass laws applicable to all of a class, provided the classification is founded on a reasonable intrinsic basis of differentiation. In re Zhizhuzza, 147 Cal., 328. One reasonable basis of classification may be according to districts or location. In re Hang Kie, 69 Cal. 149; Grumbach vs. Lelande, 154 Cal. 679.

If in your opinion there are certain districts in the City and County within which for the reasonable security of public health and safety, permits should be required for the maintenance of laundries, stables, etc., while such regulation is unnecessary in other districts, such an ordinance as you propose would clearly be constitutional.

I would suggest an ordinance along the following general lines:

Divide the City and County into districts, describing them carefully by metes and bounds, and denominate the districts respectively industrial districts and residence districts. Provide that it shall be unlawful for any person, firm or corporation to establish or maintain, within the districts described herein as residence districts, any stable, laundry, etc., without first obtaining the necessary permit or permits, and stating the conditions, if any, upon which such permits might be obtained. Provide that it shall be unnecessary to secure permits for the establishment and maintenance of laundries, stables, etc., within the districts herein described as industrial districts.

In this connection let me call to your attention the fact that in the case of In re Dondero, 19 Cal. App. 66, Section 197 of Ordinance No. 1008 (New Series), known as the Building Law, was declared unconstitutional and invalid. Section 197 reads:

"It shall be unlawful for any person, firm or corporation hereafter to construct any building or premises to be used as a stable

for horses, mules, cows, or other animals without first obtaining a permit from the Board of Supervisors and the Board of Health, etc. * * *

"It shall be unlawful for any person, firm or corporation to maintain as a stable any existing structure not used at the date of the passage of this ordinance for stable purposes without first obtaining a permit, etc."

The Appellate Court in the Dondero case held that this ordinance discriminated unreasonably in favor of the owners of existing stables in not requiring permits of them, and so held it invalid.

That a classification of subjects for the exercise of the police power, placing those in existence in one class and those to be established in another, may be proper if there is a reasonable ground for making such a distinction, was pointed out by the Supreme Court in a recent decision. In re Stoltenberg, 46 Cal. Dec. 103. But in the Dondero case the Appellate Court said that the only ground for regulating stables was the possible danger to public health and safety from their maintenance, and that an existing stable might be as dangerous in that regard as one not yet established; in other words, that the discrimination in that instance was not a reasonable one. That this was the basis of the decision in that case may be seen from the following extract:

"It is plain that the purpose of the ordinance is to regulate the maintenance of stables. The mere erection of a building for stable purposes could not injuriously affect the community. It is the maintenance and operation of a stable that might injuriously affect the public health or otherwise create a nuisance. Yet under this ordinance, if a structure was being used as a stable at the enactment of the ordinance, no permit to maintain such stable in such structure is required. * * * while such permit is required to maintain a stable in any structure not so used at the time of the enactment of the ordinance."

Recently Section 196 of the Building Law, providing that "it shall be unlawful for any person, firm or corporation hereafter to establish and maintain any building or premises as a public laundry or wash-house without first obtaining a permit" was held invalid in Department 12 of the Superior Court, for the same reason.

I would suggest that in drafting this proposed ordinance you cure this defect in the Building Law by making the requirement for a permit apply equally to all. Under these decisions any one may at present conduct a laundry or a stable without securing a permit.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Preferred Runs on Municipal Railroad Within Superintendent's Discretion.

November 19, 1913.

Gentlemen: I am in receipt of your communication of November 1st, asking for an opinion as follows:

"The Committee on Efficiency and Civil Service desires to secure an interpretation of the provision of the Charter providing for a certain preference to be given to the former Geary Street Railway employees in their appointment as Municipal Railway employees.

"Is it legal for the Superintendent to give preferred runs to such employees over those having a higher standing on the Civil Service lists and whose appointments to service were prior to the appointment of the former Geary Street employees?"

Opinion.

The Charter (amendments of 1913), Art. XIII, Sec. 11, Subd. B reads:

"The following persons securing standing on the eligible lists in examinations shall be preferred for appointment:

"1. Persons employed in the operating service of the Geary Street Park and Ocean Railroad Company on May 5, 1912, such preference to be solely for employment in the municipal railroad service."

This provision entitles former employees of the old Geary Street line to be appointed to positions in the municipal railroad service in preference to all others on the eligible list. Once they

are appointed to that service it has no further effect. However, I understand that these preferred runs are not so classified under the Civil Service. If the Superintendent chooses, for convenience in management, to call certain runs preferred runs and to assign certain employees to those runs that is a matter within his discretion.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Amusement Pier on Park Lands on Ocean Front Cannot Be Erected—No Jurisdiction in Park Commissioners or Supervisors to Grant Permit.

November 20, 1913.

Sir: I have before me the following communication:

"Application has been made to the Honorable Board of Supervisors by the Ocean Pier Amusement Company, a corporation organized and existing under the laws of the State of California, for permission to use as an entrance to a proposed amusement pier, certain property extending from the Great Highway to high water mark, directly west of Cabrillo Street, and which would practically make such entrance a continuance of said street.

"Said application, which I transmit to you herewith for use in consideration of the question which is submitted to you for an opinion, clearly indicates the position of the Ocean Pier Amusement Company in this matter. The question is under consideration by the Board of Supervisors and myself, and, before proceeding, we desire to know if it is within the province of the Board of Supervisors or the Board of Park Commissioners to determine where the authority rests in giving consideration to the application of the Ocean Pier Amusement Company to cross the Great Highway as an approach to said amusement pier, and whether or not that part of the land upon which said amusement pier would be constructed, is under the jurisdiction of the City and County of San Francisco, and if so, has that branch of the city government in whose province this matter is, the right to grant the Ocean Pier Amusement Company the privilege to construct said amusement pier.

"I enclose you, herewith, a copy of an opinion filed with the Board of Supervisors by Hon. Curtis H. Lindley, a member of the Park Commission, expressing his views on the jurisdiction of this matter.

"I beg to advise you that a conference was called by me, at the request of the Lands and Tunnels and the Public Welfare Committees of the Board of Supervisors, and held in my chambers on Friday morning, November 14, 1913, and, for your information, I hand you herewith a transcript of discussions, pro and con, which took place. This may give you some enlightenment on the whole question as viewed by many of those present, including the members of the Board of Park Commissioners.

"I shall be glad to have your opinion on the law points involved in the whole question at as early a date as possible, so that I may take same up with the Lands and Tunnels Committee and the Public Welfare Committee of the Board of Supervisors, who have requested that I join with them in consideration of this application."

Accompanying the above letter is the formal application of the Ocean Pier Amusement Company, a copy of the preliminary report (unsigned, but presumably from their engineer), brief of Henry M. Owens, attorney for petitioner, and copy of opinion from Hon. Curtis H. Lindley, Park Commissioner. All of these papers I am returning to the Clerk of the Board of Supervisors in accordance with your request.

Opinion.

The questions presented by your letter are briefly as follows:

1. Is the land on which this pier is sought to be constructed under the jurisdiction of the City and County of San Francisco?

2. If said land be under the jurisdiction of the City and County government, in what branch or branches of said government is jurisdiction over it vested?

3. Has the branch of the City and County government which is vested with control of said property the legal authority to grant the privilege for which application has been made?

I will endeavor to answer the above questions in the order stated.

I. Consent of City Necessary.

Section 3950 of the Political Code, defining the boundaries of the City and County of San Francisco, contains the following language in definition of the westerly boundary:

"Beginning at the southwest corner, being northwest corner of San Mateo, in Pacific Ocean, on the extension of northern line of township three south, of Mount Diablo base; thence northerly *along the Pacific Coast,* to its point of intersection with westerly extension of low water line on northern side of entrance to San Francisco Bay. * * *"

Section 3907 of the Political Code reads as follows:

"The words 'in,' 'to,' or 'from' the ocean shore mean a point three miles from shore. *The words 'along,' 'with,' 'by,' or 'on' the ocean shore, mean on a line parallel with and three miles from the shore.*"

Inasmuch as the State of California by virtue of its admission to the Union acquired proprietorship of all the lands below the line of ordinary high tide on its sea boundary, it is questionable whether the definition of the seaward boundary of the City and County of San Francisco, as given in Section 3950, Political Code, amounts to anything more than a conferring of jurisdiction over such tide lands on the City and County for governmental purposes, retaining in the State the ownership in fee and power of disposal thereof. The final decree of the Circuit Court confirming the title of the City of San Francisco to its pueblo lands entered May 18, 1865, which was subsequently confirmed by two Acts of Congress, described the City's lands as being so much of the extreme upper portion of the peninsula *above ordinary high water mark* as will contain an area of four square leagues, bounded on the west by the Pacific Ocean, etc. The State has never ceded any of the tide lands to the City, so there can be no doubt but that the proprietary title to the lands below the line of ordinary high tide is still vested in the State subject, of course, to federal control in matters affecting navigation. Title to the Park lands above the line of ordinary high tide, on the other hand, was fully vested in the City by the confirmation of the pueblo grant, as above indicated. Furthermore, as a littoral proprietor, the City of San Francisco has a right to free and uninterrupted access to its ocean front and can restrain the erection of any structures in

front of said Park lands which would interfere with that free and uninterrupted access.

McCloskey vs. Pacific Coast Co., 160 Fed. 794;

San Francisco Savings Union vs. R. G. R. Petroleum Co., 144 Cal. 134.

The applicants for the privilege of erecting this amusement pier must therefore obtain the consent of the city government before they have any legal right to proceed with the erection of a pier at the proposed location at all. The request in their application is merely for a means of approach or access to this pier and they apparently assume that they have a right to erect the structure below the line of ordinary high tide. Their application should be amended in this respect.

2. Park Commission Has Jurisdiction.

In my opinion the only department of the City Government having jurisdiction in this matter is the Park Commission. The following sections of the Charter control this question and nowhere is any authority vested in the Board of Supervisors to either take this control away from the Park Commission or to exercise concurrent jurisdiction with them.

Article XIV, Section 1, so far as it pertains to the matter in hand, reads as follows:

"The lands designated upon the map of the outside lands of the City and County, made pursuant to order No. 800, by the word 'park,' extending from Stanyan Street to the Pacific Ocean, and known as Golden Gate Park; also the land fronting on Haight Street, designated on said map by the word 'park,' and known as Buena Vista Park; also the lands designated on said map by the word 'avenue,' extending from Baker Street westward until it crosses Stanyan Street; also that certain highway bounded on the west by the Pacific Ocean, and designated upon said map as 'Great Highway'; also Mountain Lake Park; also Seal Rocks, as ceded to the City and County of San Francisco by Act of Congress; and all the other parks and squares in the City and County, and all the grounds surrounding public buildings in the City and County, and all parks and squares and public pleasure grounds hereafter acquired by the City and County, shall be under the exclusive management of a Board of Commissioners who shall be known and designated as Park Commissioners, except

that children's playgrounds and recreation centers outside of Golden Gate Park, shall, to the extent of their use as such playgrounds and recreation centers, be under the exclusive management and control of the Playground Commissioners."

Section 6 of the same article reads in part:

"The Commissioners shall have the complete and exclusive control, management and direction of the aforesaid parks, squares, avenues and grounds, and the exclusive right to erect, and to superintend the erection of, buildings and structures thereon; and to that end may employ and appoint superintendents, laborers, surveyors, engineers, and other officers and assistants, and prescribe and fix their duties, authority and compensation. They shall have the exclusive management and disbursement of all funds legally appropriated or received from any source for the support of said parks, squares, avenues and grounds."

From the language of the foregoing Charter sections there can be no question but that the Park Commissioners have exclusive jurisdiction over Golden Gate Park and the Great Highway. The western boundary of this park and highway was fixed as the "Shore of the Pacific Ocean" by Order No. 800, confirming the report of the Outside Lands Committee of the Board of Supervisors, filed May 18, 1868 (see Municipal Reports 1867-8, page 576), and is so described in Article XIV, Section 1 of the Charter, supra. Thus, having exclusive jurisdiction of the Park and highway to its western edge, it follows that the Commission has exclusive jurisdiction of the rights appurtenant to the Park and highway on the western boundary, i. e., the right of littoral access, and the wharfing-out privileges.

In my opinion, Article VI, Chapter V, Section 1 of the Charter, cited by attorney for the petitioners as authority for the Board of Supervisors to assume jurisdiction in the premises, has no application whatever, first, because by its title and general language it refers only to the San Francisco Harbor; second, because if the words "Water Front" refer to the ocean front the section would have to be read in connection with the sections giving the Park Commissioners exclusive control of that portion of the ocean front which lies within the park and highway limits, and the latter sections would be taken as an exception to the general control vested in the Board of Supervisors; third, because if said section applies to the ocean front, it also specifically pro-

vides that all wharves built thereon must be built by the Board of Public Works.

Orders Nos. 1274 and 1275, cited by counsel for petitioner as an example of exercise of jurisdiction over the Park by the Board of Supervisors were both police ordinances and not at all pertinent to the case in hand. The police power of the Board of Supervisors of course extends over all property within the corporate limits of the City, private as well as public. Orders No. 1534 and 1736 granting a franchise for the Park and Ocean Railway were made subject to the approval of the Park Commission where the proposed line crossed the westerly end of the Park. Order No. 2492, granting permission for the erection of the Olympic Club's pier was granted long prior to the adoption of the San Francisco Charter and cannot be cited as authority for the present jurisdiction of the Board. I am also informed that the Park Commission concurred in granting permission for that pier, there being no inhibition against their so doing under the Consolidation Act which was then in force.

3. Power of the Commission.

This brings me to the present powers of the Park Commission in reference to this application. The third paragraph of Section 6, Article XIV of the Charter reads as follows:

"Except as provided in Section 9 (relating to a State Exposition Building) of this chapter, nothing in this section shall be so construed as to authorize the Commissioners to lease any part of any of said parks, squares, avenues and grounds to any person, company or corporation for any purpose; *or to permit any person, company or corporation to build or maintain any structure on any part of said parks, squares, avenues or grounds;* but this shall not inhibit the Board from leasing, for a period not greater than one year, such buildings as may be constructed by itself for the use of the public to such person, company or corporation who shall undertake to serve such use; and in every such lease the Board shall reserve the right to enter at all times into and upon the premises so leased, and shall make the condition that the buildings so leased shall be used for park-pleasure purposes only. No such building shall be conducted by the Board except it be within the objects and purposes for which said parks, squares, avenues and grounds were dedicated to the public."

The above language speaks for itself, and prohibits the Com-

mission from granting the privilege sought, even if the present application should be directed to them. Possibly the Charter does not inhibit them from granting a wharfing-out privilege in front of the ocean boundary of the Park, on the tide lands over which they have only a right of access, as I have before stated, but they may not consent to the erection of any structure or approach to such wharf on the Park lands. The authority which they exercised under the Consolidation Act in granting privileges for the Park and Ocean Railway and the Olympic pier, they do not now possess under the express prohibition of the Charter.

I am therefore of the opinion that regardless of whatever merits the proposition embodied in the application of the Ocean Pier Amusement Company may have, no legal authority at present exists in either the Board of Supervisors or the Park Commission to grant the privilege sought in their petition.

Respectfully,

PERCY V. LONG,

City Attorney.

Mayor.

Meat Inspectors May Work Saturday Afternoon.

November 20, 1913.

Gentlemen: I am in receipt of your communication of October 30th, as follows:

"At a meeting of the Board of Health held October 28th, a resolution was adopted to the effect that the City Attorney be requested to submit an opinion to the Department of Public Health relative to the demand of the firm of Miller & Lux, wholesale butchers, that inspection be provided until five o'clock each day instead of until four as has been the custom, and also providing such inspection for Saturday afternoons.

"This department wishes to be advised as to whether or not it may direct its employees to work on Saturday afternoon in view of the fact that there is a State law requiring the closing of all public offices on such afternoons, and further, if the demand of said firm of Miller & Lux requires the working of inspectors nine hours per day, must the Department of Health accede to such request?"

Opinion.

The inspection of meat and slaughtering by your department is purely a police regulation. In adopting rules for meat inspection you are putting certain restraints upon the conduct of a lawful business, and only such restraints may be imposed as are reasonably necessary, taking into consideration both the nature of the business and the object to be attained. The object to be attained by meat inspection is the assurance that no meat shall be sold for food that is unwholesome or dangerous to health, and the hours during which slaughtering is conducted bear no reasonable relation to that object. I am satisfied, therefore, that you may not limit the business of slaughtering in any establishment to eight hours a day.

On November 14, 1912, I rendered an opinion to the Board of Police Commissioners in which I held that the State laws providing for hours of labor did not apply to the members of the Police Department of the City and County. The meat inspectors are engaged in a branch of police regulation and the reasoning of that opinion applies with equal force to the question here.

The State law making Saturday afternoon a holiday applies to the closing of public offices, and not at all to a case of this sort. Policemen and firemen are required to work on Saturday afternoon. Meat inspectors may do the same.

I advise you that there is nothing in the law to prevent you providing such meat inspection as Miller & Lux have asked for.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Time for Filing Tax-Exemption Affidavit.

November 21, 1913.

Dear Sir: I am in receipt of your recent communication requesting my opinion as to whether or not veterans claiming exemption from taxation under Section 1¼, Article XIII of the State Constitution must file their affidavits before the assessment roll is completed, in order to take advantage of the said exemption.

Opinion.

Section 1¼, Article XIII of the Constitution of California provides that "The property to the amount of one thousand dollars of every resident in this State who has served in the army, navy, marine corps," etc. * * * "shall be exempt from taxation."

Section 3650 of the Political Code provides for the preparation of an assessment book in which must be listed all property within the county. Paragraph 15 or Section 3650 provides that the Assessor must enter in such book properties entitled to exemption and deduct the same from the total value of property within the county.

This assessment book must be delivered to the Board of Supervisors, who, on the basis of the value of the property therein assessed, fixes the tax rate for the coming year. If, however, persons entitled to exemptions fail to give proof before the assessment book is completed, an erroneous roll is filed by the Assessor, thus affecting the tax rate for the year.

The State Board of Equalization, to obviate this difficulty, has prepared a form of affidavit to be filed by persons claiming this exemption, and has made the rule that such affidavit must be filed before the completion of the assessment.

It is true that the exemption is a right granted veterans by the Constitution, and, as such, the State Board of Equalization cannot take it away, but it can limit the time within which one may avail himself of that right.

It is a rule similar to the Statute of Limitations, depriving no one of his right, but simply prescribing that a person must exercise that right within a reasonable time. The rule prevents repetition of labor and added costs of administration, while working no hardship on the individual.

I would, moreover, call your attention to Section 3697 of the Political Code, prescribing a penalty for the refusal of any officer to obey the rules and regulations of the State Board of Equalization, or to perform the duties prescribed therein. This Code section gives you no discretion in the matter of refusing to accept affidavits of exemption after the closing of your books. The responsibility for such a rule rests entirely with the State Board of Equalization.

In view of the foregoing you are advised that only such persons as file the proper affidavits for exemption before the completion of the assessment book are entitled to such exemption.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Excess Charges, Gas Rate—Pending Injunction City Cannot Enforce Ordinance Rates.

November 21, 1913.

Gentlemen: I have before me the following resolution of your Board:

"Whereas, the Pacific Gas and Electric Company is charging 85 cents per one thousand cubic feet of gas although the maximum rate fixed by this Board is 75 cents, and

"Whereas, they are charging higher rates for electric current than the ordinance rates; and

"Whereas, such greater rates are being charged consonant with a resolution of the Board of Directors of said Pacific Gas and Electric Company;

"Resolved, That the City Attorney be and he is hereby requested to render to this Board an opinion as to whether or not the Pacific Gas and Electric Company, or any other companies, firms or persons selling gas and electricity are legally entitled to charge such greater rates than those fixed by this Board of Supervisors."

I assume that at the time of passing the above resolution you were familiar with the fact that the enforcement of the ordinances

of your Board fixing gas and electric rates for the current fiscal year has been enjoined for the time being by the United States District Court at the suit of the Pacific Gas and Electric Company, and the City Electric Company, based on their allegation that the rates fixed by said ordinances are confiscatory. A temporary restraining order is now in effect pending the hearing of motions for injunctions pendente lite in each case. Bonds have been furnished by both complainant companies in amount sufficient to insure the return to rate payers of excess rates if the ordinances should be upheld as valid.

Opinion.

In view of the above action by the District Court, the City is powerless at law to enforce the present ordinances. The gas companies have accordingly asserted the right to charge consumers what rates they please for the commodities they are furnishing. I do not concede that their action is legal, but I am unable to suggest any practical remedy until these suits are determined.

If it could be shown as a matter of fact that any rates in excess of the ordinance rates are unreasonably high, it might be possible to enjoin them from charging rates in excess of those fixed by ordinance, but it must be remembered that the courts would require proof of that fact and would go no further than to say what was unreasonable. Fixing a rate is exclusively a legislative and not a judicial function. A Court might say that five, six, seven, or eight, or higher percent of net return was *not unreasonable.* They persistently refuse to say what is a reasonable rate of return.

On the other hand, if it should be found that the rates fixed by the companies yield, say for example, a ten per cent return, and if the Court should also say that ten per cent was not unreasonably high, the decision would certainly be used against the City in the suits now pending.

I am proceeding with all possible expedition in the valuation of properties and preparation of affidavits necessary for use on the hearing of the application for temporary injunction. Until that hearing is had, however, I know of no effective measures to prevent the companies from charging their present contract rates.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Removal of Cemeteries—Abandonment Plan and Parking Plan in Conflict with Each Other—Cannot Be Combined.

November 25, 1913.

Gentlemen: I am in receipt of the following request:

"The enclosed Journal Resolution will be recommended to the Board of Supervisors at its meeting next Tuesday by a majority of the Public Welfare Committee for adoption. Will you kindly advise the Public Welfare Committee whether or not the passage of this resolution calling upon you to prepare the necessary ordinances for the abandonment and removal of the cemeteries and the passage of the ordinances prepared by you in accordance with this resolution, would conflict with or preclude the adoption of a suggested plan designed for the subsequent parking of these cemeteries either in whole or in part?

"We would like very much to secure your opinion concerning this matter in time for consideration at the meeting of the Board next Tuesday when the subject matter will be under discussion. Will you, therefore, kindly give this request your immediate attention?"

Opinion.

In reply to the above inquiry I am of the opinion that the abandonment plan and the parking plan are essentially in conflict with each other and that it would be unwise to attempt to combine them. The abandonment plan proceeds upon the theory that the cemeteries constitute a public nuisance and that in the exercise of their general police powers and under the authorization of the Act of 1911, the Supervisors may proceed to enforce the removal of these cemeteries as such nuisance. The parking plan, as submitted by the Outdoor Art League, contemplates the removal of all the bodies in the western half of Laurel Hill Cemetery and from portions of other cemeteries, with the consent of the cemetery associations and lot owners, and the reinterment of such bodies in the eastern half, which is then to be parked. This plan depends upon the consent of the lot owners affected and the cemetery associations.

It may be, however, that it will be impossible to secure the consent of all of said lot owners and the Laurel Hill Association. If that were to prove the case I know of no means

by which the removal of bodies from the western half of that cemetery could be enforced except upon the theory that their interment there constitutes a public nuisance. If then the Board of Supervisors were to compel the removal of these bodies on that theory and reinter them in the eastern half of the cemetery leaving the present graves in the eastern half untouched, in my opinion the position of the Board would be legally indefensible. It would place itself in the embarrassing position of having declared that part of the cemetery was a nuisance and that the remaining part, a few hundred feet eastward was not a nuisance.

While the question of whether or not a nuisance exists is for the Board's determination in the first instance, that determination must be reasonable and such a declaration as I have just outlined would appear legally incongruous.

I am therefore of the opinion that any attempt to remove a part of the cemeteries and park the remainder must rest entirely upon the mutual consent of the parties in interest and not upon any exercise of the police power. My opinion upon the possibility of making entire removals is already in your hands.

I have suggested to you that the plan outlined in the communication from the Outdoor Art League is free from legal objections as it depends upon the consent of the lot owners. Probably public opinion could be brought to bear with considerable force on any small minority who might see fit to oppose the latter plan if you see fit to adopt it but I do not believe that the two plans can be co-ordinated. The determination of which you wish to follow is a matter for the discretion of your Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Jurisdiction of Fire Commissioners to Entertain Claim for Loss of Property by Firemen Through Fire in Firehouse.

November 28, 1913.

Gentlemen: I am in receipt of your request for an opinion dated November 20th, which reads as follows:

"I have been directed by the Board of Fire Commissioners to request that you render this Department an opinion as to whether it has jurisdiction to entertain the claim, as per attached list, for losses by fire to the members of Engine Co. 26, which occurred in the quarters of said Company on September 25, 1913.

"Anticipating your courtesy in the above matter, I am,

Respectfully,

Frank T. Kennedy."

Opinion.

It does not appear from your communication under what circumstances the fire occured and so it is impossible for me to determine anything as to the merit of this claim. But in any event there is nothing in the Charter which would authorize your Board to entertain or pass upon such a claim as this.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Blasting at Thirtieth and Castro Streets.

November 29, 1913.

Gentlemen: I am in receipt of your communication of August 29th, accompanied by copies of Resolution No. 5040 (New Series) and 5055 (New Series), and in compliance with your request that I inform you as to the status of the same, will state that on the 29th day of August, 1908, a complaint was filed in the case of People of the State of California vs. Gray Bros. Crushed Rock Company, a corporation, and H. N. Gray and George Gray individually and as co-partners under the firm name and style of

Gray Bros., defendants, being action No. 18526 on the files of the Superior Court of the City and County of San Francisco. After a trial of the issues involved, Judge Murasky, sitting in Department No. 2, made and rendered a certain decision in writing which was filed November 24, 1909, in part as follows:

"It is ordered, adjudged and decreed, that defendants and each one of them, their servants, agents, employees, attorneys and representatives, be perpetually enjoined from the use of explosives and from the letting off of blasts in that certain part of the City and County of San Francisco, State of California, bounded and situated within the following blocks: upon the North by Thirtieth Street; upon the South by Thirty-first Street; upon the East by Castro Street and upon the West by Diamond Street, in such way, manner or method as may cause injury to persons or property within the neighborhood of, or adjacent to or near said blocks above described, or as may disturb or interfere with the peace or comfort or health of any considerable number of persons or comfortable enjoyment of life or property of the persons residing near or adjacent to or in the neighborhood of said blocks above described." Said judgment and decree was recorded November 29, 1909. As no appeal was taken from said judgment the same became and is final.

On the 11th day of November 1908, an opinion was rendered by me to the City Engineer in which I advised him that Beacon Street as described in Resolution No. 5055 (New Series) was a public street of this City and County by reason of the fact that that portion of Beacon Street was offered to the City and County of San Francisco for dedication as a public street by the Castro Street Land Company on April 6, 1896, recorded in Vol. 1 of Maps at page 203. Said opinion may be found in the opinions of the City Attorney for the years 1908-9 at page 286 et seq.

Holding, as I do, that Beacon Street is a public street of this City and County it is unnecessary to institute any proceedings to quiet title to the same for the reason that no title can be acquired thereto by others adverse to the City. If there exist any illegal or unauthorized obstructions thereon the same may be removed by the Board of Public Works of this City and County.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Emmet Place—Obstructions May Be Removed.

December 1, 1913.

Gentlemen: I am in receipt of your communication of November 18th, which reads as follows:

"On behalf of Mr. Edouard Mandonnet, Mr. Garret W. McEnerney, 1277 Flood Building, under date of November 13, 1913, states that action has been brought in the Superior Court to have Mr. Mandonnet's title quieted to the land delineated on the map of this City and County as Emmet Place, under the McEnerney Act. The judgment of the Superior Court was adverse to Mr. Mandonnet's claim, but as this judgment has not yet been entered, Mr. McEnerney requests that obstructions on Emmet Place be not removed by the Board of Public Works until an appeal can be taken from the decision of the Superior Court after judgment has been entered.

"In the meantime a complaint has been received by this Board concerning the obstruction on this street, and we desire to request your opinion as to whether this Board should proceed to remove these obstructions forthwith, or comply with Mr. McEnerney's request that action be delayed until judgment of the Superior Court can be entered and an appeal therefrom has been taken on behalf of Mr. Mandonnet."

Opinion.

The findings and decision and judgment and decree in Mandonnet vs. All Persons (No. 30,249), have been signed by Judge Buck, the judgment on November 25th. An examination of the decision and judgment makes it impossible to agree with Mr. Burke's statements and deductions in his letter of November 13th on behalf of Mr. Mandonnet to Mr. Andrew J. Donovan as to the status of Emmet Place (see Findings III and IV, Mandonnet vs. All Persons, No. 30,249, and paragraphs second and third of the judgment in the same case).

Emmet Place has for many years been regarded and treated by the city officials as a public place. It has never been assessed as private property. It appears on the Humphreys Map of 1870 and on all official maps of the City since that time. It has been used as a public street for many years by all that portion of the general public who have occasion to use it (see above findings and decision).

Some of the obstructions which have been recently put up by the plaintiff in the above action embarrass, restrict and inconvenience to a considerable and quite unnecessary degree those who have occasion to use this street or place, and particularly abutting property owners, and this, more especially now, in view of the condition of Stockton Street and the tunnel construction in progress thereon. With regard to some of these obstructions, in the interest of abutting property owners and others having occasion to use the street, they should be at once removed, especially since their removal does not occasion inconvenience to the plaintiff.

The entrance to Emmet Place on Stockton Street has always been open. It is the fences on the sides put up by Mandonnet since the fire that restrict abutting property owners and others from now getting into Emmet Place, especially since Stockton Street is now cut down vertically at this entrance at least twenty-five feet below the level or grade of Emmet Place. Some of the adjacent lots are unoccupied and permission has been given to pass through them and enter Emmet Place from the side, which can be done, except for the side fence put up by plaintiff since the fire, which cuts off abutting property owners from Emmet Place as well as the public having occasion to use Emmet Place, from access thereto.

An appeal with regard to the title and possession of real property does not operate *per se* as a stay. (C. C. P., Sec. 945.)

It follows, that if in your judgment the obstructions referred to restrict and retard the use and enjoyment of Emmet Place by abutting property owners and by the portion of the public having occasion to use the same, it is within your power to order their removal.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Proposed Ordinance Requiring Permit From Board of Police Commissioners to Sell Liquor in Greater Quantities Than One Quart—Supervisors May Pass Ordinance Requiring Permit, but Cannot Impose License Tax on Such Dealers.

December 12, 1913.

Gentlemen: I am in receipt of your communication as follows:

"At the request of the Police Committee, I enclose copy of a proposed ordinance that will be heard by the Committee November 14, 1913.

"The Committee wishes your opinion on the following matters:

"First: Does the Charter give power to the Board of Supervisors to enact the proposed ordinance?

"Second: In case the Board has such power, does the exemption provided for in Subdivision 15, Section 1, Chapter II, Article II, apply to all persons, firms or corporations obtaining permits from the Board of Police Commissioners?"

Opinion.

I take it that your first query concerns your power to pass an ordinance regulating the sale of liquor by requiring a permit therefor from the Board of Police Commissioners. This is already required as far as those engaged in selling in quantities of less than one quart and of liquor to be drunk on the premises by Sub. 3, Sec. 1, Chap. III, Art. VIII of the Charter. Your ordinance cannot take away any of the powers of the Police Commission in this request and if it does so is to that extent invalid.

The ordinance, however, covers all others engaged in the sale of liquor and as to these I would say in passing upon your right to regulate such sales by requiring a permit from the Board of Police Commissioners as follows:

It has been uniformly held by the Courts of this State and of other jurisdictions that under a police power granted to municipalities by the Constitution and similar to that contained in Subdivision 1, Section 1, Chapter II of Article II of the Charter of this City and County that a Board of Supervisors may pass an ordinance regulating the business of the sale of intoxicants within the boundaries of the municipality.

The proposed ordinance, if enacted, will have no effect upon that class of liquor dealers mentioned in Subdivision 3 of Section 1 of Chapter III of Article VIII of the Charter relating to the granting of permits by the Board of Police Commissioners to any person desiring to engage in the sale of liquor in less quantities than one quart and the granting of permits to any person engaged in the business of selling liquor to be drunk on the premises.

The case of Ex parte Braun, 141 Cal., pages 224 et seq., deals with an ordinance of the City of Los Angeles very similar with the ordinance submitted by your Honorable Board. It is true that said ordinance provided for the licensing and regulating of the business of a wholesale liquor dealer.

While your Honorable Board cannot, in view of Subdivision 15, Section 1, Chapter II, Article II of the Charter, impose any license taxes upon grocery stores and wholesale liquor dealers, as was decided in the case of Rapp vs. Keil, 159 Cal. 702, a matter which I shall pass upon further along in this opinion, the power to regulate such a business was upheld by the Supreme Court in the case cited.

In the case of Laurelle vs. Bush, 17 Cal. App., pages 409 et seq., the Court upheld an ordinance requiring every person, firm or corporation maintaining or conducting any museum, panorama, cyclorama, kinetoscope or phonograph parlor wherein an admission fee is charged, to obtain a permit from the Board of Police Commissioners to conduct the same. The Court in the Laurelle case held that the requirement that a permit be obtained from the Board of Police Commissioners could in no sense be said to be an improper delegation of power.

In the case of Goitino vs. McAleer, 88 Pac. Rep., pages 991 et seq., the Supreme Court considered another ordinance of the City of Los Angeles concerning the issuance of permits to conduct poolrooms, which ordinance required that such permit be issued by the Board of Police Commissioners. The claim was made by the petitioner that the ordinance was invalid because it vested an undefined and unrestricted discretion in the Board of Police Commissioners. After discussing that phase of the question fully the Court said:

"Holding, as we do, the right of the City under the Charter, to enact the ordinance under consideration, the Court will not

interfere with the discretion reposed in a proper board or tribunal, but will assume that official duty has been properly and lawfully performed in the absence of positive proof to the contrary."

Another question arises in the consideration of your first query and that is as to the power of your Honorable Board to impose on the Board of Police Commissioners a duty not already imposed on such Board by the Charter, which specifically gives said Board power to issue licenses to those engaged in the retail liquor business.

This being an exercise of the police power, however, it is my opinion, based upon the ruling of the Courts, and particularly the rulings in the cases of Laurelle vs. Bush, supra, and In re Flaherty, 105 Cal., page 562, where the Court said:

"Our federal, state and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises; and laws and ordinances based on that principle have nearly always been upheld when subject to judicial test. Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief,"

that such an addition to the powers and duties of the Board of Police Commissioners would not be held to be without the power of your Honorable Board.

Therefore, in answer to your first query, you are advised that your Honorable Board possesses the power to enact an ordinance designed for the purpose of regulating the business mentioned in the ordinance submitted to me.

Without passing upon the form of the ordinance I would call your attention to Section 7 which seems somewhat ambiguous in that it might possibly be interpreted as permitting the carrying on of a liquor business under a Tax Collector's license and without a permit from the Board of Police Commissioners.

In answer to your second query you are advised that no license tax can be imposed on the business sought to be regulated.

Subdivision 15, Section 1, Chapter II, Article II provides that license taxes may be imposed upon any person who at any fixed place of business in the City and County, sells or manufactures goods, wares or merchandise who requires a permit from the Board of Police Commissioners, as provided in the Charter.

Sections 3 and 7, Chapter III, Article VIII designate the persons who must obtain permits from the Board of Police Commissioners and it is those only who can be compelled to pay a license tax under the power to impose such given by Subdivision 15, supra.

The Board of Supervisors, by the enactment of a regulatory ordinance, under the police power, requiring persons, other than those enumerated in Sections 3 and 7, Chapter III, Article VIII, to obtain permits from the Board of Police Commissioners, cannot, as a consequence thereof, impose a license tax on them, as the Charter, in Subdivision 15, restricts the power of the Supervisors to impose such license on those only who are required to obtain permits from the Police Commissioners "as provided in the Charter" and not otherwise.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Power of Supervisors to Acquire Opera House by Eminent Domain Proceedings.

December 20, 1913.

Gentlemen: My attention has been directed to Journal Resolution No. 985, which reads as follows:

"Resolved, That the Board of Supervisors request the opinion of the City Attorney as to whether power rests in the people or could be so vested by amendment of law to acquire in eminent domain proceedings or otherwise, the rights, interests or privileges of the donors of the proposed opera house, providing the proposed agreement should go into effect."

In this State all property of every description is subject to the right of eminent domain, provided that it is within the jurisdiction of the State and that it may be taken without infringement of any

specific constitutional prohibition. The constitutional prohibition against taking private property in this State is that "private property cannot be taken for public use without just compensation having been first made to or paid into court for the owner which compensation shall be ascertained by a jury." (Sec. 14, Art. I, Const.)

Real property, easements, personal property, choses in action, franchises, patented inventions and all other legal rights are held subject to eminent domain. In the case of Long Island Water Supply Co. vs. Brooklyn, 166, U. S. 685; 41 L. ed. 1164, it was held that a contract is property and like any other property may be taken under condemnation proceedings for public use. Whatever the rights of the donors of the Opera House may be it is quite clear that those rights could be taken under eminent domain proceedings. It would probably be necessary however that an amendment of the State law would have to be made to enable the City to exercise this right. The general law enumerates the classes of property that may be taken under eminent domain proceedings and the right of a person to a seat in a public building is not so enumerated.

I therefore advise you that in my opinion power could be vested in the people of the City and County of San Francisco to acquire in eminent domain proceedings the rights, interests and privileges of the donors in the proposed Opera House.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Power of Election Commissioners to Appoint a Carpenter.

December 23, 1913.

Gentlemen: I am in receipt of your communication of the 19th inst., enclosing a set of seven questions upon which my opinion is requested. Said questions relate to the power and authority of your Honorable Board to employ a carpenter and the manner in which and the funds out of which he is to be paid if so employed. In your communication you direct my attention to various sections of the Charter, but I find on examination thereof that it is only necessary to pass upon one of the sections to which my attention has been called, viz.: Section 4 of Chapter I of Article XI, which, together with Subdivision 6 of Chapter I of Article VI relating to the powers of the Board of Public Works, are determinative of all the questions propounded to me.

Section 4, Chapter I, Article XI provides that the Board (of Election Commissioners) may appoint such other clerical assistants as may be necessary at a salary not to exceed $100 each for the time actually employed. This section must be read in connection with the preceding sections of said Chapter I, Article XI and when so read, in my opinion, the meaning is clear that it empowers your Honorable Board to appoint clerical assistants to the Registrar only and not mechanics.

Subdivision 6 of Chapter I of Article VI of the Charter provides that the Board of Public Works shall have charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors in the construction of any and all public buildings and structures, under plans duly approved by the various departments, including all school houses and fire department buildings and the repair and maintenance of any and all buildings and *structures* owned by the City and County.

The word "structures" as used therein, in my opinion, includes election booths or election houses and therefore the construction, repair and maintenance of such election booths or election houses is, by the provisions of Subdivision 6, supra, given to the Board of Public Works of this City and County.

Therefore, in answer to your first question it is my opinion that your Honorable Board; (1) has no power to appoint a carpenter under the power to appoint clerical assistants, (2) that

the construction, repair and maintenance of election booths or election houses is under the jurisdiction and control of the Board of Public Works of this City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Employees Using Their Own Automobiles—Cannot Charge City Therefor.

December 23, 1913.

Gentlemen: I am in receipt of your communication of November 29th in which you ask to be advised as to whether certain employees in your department may not use their own automobiles and apply their transportation allowances thereon.

Opinion.

In my opinion to the Auditor of November 7th I went into the matter very fully and reached the conclusion, as announced there, that officers and employees are forbidden by Article XVI, Section 6 of the Charter to receive compensation from the City and County for the use of their automobiles.

You say in your communication that certain employees in your department "are allowed transportation, provision having been made by the Board of Supervisors in the annual budget for this purpose. There is no particular provision, however, made in the maintenance fund of the budget of this department as to the specific form of transportation to be furnished." No provision is made as to the form of transportation to be furnished—it may be by buggy, street car, automobile or what not. But the transportation allowance is intended to be *expended* for transportation. These employees, instead of spending it with some third person, spend it—in a manner of speaking—with themselves; that is, instead of renting an automobile from somebody else and paying him the amount of the allowance, they use their own automobiles and keep the allowances themselves. It seems clear when the matter is put in this form that they are receiving com-

pensation from the City and County for the use of their automobiles, and under Article XVI, Section 6 of the Charter that may not be done.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Application of Motor Vehicle Act to Fire Department—All Motor Vehicles Used Exclusively to Fight Fire Are Exempt from Taxation.

December 24, 1913.

Gentlemen: I am in receipt of your request for an opinion under date of December 5th, as follows:

"I am enclosing you herewith, as per direction of the Board of Fire Commissioners, communications from the State Treasurer relative to license fees for automobiles and the drivers thereof, which goes into effect January 1, 1914, and to request that you advise this Department as to whether or not it falls within the purview of this law."

Opinion.

In an opinion rendered by the Attorney General to the State Department of Engineering on December 20th, the provisions of the Motor Vehicle Act were interpreted rather fully. In the course of that opinion the Attorney General held that the provisions of that Act apply to municipalities and counties as well as to private persons. I quote from that opinion:

"The reason for the law applies with equal force to publicly owned and operated vehicles as it does to those owned and operated by private persons. As counties, school districts and other political subdivisions of the State are purely State agencies, deriving their powers from the Legislature, they are subject to these general police regulations of the State and they may not object to such regulations upon the ground that they interfere with the exercise of governmental functions. The Legislature having vested such agencies with the exercise of certain governmental functions, it may limit such powers by regulatory acts, unless prevented by the Constitution.

"The law should, therefore, extend to all public agencies, such as counties, cities, school districts, and other political subdivisions of the State, or, in other words, to all public agencies, other than Federal operating upon the public highways of the State, motor vehicles not especially exempted under the provisions of section two of the Act. All such motor vehicles other than those mentioned in Section 2 of the Act, and other than those owned and operated by Federal agencies, must be registered with your department, and, upon such registration, the fees specified in Section 7 of the act must be paid."

Section 2 of the Motor Vehicle Act provides for certain exceptions, as follows:

"Fire engines and fire patrol apparatus, police wagons, municipal or county ambulances and self-propelling vehicles as are used either for the conveyance of persons for hire, pleasure or business, nor for the transportation of freight, such as road rollers, street or road sprinklers and traction engines, are excepted from the provisions of this Act, except where otherwise expressly provided."

The Attorney General, in his opinion, comments on this section as follows:

"Though the vehicles mentioned in Section 2 of the Act are exempted from its provisions, the operators thereof are nevertheless subject to the provisions of the Act. The law has two distinct features, first, the registration, licensing and control of the vehicle itself, and second, the registration, licensing and control of the operator. The vehicles mentioned in Section 2 of the Act need not be registered, but the persons employed to operate the same are required to have either an operator's or a chauffeur's license according to the character of their employment, that is to say, that if they are employed by the municipality, or other public agency, and receive, either directly or indirectly, compensation for the operation of the vehicle, they come within the definition of 'chauffeurs' found in Subdivision 8 of Section 1 of the Act, and must have a chauffeur's license for which the fee of $2 must be paid. If they are employed in a different capacity and operate the motor vehicle merely as an incident to their other duties, they are 'operators' as that term is defined in Subdivision 16 of Section 1 of the Act.

"Thus, in the instance presented by the City of Los Angeles, if a battalion chief of the Fire Department, who is employed and paid

for his services as such, whether he ride in a motor vehicle or not, is given a machine to enable him to reach fires more readily, and operates the machine himself, he is to be classed as an operator rather than a chauffeur. Where, however, another person is employed to operate the machine for him, and one of his chief duties is the operation of such machine for which services he receives, either directly or indirectly, a compensation, he is to be classed as a chauffeur and must have the required chauffeur's license."

You will observe that under this interpretation, which I agree with fully, every person operating a motor vehicle of whatever kind in your Department must secure either an operator's or chauffeur's license, according to the nature of his employment.

There remains to be determined the question of what self-propelled vehicles are excepted by Section 2 from the provisions of the Act. Fire engines and fire patrol apparatus are expressly excepted, and also "such self-propelled vehicles as are used neither for the conveyance of persons for pleasure, hire or business, nor for the transportation of freight." In my opinion this exception is broad enough to cover all automobiles and self-propelled vehicles used exclusively for fighting fire. However, if there are in your Department, automobiles or motor vehicles used for other purposes than fighting fire, for instance, to carry supplies or for use in inspection work, etc., such motor vehicles must be registered under the provisions of this Act and the proper fees paid therefor.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Publication of Notice of Time, Place and Scope of Examinations by Civil Service Commission Is Limited to Official Newspapers.

December 24, 1913.

Gentlemen: I am in receipt of your request for an opinion as follows:

"The first section quoted below is 'Section 6' of Article XIII, and the second section is Section 25 of Article XVI, of the Charter.

Notice of Examinations.

"'Sec. 6. Notice of the time, place and general scope of every examination shall be given by the (Civil Service) Commissioners by publication for two weeks preceding such examination in the official newspaper, and such notice shall also be posted by the Commissioners in a conspicuous place in their office for two weeks before such examination. Such further notice of examination shall be given as they may prescribe.

Official Newspaper.

"'Sec. 25. All publications provided for in this Charter must be made in the official newspaper only.'

"The Civil Service Commission respectfully requests your opinion on the following point: Does the last sentence of the section first above mentioned permit the Commission to advertise its examinations in the official newspaper and to also advertise them in other newspapers at the same time, or does the last word in the second section above quoted prevent the Commission from advertising in all newspapers except the official newspaper?"

Opinion.

My examination of the Charter provisions to which my attention has been called in your communication leads me to the conclusion that the power of your Honorable Board to publish notice of the time and scope of examinations to be given by your Board is confined to such publication thereof in the official newspaper selected and designated by the Supervisors under the provisions contained in Section 2, Chapter III, Article II of the Charter. The last sentence of the section first quoted by you must be read in connection with all the other sentences and clauses of that section

and thus reading them together it appears that the only reference to publication is that confined to the official newspaper and that alone.

There is another section of the Charter bearing upon this matter which you have not cited and that is Section 2, Chapter III of Article II, the concluding part of which is as follows: "No board, department or officer shall make any publication which is not expressly authorized by this Charter or by the Supervisors." This portion of Section 2 is determinative of this question, it being expressly provided in Section 25 that the power of your Honorable Board to make publications is confined to publications in the official newspaper and there being no express power to make any other publication the power of your Honorable Board to make such publications is confined to those in the official newspaper.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Meat Inspection on Holidays—Health Department Can Legally Close Its Office Only on State Holidays and General Election Days.

December 24, 1913.

Gentlemen: I am in receipt of your communication, requesting an opinion on the following points:

"1. Can the Health Department legally close its office to public business on City election or so-called 'Municipal Holidays?'

"2. If a State holiday is declared by the Governor must the Health Department cause its Meat Inspection Corps to work on such a day if the wholesale butchers demand inspection on said day?"

Opinion.

I.

You are advised that your Department is a City and County office, and as such can legally close its office to public business only on State holidays and general election days.

II.

As regards your second inquiry, I would direct your attention to an opinion rendered your Department by this office November 20, 1913.

Your Meat Inspection Corps is engaged in a branch of police regulation, and may be required to work on any day on which the wholesale butchers may reasonably require inspection.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Payment of Auto Registration Fees to State.

December 29, 1913.

Gentlemen: I am in receipt of your communication of the 18th inst. as follows:

"I am directed by the Finance Committee to request you for an opinion as to whether or not the City of San Francisco is liable to the State for the payment of the registration fee and chauffeur's license provided for in the Motor Vehicle Act passed by the last Legislature. Does the City have to pay the tax or fees on its machines used by the various municipal departments? A communication from the Board of Public Works, under date of December 11, 1913, transmitting papers pertinent to this matter, is enclosed and you are kindly requested to return the same with your opinion."

Opinion.

On the 24th inst. I rendered an opinion to the Board of Fire Commissioners, a copy of which is herewith enclosed, in which I held that automobiles in that department, not used exclusively for fire fighting purposes must be registered under the recent Motor Vehicle Act.

The same ruling applies to all other automobiles owned by the City and County, with the exception, as provided in Section 2 of the Act, of police wagons, municipal or county ambulances, road rollers, street or road sprinklers and traction engines.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Preliminary Legal Steps for Hetch Hetchy Project.

December 29, 1913.

Gentlemen: I have before me the following resolution of your Board:

"Resolved, That the City Attorney be and he is hereby requested to advise this Board as to the legal steps to be taken by it to carry into effect the Hetch Hetchy grant just made to the City by the United States."

Opinion.

In reply to the request contained in the above resolution I respectfully suggest the following steps as being immediately advisable to preserve the rights which the City now has by virtue of the Hetch Hetchy grant, and its water filings on the Tuolumne River, Cherry River and Eleanor Creek.

First: In compliance with sub-section (s) of Section 9 of the Raker Act, an ordinance accepting on the part of the City and County of San Francisco the terms and conditions of the grant therein expressed, should be adopted by your Board, approved by the Mayor, and filed with the Secretary of the Interior. I am satisfied that your Board has the power to make this acceptance. The people of the City and County of San Francisco by an overwhelming vote cast at two elections have authorized you to proceed with the acquisition and construction of works necessary to the development of a municipal water supply from Tuolumne River sources. For your information I submit herewith the text of the propositions upon which they voted.

"Proposition One. To authorize the City and County of San Francisco to acquire by purchase or condemnation a public utility, viz.: A water supply and works to be owned and controlled by said City and County, to furnish to said City and County and to the inhabitants thereof a sufficient supply of good, pure water for all purposes, the source of such supply to be Lake Eleanor, the Hetch Hetchy Valley and the waters of the Tuolumne River in Tuolumne County, California.

"Proposition Two: To incur a bonded indebtedness by the City and County of San Francisco to the amount of Six Hundred Thousand ($600,000) Dollars for the purchase of lands, rights and claims in and adjacent to the Hetch Hetchy Valley, adjacent

and near Lake Eleanor and within the watershed of the Tuolumne River, and in constructing certain works, all of which are necessary in order to comply with the conditions and stipulations agreed to by the City and County in the acquiring of certain rights and privileges heretofore granted by the Interior Department *or hereafter to be granted by the Congress of the United States.*"

Proposition voted upon January 4, 1910:

"A proposition to incur a bonded debt of the City and County of San Francisco to the amount of forty-five million dollars for the purpose of the acquisition, construction and completion of a public utility, to-wit: A water supply and works to be owned and controlled by the City and County of San Francisco to furnish to said City and County and to the inhabitants thereof a sufficient supply of good, pure water for all purposes, the sources of such supply to be Lake Eleanor, the waters of the Tuolumne River and its tributaries in Tuolumne County, California."

You will note from the above language that the source of the proposed water supply is to be Lake Eleanor and the waters of the Tuolumne River and its tributaries. To my mind it is immaterial that the engineering plans then under consideration by the City officials, involved the development of the Lake Eleanor Reservoir first and the Hetch Hetchy Reservoir later. The essential proposition before the people at both these elections was the acquisition of a municipal water supply from the Tuolumne River with dams at Hetch Hetchy Valley, Lake Eleanor and on the Cherry River. That the order of construction of these dams and the route of the conduit has been changed under the Freeman plan is a matter of engineering detail, and does not affect the authorization of the general project. If under the authorization of the people at the foregoing elections you have the power to proceed with the construction of works destined to bring in this water supply, you have the power to make a valid acceptance of this congressional grant, said formal acceptance being a necessary condition to the complete vesting of title in the City and County, under the terms of said grant.

Second: With convenient expedition copies of maps heretofore filed with the Secretary of the Interior showing proposed reservoir sites and rights of way, should be filed with the Department of the Interior, under the provisions of Section 2 of the Raker Act. As soon as surveys of the proposed conduit route over and

through the Stanislaus National Forest and Government lands west of the said forest boundaries can be completed, maps showing the proposed location should be filed with the Secretary of the Interior for his approval. I have already made application for an executive withdrawal of lands west of the Stanislaus Forest pending selection of a route through such lands by the City.

Third: Condemnation suits for rights of way over and through lands along the proposed conduit line now held in private ownership, should be filed as soon as the line of such right of way can be definitely surveyed.

Fourth: I believe it to be very important for the City to commence some work immediately looking to the actual construction of this project.

Fifth: The matter of the administrative organization under which the Hetch Hetchy project is to be constructed is primarily one of policy, although various legal questions will arise in connection with any procedure which is adopted. When your Board has determined the policy to be followed in this respect, I shall be glad to co-operate with you in the solution of any legal questions which may suggest themselves. I urge upon you, however, that preliminary work be not delayed until a satisfactory solution of the last problem is reached.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Premiums on Bonds of Street Railway Employees Are Valid Claims Against City.

January 8, 1914.

Sir: I am in receipt of your request for an opinion in which you inquire whether claims filed with you by Lloyd & Spengler, General Insurance Agents, are valid.

My understanding of these claims is that the Board of Supervisors has, by Ordinance No. 2070 (New Series), fixed the amount of the liability bonds of all conductors and motormen of the Municipal Railway at the sum of $300, such bonds to be given as required by Section 4, Chapter I, Article VI of the Charter. This section provides that the Board of Public Works "shall * * * require adequate bonds from its officers and employees, except laborers, for the faithful performance of all their duties in such sums as may be fixed by the Supervisors. Said bonds shall be approved by the Mayor and shall be filed in the office of the Auditor."

The Board of Public Works has, by Resolution No. 23,303 (New Series), provided that the Superintendent of the Municipal Railway shall charge the cost of the premium on these bonds to "operating expenses" of the road.

These claims, concerning which you inquire, are for premiums on such bonds and are filed as claims against the City and County of San Francisco.

Article XV, Section 2, of the Charter provides for the different bonds that must be furnished to the City and County by the different elective and appointed officers thereof and concludes as follows:

"In all cases of elective officers, officers appointed by the Mayor, and officers whose bonds are fixed by the Charter, the premium or charge for such bonds shall be paid by the City and County; provided, however, that no premium or charge shall exceed one-half of one per cent per annum on the amount of such bond."

The question presented is whether the above enumeration of bonds furnished by "elective officers, officers appointed by the Mayor, and officers whose bonds are fixed by the Charter," is exclusive, so that the City is prohibited from paying premiums on the bonds concerning which you have made inquiry. In my

opinion the enumeration is exclusive only so far as "officers" of the City and County are concerned, for that is the only class referred to in the Charter section permitting the payment by the city of the premiums. It is clear that conductors and motormen of the Municipal Railway are not "officers" of the City and County and I am therefore of the opinion that since they do not come within the general class of persons referred to in the above Charter sections that the claims for the premium on their bonds, which claims were submitted by you for my consideration, are valid claims against the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Sewer on Great Highway—Supervisors May Order Constructed Without Permit from Park Commissioners—Cost May Be Assessed to Adjoining Property Owners Except for Four Blocks Where Highway Runs Through Park—Respective Powers of Park Commissioners and Supervisors With Regard to Parks.

January 8, 1914.

Gentlemen: I am in receipt of your communication as follows:

"The Golden Gate Park Federation of Improvement Clubs, R. T. Crocker, Secretary, 1217 Shrader Street, under date of November 8, 1915, complains to this Board concerning condition of the sewage system at the Seal Rock House.

"This office is now preparing plans and specifications for the construction of a sewer draining this locality, this sewer to operate in conjunction with the pumping station which it is contemplated to install at the crossing of Forty-eighth Avenue and Fulton Street, but this work cannot be commenced until the completion of that portion of the main Forty-eighth Avenue sewer now being constructed by Contractor F. Rolandi.

"In the meantime we desire to request your opinion on what power the Board of Public Works has to assess the cost of sewer work in the Great Highway to the abutting frontage thereon or to a suitable district, and what right has the Board of Public Works

or the Board of Supervisors to order the construction of a sewer, or the performance of street work, in or on the Great Highway."

Opinion.

The Charter, Sections 1 and 6 of Article XIV, gives to the Board of Park Commissioners the exclusive management, control and direction of the Great Highway and the exclusive right to erect and to superintend the erection of buildings and structures thereon.

Section 1 of Chapter II, Article VI, provides that "all streets, lanes, alleys, places or courts in the City and County now open or dedicated or which may hereafter be opened or dedicated to public use, shall be deemed and held to be open public streets, lanes, alleys, places or courts for the purpose of this chapter; and the Supervisors are hereby empowered to fix the width and grade thereof and to order to be done therein and thereon any and all street work and street improvement under the proceedings hereinafter described."

In Section 26 of said chapter and article the word "improvement" is held to include the construction of sewers, and the word "street" is held to include all streets, lanes, alleys, places and courts which may have been or may be hereafter dedicated and open to public use and whose grade and width have been legally established.

The grades of the Great Highway have been established by various orders of the Board of Supervisors (Vide pp. 126 and 127, "Official Grades of the Public Streets" published by authority of Resolution No. 3593 (New Series) of the Board of Supervisors).

The width of the Great Highway was established by Section 9 of an Act of the Legislature of this State, entitled "An Act to confirm a certain order passed by the Board of Supervisors of the City and County of San Francisco," approved March 27, 1868 (Stats. 1867-68, p. 379), as follows:

"Sec. 9. All that portion of the land described in Section One of this Order which lies South of a line drawn due South 81° 35′ East, magnetic, through Seal Rock and West of a line easterly not less than 200 feet from ordinary high water mark, is hereby reserved and set apart for public use as a public highway."

Therefore, the Great Highway, having been dedicated and

open to public use and the width and grades thereof having been legally established, possesses all the attributes to bring it within the term "street" as defined in Section 26, supra, and there would be no question of the power of the Supervisors to order, and your Honorable Board to perform, the work of constructing a sewer therein but for the provisions of the Charter quoted in the opening of this opinion giving to the Board of Park Commissioners the management, control and direction of said Highway.

This brings me to a discussion of the extent of the powers of the Park Commissioners over the Great Highway and necessarily over all other lands over which they have jurisdiction, by reason of the fact that their power over such other lands differs in no degree or extent with their power over the Great Highway, in the matter of the construction of sewers therein, or the construction of other works of public necessity, such as municipal street railways, constructed in such manner as not to interfere with the use of the parks by the public.

The power of management over the Great Highway, given to the Commissioners is a comprehensive term, and, as defined in Cyc. Vol. 26, p. 123, it means: "the act or art of managing; the manner of directing; carrying on; using for a purpose; conduct; administration; guidance; control; superintendence; the act of managing by direction or regulation."

The Court of Appeals of the State of New York in the case of People etc. vs. Coler et al., p. 83, N. E. 18, at page 20, discussing the power of Park Commissioners, said:

"We at once recognize that such department naturally would be invested with general supervision, maintenance, care and control of parks and public places, and the regulation of the use thereof by the public, always having reference to the ordinary purposes for which they were designed. We would expect it to have the right amongst other things, to decide questions relating to the care and beautifying of parks, the proper maintenance of roadways, the lighting thereof, and the location of structures properly placed therein. Such matters naturally would be placed within the jurisdiction of authorities charged with special and limited powers of maintenance and supervision. * * *

"These powers would doubtless authorize the department to confer a limited franchise to use the parkways for purposes which were necessary for and incidental to the ordinary public enjoy-

ment thereof. For instance, it was necessary that it should be lighted, and it would be entirely proper and necessary that the commissioners should have power to authorize some corporation to lay conduits therein for the purpose of supplying such lights. The same very likely might be said of water pipes and other structures."

So that it is apparent that the powers given to the Commissioners by the Charter, while large enough to enable them to at all times and free from intrusion by other board or officer of the municipal government in park management, carry out the purpose for which the various parks and other places were dedicated to the use of the public and entrusted to their administration and guidance, yet in the management of the Great Highway, the Park Commissioners can only exercise such power as is granted to them and they must exercise that power subject to the constitutional grant of the police power of the Board of Supervisors expressed in Section 1, Chapter II, Article II of the Charter.

Dillon, in his work on Municipal Corporations, Section 1461 (5th Ed.), recognizes that the construction of sewers at the expense of abutting property owners is an exercise of the police power vested in the governing body of a municipality, as distinguished from the taxing power.

The Board of Supervisors may, in accordance with the provisions of Chapter IV, Article VI, relating to Sewers and Drainage, by a vote of not less than fourteen affirmative votes, authorize the Board of Public Works, to construct such sewers, reservoirs and pumping works as may be necessary to carry out the general system of sewerage for the City and County. This is an express authority in the Charter itself, aside from the general police power vested in the Supervisors, to order the construction of a sewer whenever the health of the community and sanitary conditions make such construction necessary.

A case very similar to the one under discussion was decided by the Supreme Court of Illinois, Lingle vs. City of Chicago, 50 N. E., p. 192, in which the Court said:

"The West Chicago Park Commissioners are a corporation and have control of the boulevards within their district for the purpose of improving the same by adding to their utility as driveways or streets. It was held by this Court in Commissioners vs.

Baldwin, 162 Ill. 87, 44 N. E. 404, that the Act of June 24, 1895, authorizing park boards to make assessments for the purpose of improving any boulevard, driveway or street, confers no power on such boards to levy an assessment for sewers and water mains intended to supply sewer and water service to residences on a boulevard, as the laying of a sewer or a water main could not, in any proper sense, be regarded as an improvement to the boulevard by adding to its utility as a driveway or street or to its attractiveness. The object and purpose of putting a sewer in a boulevard is to benefit adjoining property along, and not in any proper sense as an improvement to, the boulevard. No authority is given park commissioners to place a sewer in a boulevard, and the power to do so exists in the city council of the city."

The views herein expressed are not intended to, nor do they take away or limit any of the powers of the Park Commissioners; on the contrary, they simply define the powers of the Supervisors to order and the Board of Public Works to construct sewers along, or across the public parks, squares, avenues and grounds, whenever in the judgment of the Supervisors it becomes necessary for the health of the community or expedient for any other reason.

The power of the Board of Supervisors in this instance, it is to be understood, may be exercised by it without the necessity of a permit or other sanction from the Board of Park Commissioners, and in the manner provided by law for sewer construction in other public streets.

There remains but the question of the power of your Honorable Board to assess the cost of sewer work in the Great Highway to the abutting frontage thereon or to a suitable district.

Section 8, Chapter II, Article VI, provides, "that the expense of all sewers * * * shall be assessed upon the lands within the block or blocks adjacent thereto, except where by an assessment district it may be provided otherwise" and Section 9, Subdivision 1, provides:

"Except where the expense incurred for the street work and improvement authorized herein is to be assessed upon a district as hereinafter provided, such expense, other than that to be paid by a person, company or corporation having tracks on the street where such work and improvement has been done, shall be assessed upon the lots and lands fronting thereon, except as here-

inafter specifically provided; each lot or portion of a lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work."

Golden Gate Park extends to the Pacific Ocean and consequently the Great Highway runs through the Park for a distance of four blocks. Any expense for sewer construction on that portion of the Highway would have to be paid by the City and County, and the expense of such construction on other portions of the Highway would be assessed to the adjoining property on both sides thereof, either public or private, always keeping in mind the limitation imposed in the Charter, concerning the levying of assessments upon property amounting to over fifty per centum of the assessed valuation thereof.

Subdivision 8 of Section 9 of Chapter II, Article VI provides for the levying of the assessment of the cost of a sewer constructed under the sidewalk or only on one side of a street for any length thereof, upon the lots and lands fronting nearest upon that side.

The proceedings to be taken by your Honorable Board in the matter of defraying the cost of the sewer on the Great Highway will be the same as in other cases, whether assessing the adjoining property or the creation of an assessment district.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Personal Liability of Officers—Unauthorized Liability Cannot Be Imposed by Ordinance.

January 19, 1914.

Gentlemen: I am in receipt of your communication of December 29, 1913, enclosing Section 1 of a proposed ordinance, as follows:

"Section 1. No officer, board or commission, authorized by law to appoint subordinates or to engage the services of laborers, shall make any such appointment or engage such services except in the manner required by the Charter of the City and County. Any employment or engagement other than in the manner and

form required by such Charter shall be void, and the officers making such appointment shall be personally liable to the person so appointed or engaged for the value of all services rendered or time spent in the service of the City and County, under such attempted employment, and the members of every board or commission voting for or sustaining such employment shall be likewise personally liable. In case any demand is made against the City and County for services rendered under any unauthorized appointment, it shall be the duty of the Civil Service Commission to notify the Auditor to withhold from the salary of the officer or officers, making or authorizing such unlawful appointment, the amount of the claim so made, and the Auditor shall withhold the same until such claim is satisfied."

You ask whether the Board of Supervisors has power to impose this personal liability upon the officers, boards and commissioners.

Opinion.

In my judgment your Honorable Board is without power to impose such a personal liability as the one here attempted. It is a well settled rule of law that persons contracting with a municipal corporation are charged with notice of the laws governing such contracts, and if the contracts are in excess of the corporate powers the contracting party cannot recover either against the corporation or its officers. Dillon on Municipal Corporations, Sec. 443. In Shaw vs. San Francisco, 13 Cal. App. 547, this general rule was held to apply in the case of unauthorized appointments under the Civil Service rules. It is the purpose of this ordinance to change this general rule by imposing a personal liability upon the appointing officer or board.

The powers, duties and liabilities of all charter officers are fixed by the Charter itself, and your board can only add to them when authorized by the Charter to do so. It was held in State vs. Von Sachs, 45 La. An. 1416, that a city council is without power to impose unauthorized obligations. It follows that the creation of this new obligation, being unauthorized by the Charter, would be void.

Respectfully,

PERCY V. LONG,

City Attorney.

Judiciary Committee,
Board of Supervisors.

Advertising on Municipal Waste Cans.

January 19, 1914.

Gentlemen: I am in receipt of your communication as follows:

"I am directed by Supervisor Geo. E. Gallagher, Chairman of the Committee on Streets and Sewers, to refer to you the application of Robert D. Duke for a permit to advertise on the municipal waste cans.

"The Committee on Streets and Sewers wish to be advised as to whether or not the Board of Supervisors has the power to grant the permit requested by Robert D. Duke."

Opinion.

It will only be necessary in answer to your request for an opinion on this subject to cite the opinion of the Court in the case of State ex rel Belt vs. City of St. Louis, reported in 61 S. W. Reporter, 658 et seq. In that case the municipal assembly of the City of St. Louis passed an ordinance authorizing, directing and empowering the Board of Public Improvements of that city to erect and maintain boxes or receptacles for the collection of waste paper and other litter from the streets and to contract with Fred R. Belt or his assignees to erect and maintain said boxes or receptacles and directing that the contract with Belt should specify that he or his assigns were to erect, renew and maintain said boxes as should from time to time be designated by said Board of Public Improvements, without cost to said city for the erection and maintenance of said boxes or receptacles and for keeping said boxes or receptacles clean; that in consideration and as full compensation to said Belt or his assigns for said work said Belt or his assigns were to have the exclusive right and privilege to place advertisements on such boxes or receptacles for the benefit of himself or assigns, provided, however, that no advertisement which was of an improper character should be placed thereon. Said Belt or his assigns being by the terms of the ordinance authorizing the contract required to pay into the treasury of the City of St. Louis at the end of each quarter fifteen per cent of the gross receipts received by him or his assigns during the lifetime of the franchise granted by the ordinance.

The case came before the Supreme Court of Missouri on a

petition for a writ of mandate by the State on the relation of Belt to compel the City of St. Louis and the Board of Public Improvements to enter into the contract with relator in pursuance of the said ordinance.

The Court first cited various provisions of the Charter of the City of St. Louis and held that the ordinance and the proposed contract were invalid for the want of compliance with said Charter provisions.

While the provisions of the Charter of the City of St. Louis and the Charter of the City and County of San Francisco are not identical it is not necessary for this opinion to ascertain whether or not that is so because the Court advanced another reason why the proposed ordinance and contract were invalid, which reason is applicable to the matter under consideration.

The Court said:

"But there is another view to be taken of this ordinance. It subjects the public streets to a purely private purpose, to-wit, the advertising of individual business and enterprises. Can the City devote its streets to such a purpose? We hold that it cannot. The Charter gives the city power to regulate the use of the streets. Under this grant it may, it is true, not only regulate the travel thereon, but it may allow gas, water and sewer pipes to be laid therein, and permit telegraph and telephone poles to be erected therein, because all of these uses are consistent with the use for which they are dedicated or condemned. Schopp vs. City of St. Louis, 117 Mo. 136, 22 S. W. 898, 20 L. R. A. 783. But it has been held by this Court that it has no power to lease out portions of the streets for huckster stands and stalls. The 'public highways belong from side to side and end to end to the public, and the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,' and the abutting property owner has the right to the free and unobstructed passage to and from his property. Schopp vs. City of St. Louis, 117 Mo. 136, 137, 22 S. W. 898, 20 L. R. A. 783; Sherlock vs. Railway Co., 142 Mo. 172, 43 S. W. 629; Knapp, Stout & Co. vs. St. Louis Transfer Ry. Co., 126 Mo. 26, 28 S. W. 627; Schullenburg & Boeckeler Lumber Co. vs. St. Louis, K. & N. W. R. Co., 129 Mo. 455, 31 S. W. 796. And it was held in Glaessner vs. Association, 100 Mo. 508, 13 S. W. 707, that a franchise to lay a railroad track in a street must be for

a public, and not for private, purposes. Referring now to the ordinance, it will be observed that it confers upon Belt the exclusive right to place advertisements on such boxes for the benefit of himself and his assigns. In a word, the City has attempted to farm out its sidewalks and streets to a private person for advertising. Belt is free to make his own charges for advertising. No power is reserved to the City, even if it were a purpose to which it could devote the streets, to regulate the charges for advertisements. The legislative authority of the City could not thus be delegated, nor could it abdicate its control over the public streets, held by it in trust for the public, and create a monopoly in favor of one advertiser. Matthews vs. City of Alexandria, 68 Mo. 115; Cooley, Const. Lim. (6th Ed.) 247-253; Gale vs. Village of Kalamazoo, 23 Mich. 344; City of Oakland vs. Carpenter, 13 Cal. 540.

"But it is said that it is no objection to a public franchise that its owner may derive a private gain therefrom. This is unquestionably true when the use is public, and the gain arises out of that use; such as street cars, telegraph and telephone lines. In this case, however, the pecuniary profits to Belt arise from a source wholly distinct from any public use. They will not flow naturally from his right to erect and maintain boxes for waste paper, but solely from a distinct privilege in which the public are not interested, to-wit, his exclusive right to use the streets for advertising purposes, a purely private and collateral enterprise. We are clear that the streets cannot be devoted to such a private purpose. With what sort of propriety or fairness can the city farm out to Belt and his assigns the right to erect a box on a sidewalk in front of a business house, and not only thus deprive the proprietor, who has been compelled to construct the sidewalk and pay for improving the street in front of his premises, of the free access, ingress and egress from his store, but to advertise the goods of a rival in the same line of business? The question furnishes its own answer. The City has no such power."

I agree with the reasoning of the Court in the language cited above. You are therefore advised that your Honorable Board has not the power to grant the permit requested by Robert D. Duke.

Respectfully,

PERCY V. LONG,

Board of Supervisors. City Attorney.

Ordinance No. 754—Tax Collector Is Proper Officer to Interpret Dance License Ordinance.

January 20, 1914.

Dear Sir: I am in receipt of your recent communication with reference to Ordinance No. 754, imposing a license on keepers of public dance halls and ball rooms.

In response thereto I beg to state that in my opinion neither the Clerk of the Police Committee of the Board of Supervisors nor the Chief of Police has the power to interpret the provisions of that ordinance. This is a matter entirely within the province of the Tax Collector, and if he is in doubt, the opinion of his legal advisors should be sought.

In view of the fact that the facts in the case of the Charter Oak Club dance are not before me, it is not in my power to state whether or not that particular club was entitled to exemption from the provisions of the ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Bail Money Not Subject to Attachment.

January 20, 1914.

Sir: I am in receipt of your request of the 16th inst., as follows:

"Would be pleased to have you advise me whether in your opinion, an attachment levied upon a demand drawn on the Police Court Bail Fund would be valid. A particular demand has been released by order of one of the Police Courts and presented to this office for approval, and I am at a loss just what to do, for the reason that there has been a Sheriff's attachment levied against same."

Opinion.

Under date of January 20, 1910 (Opinions City Attorney, 1910-11-12, page 14), I advised the Treasurer that bail money in his hands was not subject to attachment or garnishment and in so

doing followed an opinion theretofore rendered to the Treasurer by my predecessor, Franklin K. Lane, on August 5, 1902.

You are advised that the bail money described by you in your communication is not subject to garnishment or attachment.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Globe Theatre, Application to Make Alterations—Must Be Granted Where Building Was Legal When Erected—Respective Powers of Supervisors and Board of Public Works With Regard to Unsafe Buildings.

January 23, 1914.

Gentlemen: I am in receipt of your communication relative to the Globe Theatre which reads as follows:

"At its meeting held November 17, 1913, the Board of Public Works considered the attached communication from the Grand Jury dated November 13, 1913, stating that it is the sense of that body that the Globe Theatre, Mission Street near Twenty-fourth Street, should be immediately condemned and closed; since it has been found to be unfit for occupancy, and demanding immediate action by this Board.

"Subsequent to receipt of this letter this Board received a communication from Chief Building Inspector John P. Horgan (a copy of which is also enclosed), stating that the owners of the Globe Theatre have applied for a permit to make certain alterations and repairs throughout said building, and asking that the opinion of the City Attorney be requested concerning the rights and duties of this Board in the premises.

"Will you kindly inform us whether the Board of Public Works must comply with the direction of the Grand Jury, and whether it is compulsory to issue the permit applied for by the manager of the Globe Theatre?"

The communication of the Grand Jury referred to in your communication is as follows:

"At a meeting of the Grand Jury held on November 13, 1913,

a resolution was passed declaring it to be the sense of the body that the Globe Theatre be immediately condemned and closed at once, since after proper investigation we have found that same is in a condition absolutely unfit for occupancy.

"We demand immediate action in connection with this matter, believing that in its present form the Globe Theatre is a menace to the lives of those who have occasion to enter it or to come within the vicinity thereof."

The report of the Chief Building Inspector referred to is as follows:

"I submit herewith a report upon the conditions prevailing in the building and premises known as the Globe Theatre, and situated on the east line of Mission Street between Twenty-third and Twenty-fourth Streets.

"The building is of frame construction, built shortly after the fire of 1906, and has been in operation as a theatre. The owner and lessees have at various times in the past endeavored to obtain a license for its operation, but have been unable to do so up to the present time.

"The owners have recently applied for a permit to make considerable alterations and repairs throughout the building, with a view to insure greater safety to patrons in case of fire or panic, and also to lessen the fire risk within the building and premises.

"These alterations and repairs consist chiefly in making the premises in and about the stage more fire-proof and also include additional means of exit to the patrons.

"This bureau is not informed as to whether this particular building has any legal right to be maintained and operated as a theatre, and for this reason a recommendation for a permit has been withheld until an opinion can be received from the City Attorney.

"I therefore suggest that an opinion be asked for covering the entire matter, and that any action by the Department be withheld until such is received."

Opinion.

The duty of the Board of Public Works with reference to the issuance of building permits is purely ministerial. Subdivision 5 of Section 9, Chapter I, Article VI of the Charter provides that

"the Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors * * * of the supervision of any and all building construction in the City and County." The Board therefore, in the matter of the construction of buildings must be guided by the ordinances passed by the Supervisors.

The Supervisors under the police powers of that Board have passed certain regulations governing the use and construction of theatres and moving picture show houses. The regulations which bear upon the question presented by your communication are Sections 159, 182 and 187 of Ordinance No. 1008 (New Series), known as "The Building Law." Section 159 provides that "Every theatre hereafter erected to be used for theatrical or operatic purposes, must be constructed in accordance with the requirement of the ordinance relating to Class A or steel frame construction. * * * "

Section 182 is as follows:

"All existing theatres shall be made to comply with the provisions of this ordinance, under the direction and supervision of the Board of Public Works and Fire Wardens, to such extent as may be deemed necessary and practical by said boards."

Section 187 is as follows:

"All places of amusement hereafter to be constructed, erected or altered wherein moving pictures are exhibited for public entertainment, and where an admission fee is charged, having a seating capacity of 400 or more persons, shall be built and constructed to conform to all laws, conditions and requirements now existing or hereafter to come in force and effect relating to theatres and places where theatrical or operatic performances are given."

The Globe Theatre is used as a moving picture show house and had it been constructed after the passage of Ordinance 1008, would have to be of Class "A" construction.

Ordinance 1008 was approved December 22, 1909. The Globe Theatre was constructed and in use as a moving picture show house prior to December 22, 1909. Section 187 of the ordinance governs moving picture show houses constructed *after* the passage of Ordinance 1008. In this respect it is similar to nearly all

building laws. The law is designed to regulate only buildings constructed *after* the adoption of the law.

At the time the Globe Theatre was erected and first used as a moving picture show house Ordinance No. 31 (New Series), adopted shortly after the fire, was in force and effect. That ordinance contained sections almost identical to Sections 159 and 187 of Ordinance No. 1008. The seating capacity of the Globe Theatre has always been in excess of four hundred (400) persons. Therefore when the Globe Theatre was constructed, either as a theatre or moving picture show house it was constructed contrary to Ordinance No. 31. But, as pointed out, the law which made its construction and use either as a theatre or moving picture show house illegal was repealed *in toto* by Ordinance 1008. The repealing ordinance contains no saving clause which would continue to denounce unlawful any theatre or moving picture show house declared unlawful by Ordinance 31. While the framers of Ordinance 1008, in repealing as they did Ordinance 31, in its entirety with no saving clause undoubtedly did not contemplate the result of such legislative action, the effect nevertheless is that so far as the Board of Public Works is concerned, the Globe Theatre does not violate any existing live ordinance.

Any offense committed by the owners of the building in causing its construction or use as a theatre or moving picture show house was condoned by the repeal of the ordinance making that construction or use unlawful. The building law is essentially a police law. Its violation constitutes a misdemeanor punishable as such.

In addition to the penal features of the use or construction of a building contrary to law, the continuance of a building so used or constructed would prima facie constitute a public nuisance. The declaration that a theatre shall be of Class "A" construction is tantamount to a legislative declaration that a theatre of anything less than Class "A" construction is dangerous to public safety. The express repeal of the law, however, furnishing the prima facie evidence of the public nuisance character of a building, leaves the question whether it is or is not a nuisance a question of fact not dependent upon any legislative declaration. The repealed law cannot now be evoked to establish prima facie proof of the existence of a nuisance. The building, nevertheless, may in fact constitute a public nuisance.

In discussing this phase of the case, the distinction should be

noted that a building itself may constitute a public nuisance as being dangerous to life, limb or property or the use of a building may constitute the nuisance, the building of itself not being a nuisance. Thus a frame building may structurally be safe but its use as a theatre may be unsafe. In the former case the building itself could be condemned and removed. In the latter the use of the building as a theatre could be abated. While it is the use of the building as a theatre or moving picture show house which by the sections of Ordinance 1008, quoted above, is sought to be controlled, the prohibitions in those sections are against the construction of a building to be used as a theatre or moving picture show house in certain respects.

The Board of Public Works has no control over occupancy of buildings. The administrative bodies of our municipal government having that supervision are the Board of Health and the Police Department. The jurisdiction of the Board of Public Works extends solely over the construction of buildings under the ordinances of the Supervisors. It is not the duty or within the power of the Board of Public Works to prevent the unlawful occupancy of a building. Its duty and power extend only in seeing that buildings are constructed in accordance with laws for the use they are designed. Nor does the Board of Public Works have jurisdiction to declare erected buildings nuisances. By Subdivision 6 of Section 1, Chapter II, Article II of the Charter, the Board of Supervisors is given power "To provide for the abatement or summary removal of any nuisance and to condemn and to prevent the occupancy of unsafe structures." Whether under this power the Board of Supervisors could constitute the Board of Public Works the body to enforce an ordinance calling for the abatement of a nuisance or for the prevention of the occupancy of a building it is not necessary here to decide. The Board of Public Works can only act under the ordinances of the Board of Supervisors and to those ordinances it must turn for guidance in its official actions.

By reason of what has been said, it follows that in so far as the Board of Public Works has any jurisdiction over the Globe the Globe has a legal existence and violates no law of which the Board of Public Works may take cognizance. Whether the use of the Globe as a moving picture show house is a nuisance or whether that use should be discontinued is a matter for the Supervisors to determine, and in the absence of a determination

to the contrary the Board of Public Works must proceed upon the assumption that it shall govern its official action by the ordinance now in existence.

The question now arises whether the Board of Public Works should issue a permit to repair the building. Those repairs are stated by the Building Inspector to be as follows:

"The owners have recently applied for a permit to make considerable alterations and repairs throughout the building, with a view to insure greater safety to patrons in case of fire or panic, and also to lessen the fire risk within the building and premises.

"These alterations and repairs consist chiefly in making the premises in and about the stage more fire-proof and also include additional means of exit to the patrons."

Section 187 of Ordinance 1008 has been quoted above. That section declares that a place of amusement *hereafter to be altered* for use as a moving picture show house shall be built and constructed to conform to the conditions and requirements governing theatres. Does this mean that a moving picture show house which was in existence at the time of the passage of Ordinance 1008 and has at all times remained in existence as such, if altered in any particular must also be altered in every particular in which it does not conform to conditions presbribed in Ordinance 1008 for theatres? I am convinced that such is not the correct construction of that section. The meaning of the section in my opinion is that where a building not used as a moving picture show house is altered for purpose of using it as a moving picture show house it must be made to comply in all respects with the requirements prescribed for theatres. This construction of the sections is in harmony with the spirit of the whole ordinance as well as Section 187, that the ordinance and section shall be prospective and not retrospective. Otherwise we would have this peculiar anomaly: a moving picture show house does not as it stands violate any law. It can go on as it is until age and decay make it unsafe. If, however, the owner desires to make a simple alteration of great benefit to the building he cannot do so unless he alters it in every particular in which it does not comply with a law which does not govern it in an unaltered condition. Such a construction applied to the Globe would cause this remarkable result. The Globe, a frame building, does not violate any existing law, is permitted to remain as it is, and if not a nuisance in fact,

which I do not and cannot pass upon, can legally be continued to be used as a moving picture show house. It is physically impossible to alter a frame building into a Class "A" building, but if the owners of the Globe desire to alter the building in any respect they would be obliged to do the physically impossible, viz.: make a frame building into a Class "A" building. Such a construction is tantamount to saying that they cannot alter their building at all.

The construction I have placed upon Section 187 is strengthened by Section 182 quoted above, which is made applicable to moving picture show houses by Section 187. For convenience I quote the section.

"All existing theatres shall be made to comply with the provisions of this ordinance, under the direction and supervision of the Board of Public Works and Fire Wardens, to such extent as may be deemed necessary and practical by said Boards."

By this section the power is given the Board of Public Works and Fire Wardens to require alterations in theatres existing at the time of the adoption of Ordinance 1008. The section, however, does not require that a theatre shall be altered so as to completely comply with Ordinance 1008. It is only those alterations which are practical and necessary which can be ordered. Section 182 is the only respect in which Ordinance 1008 is retrospective as regards theatres and moving picture show houses. By this section alterations can be required and if required can be permitted.

I am of the opinion that the Board of Public Works should grant the permit to repair or alter the Globe if the alterations or repairs of themselves do not violate any regulation of the Building Law, and, if those alterations or repairs are not sufficient in the judgment of the Board of Public Works and Fire Wardens additional repairs necessary and practical can be required.

The only other question contained in your communication is the Order of the Grand Jury. I am informed that the Globe is now closed awaiting the action of your Board on the application for repairs and alterations. With the contemplated alterations done it may be that the Grand Jury will be satisfied as to the fitness of the building for occupancy. I have discussed above the powers of the Board of Public Works and the Supervisors over unsafe buildings. If the building is unsafe for occupancy it is the duty

of the Supervisors to declare that fact and order its condemnation. The Board of Public Works has no power in the absence of such legislative declaration to prevent its occupancy. If in the judgment of the Grand Jury this building is unfit for occupancy the attention of the Supervisors should be called thereto.

I have gone into the question presented at length because of the peculiar features of this case and the action of the Grand Jury which merits careful attention. I am of the opinion and so advise you that under the law as it now stands you must issue the permit applied for, and if the law is not sufficient to fully cope with the situation presented the remedy lies with the Board of Supervisors and not the Board of Public Works.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Plan of Procedure for Extensions of Water Mains.

January 26, 1914.

Gentlemen: My attention has been directed to Journal Resolution No. 959, which reads as follows:

"Resolved, That the City Engineer and City Attorney are hereby appointed a committee to formulate and recommend to the Board of Supervisors a plan of procedure under and by which water mains and pipes shall be laid in the streets of the City and County."

Opinion.

A procedure adopted by some municipalities owning water works for the laying of water mains is to charge the whole or a part of the cost thereof upon private property according to frontage, or upon districts according to benefits. Laying of mains is put in the same category as laying of sewers, paving of streets and the ordinary street improvements, the cost of which is chargeable against property benefited.

Subdivision 10 of Section 2 of the Los Angeles charter provides that the City of Los Angeles shall have the right and power to

levy assessments on property, according to frontage, or on a district, according to benefits, for laying water mains.

The theory underlying the assessment plan is that it is as much the duty of property owners and as much to their benefit to defray the whole or part of the cost of laying water mains as to defray the cost in ordinary street improvements, such as sewers, paving, etc. The objection to this plan is that the City, in conducting water works, is engaged in a business for profit and the business should carry the burden of its cost. The answer made to the objection is that the City does not, in conducting a water works, engage therein for purpose of profit, but solely to furnish a necessary service at the smallest expense to the consumer, and that profit is only justifiable to pay the cost of extension to the main system and to cover future deterioration and replacement in the system and things of a kindred nature.

In further support of the theory it is urged that if the City is to defray the cost of laying mains it will result that there will be in the ground many miles of pipe from which there is no return on the capital invested. This loss of interest on the invested capital must be borne by the rate payers in general who derive no benefit from the mains laid. The whole theory is to take municipal water works out of the category of a profit-paying business and to place its conduct and management upon the same plane as ordinary governmental activities.

If the plan should be carried out it will have the effect of materially lowering water rates, making the cost of water its actual cost of production.

Another plan that has been followed is that whenever property owners desire the extension of mains the property owners shall pay the cost of such extensions into the city treasury and when upon a proper survey it is shown that a permanent annual income of a given per cent is being derived from such mains, the money shall be returned to the property owners paying the cost of the mains into the treasury.

A third plan is the assessment plan to which is coupled the plan of paying back to the assessed property owners money advanced by them for the cost of the extensions whenever the returns from the extensions shall warrant such return. This plan is different in theory from the straight assessment plan since

ultimately the cost is to be paid out of the profits of the business. It saves loss of interest on capital invested and obtains the capital invested from the returns of the business.

The value of this plan is that it provides a method for paying the cost for the laying of mains without the issuance of bonds and saves the interest on the investment. This plan likewise results in a lowering of water rates, but not so materially as in the straight assessment plan.

A fourth plan is for the City itself to lay the mains and entirely assume the cost thereof through issuance of bonds. The objection urged to this plan is that either the sinking fund and interest must be obtained from rates collected on the whole system, or must be paid through yearly taxation on property in general. If the entire system, including water mains, is to be paid out of future revenues it is urged that water rates during the early years of the municipal ownership of the system must necessarily be high and a burden on the rate payers.

I do not undertake to advise you on what is the best plan since that is a matter of policy which must be decided after a careful study of the subject from the standpoint of the rate payers, the property owners and the best plan for the financing of the municipal water project.

The Charter, as it is now framed, permits only of the fourth plan. Chapter II of Article VI provides for improvement of streets by levying the cost thereof upon property fronting on the improvement or upon a district benefited by the improvement. The street improvements, however, the cost of which can then be charged against private property, is defined in Section 26 of Chapter II as follows:

"The word 'improvement' shall be held to include grading, paving, planking, macadamizing, piling and capping; and the construction of repairs of sewers, cess-pools, manholes, culverts, drains, sidewalks and curbs."

In order for the Supervisors to levy assessments upon property for the construction of water mains the Charter must be amended so as to confer upon the Supervisors that power. The only method laid down by the Charter to construct a public utility is to pay the cost thereof out of current revenues or by the sale of bonds. Extensions can be made from the same sources or from

the surplus of the earnings. None of the foregoing plans are therefore available to the City except the latter plan. The Charter, however, may be amended so as to permit mains to be laid under the first, second or third plan outlined or any other plan that may be devised. The plan to be adopted, if a plan other than the one permitted by the Charter is to be followed, is a matter of policy to be determined by your Board and submitted to the people in the shape of a charter amendment.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Acknowledgments Must Be Taken by Recorder.

January 27, 1914.

Dear Sir: I am in receipt of your communication, asking my opinion as to whether or not the County Recorder must, upon demand, take acknowledgments.

In reply, I would refer you to Section 4139 of the Political Code, which reads as follows:

"It shall be the duty of the recorder, upon the payment or tender of the fees therefor, to take and certify the acknowledgment of all instruments authorized by law to be acknowledged."

Political Code, Section 4300c prescribes the fees for such acknowledgments.

Respectfully,

PERCY V. LONG,

City Attorney.

Recorder.

Motor Bus Permit—Without Adoption of General Ordinance Supervisors May Not Require Motor Bus Lines to Take Out Permit—May Regulate Rates of Fare.

January 28, 1914.

Gentlemen: I am in receipt of your communication of January 22nd, asking to be advised as follows:

"The Public Utilities Committee desires you to report legal powers of the Board of Supervisors to grant or refuse permits for the operation of motor buses as public conveyances on the streets of the city of San Francisco.

"The accompanying letter is self-explanatory and is the subject on which this request is based.

"The Committee is desirous to know what power the Board of Supervisors has to control rates of fare, service and operation of a motor bus line should one be operated."

From the letter accompanying your request it appears that your Honorable Board has been asked to issue a permit for seven years for the operation of a motor bus line upon certain designated streets, the City and County after the first six months to receive a percentage of the gross receipts.

Opinion.

The Charter (Article II, Chapter II, Section 1, Subdivision 7, provides that "the Board of Supervisors shall have power:

"7. To regulate the use of hackney carriages and public passenger vehicles, and to fix the rates to be charged for the transportation of persons or personal baggage."

Subdivision 15 of the same section gives the Board of Supervisors power "to impose license taxes and to provide for the collection thereof."

Under Subdivision 7, above quoted, and as a means of regulating the use of that particular class of public passenger vehicles, your Honorable Board has power to enact an ordinance requiring a permit to be obtained for the operation of any bus line in the City and County and to impose any reasonable requirements and restrictions. Under Subdivision 15 a license tax might be imposed on all such bus lines, and this tax might properly take the

form of a certain percentage of the gross receipts. In accordance with the terms of such a general ordinance a permit would properly issue for the conduct of this proposed motor bus line.

In the absence of such a general ordinance I am satisfied that your Honorable Board is without power to issue such a permit as is here requested. If your Board has the power to grant or refuse this permit on the terms proposed, you might equally grant or refuse another permit upon different terms. But the right to the use of the public streets is common to all, and such reasonable regulation and restriction as may be placed on that use must not discriminate between members of the same class. It follows that any regulation that may be adopted with regard to motor bus lines must operate upon all alike. A general ordinance such as I have suggested would not be open to this objection.

In answer to your second question I will say that under Article II, Chapter II, Section 1, Subdivision 7 of the Charter, above referred to, your Honorable Board has the power to make any reasonable regulation with regard to rates of fare, service and operation of all bus lines in the city and county.

Respectfully,

PERCY V. LONG,

City Attorney.

Public Utilities Committee,
Board of Supervisors.

Ordinance No. 1677, Imposing a License Tax on Hotel, Lodging, Boarding, and Apartment Housekeepers, Is Valid.

January 28, 1914.

Sir: I am in receipt of your communication requesting my opinion as to the validity of Ordinance No. 1677, "imposing a license on owners, agents, managers, or keepers of hotels, or boarding, lodging, tenement or apartment houses, or restaurants or places of refreshment, or persons engaged as caterers."

Opinion.

The ordinance reads in part as follows:

"Section 1. Owners, agents, managers or keepers of hotels, or boarding houses, or lodging houses, or tenement houses, or apartment houses, or restaurants, or places of refreshment, or persons engaged as caterers, shall pay a license tax as follows:

"For gross receipts not exceeding five thousand dollars per quarter, three dollars per quarter, and for every additional three thousand dollars or fraction thereof gross receipts per quarter, two dollars per quarter."

This ordinance was passed under the power granted to the Board of Supervisors by paragraph 15 of Section 1, Chapter II, Article II of the Charter, to impose license taxes and to provide for the collection thereof.

As the particular business of owning, managing or keeping an apartment house does not fall within the exemption provided in the second clause of the ordinance, it follows that the Board of Supervisors had the power to enact the ordinance.

I would refer you to the case of City and County of San Francisco vs. Larsen, 45 Cal. Decisions, p. 423, decided March 22, 1913, which held this same ordinance constitutional and valid in the case of a restaurant or hotel keeper.

In view of the foregoing, I am of the opinion that the ordinance in question is valid, and that you may enforce its provisions in the case of all apartment house keepers.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Removal of Overhead Electrical Wires From Exposition Grounds.

February 2, 1914.

Gentlemen: I am in receipt of your communication as follows:

"By direction of the Exposition Committee of the Board of Supervisors I am transmitting herewith copy of a proposed ordinance, entitled:

"'An Ordinance granting to Sierra and San Francisco Power Company the right of laying down underground pipes, wires and conduits in certain city streets and under Lobos Square in the City and County of San Francisco and an overhead transmission line westerly along Chestnut Street between Buchanan and Fillmore Streets in place of existing overhead construction on certain streets of said City and County of San Francisco now within the grounds of the Panama-Pacific International Exposition.'

"The Exposition Committee of the Board of Supervisors desires to be advised at your earliest convenience as to whether or not the passage of this proposed ordinance would grant to the Sierra and San Francisco Power Company any franchise rights which they do not now possess under their present franchise or ordinance of the Board of Supervisors, and whether or not it would confer or confirm any rights claimed by said Sierra and San Francisco Power Company under any franchise which may be in dispute.

"The Exposition Committee, before recommending to the Board of Supervisors the passage of this ordinance, desires to satisfy itself that the City's rights are fully protected, and would appreciate a prompt reply to the foregoing."

Opinion.

I shall assume, for purposes of this opinion, that the following facts exist with reference to the above request. The accuracy of said statement can doubtless be ascertained from inquiry of the City Engineer's office:

Prior to the amendment of Section 19 of Article XI of the Constitution of the State of California of October 10, 1911, the Sierra and San Francisco Power Company occupied, and ever since has and still does occupy, with its poles and electric wires (that is with overhead construction) the following streets of the

City and County for the purpose of transmitting electricity for lighting purposes: Buchanan Street from Beach to Bay; Bay Street from Buchanan to Webster; Webster Street from Bay to Francisco; Francisco Street from Webster to Fillmore, and Fillmore Street from Francisco to Chestnut, and that the occupancy of said streets is as stated in the proposed ordinance herewith enclosed.

The said Power Company has never received any franchise from the City and County for this construction, but relies solely upon the grant contained in Section 19 of Article XI of the State constitution as it read prior to the amendment of 1911.

The above streets are all included within the Exposition Grounds, with the exception of Chestnut Street, and it is now desired by the Panama-Pacific International Exposition Company that the said overhead construction be removed, and in lieu thereof that underground wires be installed on Buchanan Street from Beach to Bay Street and then continuing in the same direction, under and through Lobos Square to Chestnut Street, all of which is inside of the Exposition Grounds; and then along Chestnut Street, which is outside of the grounds, by overhead construction, to Fillmore Street, to join a transmission line of said Company extending southerly along Fillmore Street.

You inquire whether the granting of such a permit by your Board would grant the Sierra and San Francisco Power Company any rights which it does not possess under its present franchise, and whether or not it would confer or confirm any rights claimed by such Company under any franchise which may now be under dispute.

I know of no dispute existing between the said Company and the City with reference to any franchise. I am informed by the attorney for said Company that the Company's only claim at present is under the Constitution as it read before the amendment of 1911. Necessarily, the granting of this underground permit would be a grant of something which is not now owned by that Company, but it would simply be an exchange for a right which is already vested in the Company, to-wit, the right for overhead construction at present in existence.

The Supervisors might order such a change in the service of this Company and the Company would be required to comply

with such direction. It is to be noted that if the Company proposes to use this new construction for power and heating purposes as well as lighting, that this would constitute a new use, unless the Company did, prior to the amendment, so use these wires for power and heat in addition to light.

With reference to the proposed ordinance, a copy of which you submitted to me, I think that the same may be improved in the following respects:

1. It would appear that Section 1 thereof may possibly be construed as reserving to the Company the right to its present overhead construction in addition to and along with the right to substitute the new construction. This, of course, is not the intention of either the City or the Company.

2. Your Board has no authority to grant a franchise for the overhead construction on Chestnut Street without complying with the provisions of Sections 6 and 7, Chapter II, Article II of the Charter. I understand that the Company is willing to accept a temporary permit for this portion of the route.

3. Under the Constitution (Art. XI, Sec. 19) and the Charter (Art. II, Chap. II, Sec. 1, Par. 14; Secs. 5 and 7), the right is reserved to the municipal government to regulate charges for any such service and also it is provided that no such franchise shall be exclusive. These provisions might well be included in the ordinance.

I submit herewith a redraft of the ordinance which incorporates the above suggestions.

Respectfully,

PERCY V. LONG,

City Attorney.

Exposition Committee,
Board of Supervisors.

Interpretation of Section 15 (a) Compensation Act of 1913—If Injured Employee Elects to Have His Own Physician Employer Not Liable Therefor.

February 3, 1914.

Sir: I am in receipt of your recent communication, as follows:

"I would respectfully request that you give me an opinion in regard to the following matter:

"Is there anything under the Insurance Laws which relieves an employer of any liability on account of an injured employee should such employee have his own physician take charge of his case? In other words, cases at this hospital have been informed by various companies that unless they put themselves in the hands of the physician for the Insurance Company, they lose all right to collect damages therefor."

Opinion.

Section 15 of the Workmen's Compensation Act of 1913 reads in part, as follows:

"Where liability for compensation under this act exists such compensation shall be furnished or paid by the employer and be as provided in the following schedule:

"(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, as may reasonably be required at the time of the injury and within ninety days thereafter, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same."

If an injured employee elects to call in his own physician, he waives the right to receive medical attention at the expense of his employer.

Under no circumstances, however, does the matter of who is employed as physician by an injured employee affect his right to compensation under the Workmen's Compensation Act.

Respectfully,

PERCY V. LONG,

Health Officer. City Attorney.

Legality of Single Ordinance for All Licenses.

February 4, 1914.

Gentlemen: I am in receipt of your recent communication, inquiring as to the legality of an ordinance designed to consolidate all existing license ordinances under a single head. You state that it is the intention of the Board of Supervisors to repeal some of the present ordinances and to revise others, as well as to add new licenses on certain callings for which licenses are not at the present time necessary.

Opinion.

In my opinion such an ordinance is legal. See Law vs. City and County of San Francisco, 44 Cal. 384. The license taxes of Los Angeles are incorporated in a single ordinance. See Penal Ordinances of Los Angeles, p. 352, Ordinance No. 19,493 (New Series), approved December 30, 1909.

I beg to suggest the following as the title for such an ordinance:

"An Ordinance Imposing License Taxes on Certain Businesses, Callings, Trades or Employments within the City and County of San Francisco."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Interpreting Ordinance No. 1619.

February 4, 1914.

Sir: I am in receipt of your communication of January 28th, as follows:

"Mr. 'A' is the owner of a large tract of land in the City and County of San Francisco, which has been cut up into lots and offered for sale by the owner. Mr. 'A' for the purpose of selling this land, has opened up offices and promiscuously advertised the fact that he is selling this land.

"Messrs. 'B & Company' are in the same position as Mr. 'A,' except that the lands they offer for sale are situated outside of the limits of the City and County of San Francisco.

"I have demanded a license fee from each of the concerns above mentioned, which they have refused to pay. Will you advise me if I am interpreting Ordinance No. 1619 correctly when I demand a license from the parties above mentioned?"

Opinion.

Ordinance 1619, Section 2 thereof, reads:

"Every person, firm or corporation engaged in the business of buying or selling real estate or houses, or collecting rents, shall pay a license as follows:

"First: Those whose commissions or fees are not less than ten thousand (10,000) dollars per quarter, twenty-five (25.00) dollars per quarter.

"Second: Those whose commissions or fees are less than ten thousand (10,000) dollars and not less than five thousand (5,000) dollars per quarter, fifteen (15.00) dollars per quarter.

"Third: Those whose commissions or fees are less than five thousand (5,000) dollars per quarter, five (5.00) dollars per quarter."

It is a settled rule of statutory construction that every law is to be construed as a whole. While the owner of a tract of land who divides it into small parcels for sale, opens offices for that purpose and advertises generally, might well be said to be engaged in the "business of selling real estate," I do not think that this ordinance contemplates a license tax on such a business. You will observe that Section 2 above quoted provides for a tax varying in amount according to the amount of "commissions or fees" received per quarter. Commissions and fees are both words which indicate an allowance or compensation for transacting business or rendering services for another, and reading the ordinance with this fact in mind, it seems clear that its purpose is to impose a license tax on those engaged in the business of buying and selling real estate, etc., as agents for others.

I advise you therefore that Mr. "A" and Messrs. "B & Company" are not liable for a license tax under this ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Permit for Public Garage in Hotels, Etc.

February 4, 1914.

Gentlemen: I am in receipt of your communication of January 23rd, as follows:

"There is pending before the Fire Committee the application of L. B. Lapier for a permit to conduct a public garage in a building situate at No. 1355 Bush Street, which has been for several years last past used by the Pacific Taximeter Cab Company for garage purposes. The upper floors of the building are used for lodging purposes.

"The building was erected prior to the passage of Ordinance No. 746 (New Series), regulating the construction and maintenance of public garages. Section 5 of said ordinance provides that garages shall not be conducted in any part of a building used for hotel or rooming house purposes.

"The Taximeter Company recently vacated the premises and Lapier now wishes to occupy said premises as a public garage.

"The Committee wishes to be informed whether or not it can legally grant a permit to Lapier in face of the prohibition of Section 5 of said Ordinance No. 746 (New Series)."

Opinion.

The prohibition in Section 5 of Ordinance No. 746 (New Series) is in the following language:

"No part of any building which is used as a hotel, apartment house, rooming house or lodging house shall be used as a public garage for the purpose of storing automobiles."

This prohibition is in the most general terms. It absolutely forbids the conduct of a public garage in any building used for hotel etc. purposes, without any qualification. It has been urged because this provision is directly preceded by certain building regulations which are made applicable only to "all buildings hereafter erected and all buildings hereafter altered or changed," that the provision here in question refers exclusively to buildings hereafter erected or altered and does not extend to buildings in existence at the time of the passage of the ordinance. After giving the most careful consideration to this suggestion I am

unable to agree with it. As already pointed out the provision here involved is in the most general terms. It constitutes a separate paragraph, and between it and the provision referring to "buildings hereafter erected etc." another regulation is inserted which applies in terms to "all public garages." It is a cardinal rule of statutory construction that language is to be given its ordinary meaning, unless there is some strong reason for departing from this rule. To import these qualifying words from another paragraph would not result in giving the language used its ordinary meaning. It would result in doing violence to the ordinary meaning. I am satisfied therefore that when the Supervisors used the expression "any building" in this ordinance they meant any building. However, there is still another reason for interpreting this provision as I have. In the case of In re Dondero, 19 Cal. App. 66, a discrimination between existing stables and those not in existence was held unconstitutional. Statutes and ordinances are always to be given, if possible, a construction which will make them effective, and if this provision were given the construction contended for its validity would, in the light of the Dondero case, be very doubtful.

The provision in Section 2 "that the Board of Supervisors in the granting or refusal of such permit shall exercise a sound and reasonable discretion" must be read in connection with the rest of the ordinance. It does not mean that in every case the Board has an absolute discretion to grant or refuse a permit, but only that in such cases as it has that power it shall exercise its discretion.

It is immaterial that the building was erected before the passage of the ordinance or that the ground floor was formerly used as a garage. The right to regulate certain businesses under the police power carries with it the right to exclude those businesses from certain locations.

Ex parte Lacey, 108 Cal. 326;
Ex parte Quong Wo, 161 Cal. 220.

And this is true even though it may result in compelling the abandonment of the use of existing structures for the purpose for which they were built. The evil sought to be avoided here is the danger from fire in hotels, etc., where there are many people gathered together under one roof. The Board of Supervisors might reasonably determine that this danger was great enough to

warrant the absolute prohibition here enacted even though it might result in the destruction of some existing businesses. The latest expression of our California Supreme Court in this regard is to be found in Ex parte Hadacheck, 132 Pac. 584. In that case an ordinance of the City of Los Angeles was upheld which made it unlawful to establish or maintain any brick yard or brick kiln etc., whether established prior or subsequent to the passage of the ordinance, within a described district. In that case the petitioner had carried on the business of brick making for ten years. Says the Court, quoting from Ex parte Quong Wo (supra):

"There can be no question * * * that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists. * * * It is, of course, primarily for the legislative body clothed with this power to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with due regard for the rights of all parties, will not be disturbed in the Courts, unless it can plainly be seen that the regulation has no relation to the ends above stated, and on the following page the Court says:

"The right of the Legislature, in the exercise of the police power, to regulate, or, in the proper cases, to prohibit, the conduct of a given business, is not limited by the fact that the value of investments made in the business prior to any legislative action will be greatly diminished." Citing Mugler vs. Kansas, 123 U. S. 623; Grumbach vs. Lelande, 154 Cal. 684; Ex parte Quong Wo, supra.

I am satisfied for the reasons given that the provision here considered prohibits the conduct of a public garage in any building used as a hotel, etc., and that your Honorable Board in this case is without power to issue the permit requested.

Respectfully,

PERCY V. LONG,

City Attorney.

Fire Committee,
Board of Supervisors.

Amusement License for Restaurants Not Required.

February 5, 1914.

Sir: I am in receipt of the following communication under date of January 28th, as follows:

"Complaint has been made in this office that we are not enforcing City Ordinance No. 782 by applying the concert, amusement, or entertainment feature of it to cabarets and restaurants furnishing entertainment or amusement for patrons.

"In this matter I beg to be advised as follows:

"Where a cafe, saloon, saloon-restaurant, hotel, or hotel-restaurant pays a 'Liquor License' and a 'Hotel or Restaurant License' in addition thereto, is such a place also liable for a 'Concert Hall License' where an orchestra and entertainers are used to furnish entertainment for guests?

"If such places are liable for an additional 'Concert Hall License,' is there any distinction between places making use of a platform or stage for their performances, and places where the entertainers use the main floor and circulate amongst the guests?"

Opinion.

In People vs. Martin, 137 N. Y. S. 677, this precise question was considered. Section 1472 of the Greater New York charter requires a license to be obtained for all "public exhibitions." In this case the proprietor of Martin's Restaurant was prosecuted for conducting a so-called "cabaret show" in connection with his restaurant without obtaining a license. The test adopted by the Court in that case was this:

"Is this entertainment a public exhibition, within the scope of the Charter provision; i. e., was the primary purpose of the entertainment an exhibition for pecuniary gain, or was it given as an incident to some other legitimate pursuit?"

The Court found that it was purely a gratuitous entertainment furnished to the guests merely as an incident to the restaurant and that no direct profit was derived from it, but only the indirect profit of increased patronage. Such an entertainment, the Court held, was not such a "public exhibition" as required a license.

I am satisfied with the reasoning of this decision and so I advise you that so-called "cabarets" and restaurants furnishing entertainment to their guests gratuitously and as an incident to the restaurant business are not subject to a license tax under Ordinance No. 782.

This reply to your first question of course makes it unnecessary to answer your second.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Repair of Sidewalks on the Embarcadero—Owners of Property Liable Therefor.

February 5, 1914.

Gentlemen: I am in receipt of your communication of the 23rd ult., as follows:

"Frequent complaints are being received by this department concerning the impassable condition of side walks on the West line of the Embarcadero.

"This Board has already been advised by the City Attorney, under date of July 21, 1913, that the responsibility for the maintenance of the entire roadway of the Embarcadero rests with the State Board of Harbor Commissioners. We desire to request your opinion as to whether the sidewalks on the westerly line of the Embarcadero as well as the roadway thereof are under the jurisdiction of the State Board of Harbor Commissioners.

"In case the Board of Public Works has jurisdiction over the serving of notices upon owners of property facing the Embarcadero to repair their sidewalks, will you advise us whether this Commission can inaugurate, and continue to maturity, public proceedings, under Ordinance No. 2439 (New Series), of the Board of Supervisors, to construct sidewalks in front of the property of such owners as fail to comply with the notices of this Board."

Opinion.

My attention has been called in the communication above to an opinion rendered by me to your Honorable Board on July 21,

1913. The subject matter of that opinion was the extension of the Howard Street sewer, with particular reference to the payment of the expense of said extension.

I held that the liability of extending the Howard Street sewer across the easterly one-half of Embarcadero rested upon the Board of State Harbor Commissioners, according to the terms of Section 2525 of the Political Code.

As an incident to the elucidation of the question at that time presented to me, I referred to the Act of March 15, 1878 (Stats. 1877-8, page 2637), which authorized and directed the Board of Harbor Commissioners to widen East Street to 200 feet, the width of the roadway of which was to be fixed at 180 feet and a sidewalk on the westerly side at a width of 20 feet. The Act provided, and I so advised you, that the Board of Harbor Commissioners should construct and repair the said roadway of 180 feet. The question of the construction and repair of the sidewalk was neither presented nor discussed.

The Act of March 15, 1878, proceeds to say, after providing for the construction and repair of the roadway, as follows:

"The sidewalk shall be constructed and kept in repair in the manner provided by law for the construction and repair of sidewalks on other streets of the City of San Francisco."

The Act of March 15, 1878, is a special act with reference to the construction and repair of the roadway of Embarcadero and is a departure from the general law as contained in Section 2525 of the Political Code, which divides the responsibility for the construction and repair of other streets along the water front between the Board of State Harbor Commissioners on the one hand and the owners of the property and the City and County of San Francisco on the other.

The owners of the property fronting on Embarcadero and all other streets along the water front, over which the Board of State Harbor Commissioners has partial control and responsibility for construction and repair, are liable for the cost of construction and repair of the sidewalks on said streets contiguous to their property as well as one-half the cost of construction and repair of the pavement of the roadway, with the exception of Embarcadero, as provided in the Act of March 15, 1878.

Said owners may be forced to construct or repair such sidewalks by the Board of Public Works in the manner prescribed by law for such construction and repair in other cases.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Draying Firms Not Contemplated by Ordinance No. 942.

February 6, 1914.

Sir: I am in receipt of your recent communication as follows:

"Will you kindly advise me as to whether, in your opinion, draying firms hauling nothing but lumber, and likewise draying firms hauling building material such as gravel, cement, sand and hardware, come under the provisions of Section 1 of Ordinance No. 942."

Opinion.

Article II, Chapter 1, Section 11 of the Charter provides that "an ordinance shall embrace but one subject, which subject shall be embraced in its title. If any subject be embraced in an ordinance and not expressed in its title, such ordinance shall be void as to so much thereof as is not expressed in its title."

The title of Ordinance No. 942 is "Imposing a license on Transfer and Delivery Companies." The expression "transfer and delivery company" has the commonly accepted meaning of a firm whose business it is to carry baggage and parcels between depots and the consignees of said packages. It in no way refers to such firms as haul building materials, etc. Such firms are commonly known as "draying companies." If draying companies were to have been included by this ordinance they would have been mentioned in the title thereof.

You are therefore advised that draying firms hauling lumber or building material do not come within the purview of Ordinance 942.

Respectfully,

PERCY V. LONG,
City Attorney.

Tax Collector.

Bail Money Subject to Garnishment if Released Prior to Garnishment.

February 10, 1914.

Sir: On January 20th, 1914, I advised you that bail money was not subject to garnishment, having, in said opinion, followed prior opinions rendered by my predecessor, Mr. Lane, and also by myself. I have been advised by your office that in the case, concerning which you then inquired, the facts were that the garnishment was not served until after the bail money deposited by the defendant, whose money was garnished, had been released by order of Court. These facts were not before me when the aforesaid opinion was renedered and they present an entirely different question than was there considered.

The rule is that money in the custody of the Court, such as bail money, is not subject to garnishment, as that might interfere with the proper disposition thereof in accordance with the process of the Court. However, there is a well-recognized limitation upon this rule, which is stated as follows, in Volume 14 Am. & Eng. Ency. of Law, 2nd Ed., at page 818:

"If, however, the relation of the officer is so changed that the official obligation has become a personal liability, then he is subject to be summoned in respect thereto in his individual capacity."

The reason for this exception is that the Court is no longer concerned with such money after it has been finally ordered paid to the person owning the same. For instance, if a sheriff executes upon money to enforce a judgment, and then completely satisfies the judgment, and has a surplus on hand, this surplus, being the property of the judgment debtor, and in no way subject to the further order of the Court, may be garnished. (Lightner vs. Steinagel, 85 Am. Dec. 292.)

Money in the hands of an executor is not subject to garnishment. But if a final decree of distribution is made, and all that remains to be done is to pay the money over to the distributee, then this money might be garnished in the hands of the executor. (Harrington vs. La Rocque, 13 Oregon 344. See Weaver, Adm'r. vs. Davis, 47 Ill. 235.)

I am therefore of the opinion, under the authorities above cited, that the bail money having been originally deposited by the

owner thereof, and having been released prior to the garnishment, it then was the property of the defendant, and the County Treasurer was personally liable to the defendant for the return of that money. The Court was no longer interested in the disposition of the same, since it could not be forfeited, or taken for a fine. There is nothing in the reasoning upon which the general rule is based which would require such money to be free from garnishment proceedings.

You are therefore advised that the same was subject to garnishment.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Definition of Tenement House Act Explained.

February 14, 1914.

Sir: I am in receipt of your communication of January 28th, in which you ask to be advised as follows:

"City Ordinance No. 1677 imposes a license tax on owners, agents, managers or keepers of Tenement or Apartment Houses.

"Part IV of Ordinance No. 1008 (New Series) defines a tenement or apartment house as one which comes within the definition of the State Tenement House Law.

"The State Tenement House Act, approved April 10, 1911, in its language seems indefinite; and concerning it I should like to be advised for the purpose of determining my duty in the matter of collecting licenses.

"For the purpose of collecting license fees I beg enlightenment on the following points, to-wit:

"Is it necessary, in order to come under the provisions of this Act, that tenants must have a common right in the halls, stairways, yards, and water-closets, or is it merely required that they shall have a common right in *any one* of these conveniences?

"If a common right in only one of these conveniences is required in order to constitute a Tenement or Apartment House, would the

so-called Romeo Flats where each has a *separate entrance* but where common use is made of *a stairway* in order to reach the street, come within the definition of a Tenement or Apartment House?"

Opinion.

The definition of a tenement house in the State Tenement House Act is in the following language:

"A tenement house is any house or building, or portion thereof, of more than one story, which is designed, built, rented, leased, let or hired out, to be occupied or is occupied as the home or residence of four families or more living independently of each other, and doing their cooking upon the premises, or by three families so living and cooking and having a common right in the halls, stairways, yards, water-closets or some or any of them.

"Provided, that a building of not more than two stories in height, which is designed, built, rented, leased, let or hired out to be occupied or is occupied, as the home or residence of not more than four families living independently of each other, and so constructed that each section is arranged to be occupied as the home or residence of a separate family and each section having an entirely independent and separate entrance and stairway from the street or from an outside vestibule on the level of the first floor of said building and with no room, hall, bathroom, water-closet, kitchen or other convenience used in common by two or more families occupying said building, shall not come within the definition of a tenement house contained in this Act."

1. You will observe that where there are four or more families living independently and doing their own cooking on the premises, the house is a tenement house even if they do not have a common right in any of the conveniences mentioned. If there are only three families so living and cooking, then it is not a tenement house, unless they have a common right in the halls, stairways, yards, water-closets, or some or any of them. A common right in any one of these is all that is required.

2. In the case of a so-called Romeo Flat, if the building is not more than two stories and occupied by not more than four

families and each has a separate entrance from an outside vestibule on the level of the first floor then it is not a tenement house within the meaning of this Act.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Advertisements for Proposals for Supplies for Prisons.

February 14, 1914.

Gentlemen: I am in receipt of your communication of the 13th inst., as follows:

"The Committee on Supplies of the Board of Supervisors requests your opinion as to whether, in awarding contracts for supplies for prisoners, it is necessary to specify in the advertisement for proposals for such supplies 'each article required, the quality thereof, the quantity for each person and the existing and probable number of persons to be supplied,' in accordance with the provision of the Charter contained in Section 1, Chapter 3, Article II, it being the intention of this Board to advertise for such proposals in the same manner as for supplies for hospitals, public institutions and the other departments not otherwise specified, provided for in the Charter."

Opinion.

Section 1, Chapter III, Article II, of the Charter provides that "all contracts for goods, merchandise, stores, supplies, subsistence, or printing for the City and County, as well as for all subsistence, supplies, drugs and other necessary articles for hospitals, prisons, public institutions and other departments, not otherwise specifically provided for in this Charter, must be made by the Supervisors with the lowest bidder offering adequate security after publication for not less than ten days in the official newspaper; * * *.

"* * * In the case of contracts for subsistence of prisoners, the advertisement for proposals shall specify each article required, the quality thereof, the quantity for each person and the existing and probable number of persons to be supplied."

There is nothing in the Charter requiring similar detail in the advertisement for proposals for the subsistence of the other charges of the City and County, and apparently there exists or existed some reason why this requirement appears in the Charter in reference to the subsistence of prisoners and they alone.

I find that this provision was in the Consolidation Act, Section 69 thereof, which is as follows:

"All contracts for building and printing to be done for the said City and County, and ordinary supplies for subsistence of prisoners, must be given by the Board of Supervisors *to the lowest bidder offering adequate security, after due public notice published for not less than five days, in at least two newspapers in said City and County.* All contracts for subsistence of prisoners must be given out annually at a fixed price per day, not exceeding twenty-five cents per diem, for each person connected with the prison (Amended April 26, 1862, 466); and the advertisements for proposals to be published as aforesaid by the Board of Supervisors shall specify each article that will be required, the quality thereof, the quantity for each person, and the existing and probable number of prisoners to be supplied. All articles of food supplied for prisoners must be of a sound and wholesome quality, and subject to the inspection and approval of the keeper of the prison, and also of the President of the Board of Supervisors and Police Judge of said City and County, all of which must be expressed in the contract therefor to be entered into."

It was the custom, under the Consolidation Act, to make contracts for subsistence of prisoners at a certain sum per day for each prisoner. In order that the contractor should be firmly bound, the law required that contract should specify with particularity the quantity and quality and also for rigid inspection of food supplies.

The Charter framers did not insert in the Charter all of Section 69 of the Consolidation Act, and it was evidently their intention, expressed in the excerpts from the Charter quoted above, to provide an alternative method for contracting for supplies for the prisons maintained by the City and County. The alternative methods provided are: 1st—Contracting with the lowest bidder for the various articles required for said prisons, under the ordinary method provided in Chapter III for obtaining supplies for

hospitals, public institutions and other departments, and 2nd—contracting for subsistence of prisoners in the manner obtaining under the Consolidation Act, which, as already stated, comprehended the letting of such contracts at a certain sum per day for each prisoner.

The reason for observing the method outlined in class 2 above, does not exist when the Board of Supervisors proceeds to award a contract for supplies for prisons under the method provided for contracting for supplies for other institutions, and therefore it is my opinion that the Board of Supervisors may proceed to the award of contracts for the various articles and supplies necessary for prisoners without the formality of specifying, in the advertisement for proposals, each article required, the quality thereof, the quantity for each person and the existing and probable number of persons to be supplied, provided, of course, that the Board elects not to award such contracts at a certain sum per prisoner per day.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Damages Main Street—Change of Grade.

February 16, 1914.

Gentlemen: My attention has been called to Journal Resolution No. 1116 which is as follows:

"Whereas, The Board of Public Works has made its report to this Board of the damages sustained by the various persons claiming damages as a result of the change in the grade of Main Street, in accordance with the Ordinance of this Board, No. 2235 (New Series); and

"Whereas, Those persons claiming damages and whose property is situate outside of the assessment district have not been allowed anything on account of their respective claims for damages; and

"Whereas, This Board is advised that the said persons so denied damages will be actually damaged, but that the Board of Public Works in refusing to allow them any damages has been acting under the advice of the City Attorney to the effect that under a

strict and technical construction of the law said persons are not entitled to receive such damages; now, therefore, be it

"Resolved, That the City Attorney be requested to advise this Board in regard to the matters hereinabove stated, as well also to answer the following questions:

"1. If the damages are such as under the State Constitution must be paid, is the City any the less liable for the payment of such damages because of the fact that the Charter does not provide for their payment?

"2. Assuming that actual and special damages will be suffered by these persons as a result of this improvement, has the City the power to order such damages paid? If so, can they be made a charge against the assessment district formed in accordance with the above Ordinance, or must they be paid out of the General Fund?

"3. Have you advised the Board of Public Works that the damages claimed by these persons could not be considered because under a technical construction of the law they were not legally entitled to them, irrespective of the fact whether or not such persons actually will suffer special damages as a result of the improvement?

"Adopted February 9, 1914."

Opinion.

In answer to the first question I advise you that the City is not any the less liable for the payment of damages because of the fact that the Charter does not provide for their payment. The right to damages comes from the State Constitution and can neither be abridged nor taken away by the Charter. (See Article I, Section 14, of the Constitution.)

In answer to the second question, if the claimant suffered actual and special damages as a result of the improvement the City has the power to order such damages paid, otherwise the City would be powerless to proceed with the improvement. The Charter provision for a change of grade under the assessment plan does not provide for the payment of damages to property owners whose property lies without the boundaries of the assessment district. (See Section 2, Chapter VI of Article VI of the Charter.)

Since, however, the City has the right to proceed with the improvement and since the City must pay damages, it would follow that the damages can be paid out of any fund of the City available for that purpose.

In answer to your third question I have advised the Board of Public Works that the damages claimed by these persons could not be considered because of the provisions of the Charter which permit the Board of Public Works, in making up the assessments, to allow damages only to those persons having property fronting on the improvement and within the assessment district. (See Section 2 of Chapter VI of Article VI of the Charter.)

I do not desire to be understood as in any way indicating or holding that the damages claimed by the various claimants are such damages as must be paid to the claimants under the Constitution of the State or that the claimants, as a matter of fact, have suffered damages. I simply confine myself to answering the questions categorically as presented by you.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Advertising in Municipal Cars.

February 17, 1914.

Gentlemen: I am in receipt of your communication of February 11, 1914, requesting me to advise the Public Utilities Committee as to the legality or illegality of entering into a contract for advertising privileges in municipal cars in accordance with the proposition made in the correspondence accompanying your request. It appears that the Board of Public Works was authorized and directed by ordinance of the Board of Supervisors to enter into a contract for leasing the advertising space in municipal cars to the party offering the highest bid therefor. Thereafter the Board of Public Works called for bids for this privilege and received the bids of several parties. Not being satisfied with the bids the Board of Public Works rejected all the bids and called for bids anew. Again several parties bid for the privilege, the bid of the

R. C. Scott Advertising Company of $175.00 per car being the highest bid. The notice calling for the bids in part provided as follows:

"It is understood and agreed that the City and County of San Francisco now owns and uses forty-three passenger cars on its municipal railway and bids shall be made on the basis of so much per car per year for used cars and so much per car per year for any and all additional cars that may be purchased or used by the City and County of San Francisco or its municipal railway during the term of the contract."

The successful bidder now claims that the bid of $175.00 per car is not for the total number of cars now owned by the City in its Geary Street system, namely, forty-three cars, and the total number of the Union Street cars, namely, twenty-nine cars, purchased by the City, but that the bid was for the total number of cars actually used. However, the provision of the notice hereinabove cited provides that it was understood and agreed that the City now owns and *uses forty-three cars* and that bids shall be made on the basis of so much per car per year for said used cars.

My interpretation of that provision of the notice is that the bidder was required to bid on the basis of forty-three used cars on the Geary Street system and for the total number of additional cars either rented or purchased by the City. Inasmuch, however, as the Union Street cars are a much smaller car than the Geary Street car and the Union Street car line had not been taken over by the City at the time the bids were called for, the contention of the company that they should not be held to have bid $175.00 for the twenty-nine Union Street cars could possibly be conceded and that the term additional cars as used in the notice meant those additional cars of the same type and character as the Geary Street cars.

The company now offers to pay the sum of $8,025 for the privilege of advertising in the forty-three Geary Street cars and twenty-nine Union Street cars, figuring on the basis of actual used cars. This, however, falls below the amount of their bid figuring upon the basis of $175.00 for all cars owned by the City or figuring upon a basis of $175.00 per car for the forty-three

Geary Street cars and a pro rata adjustment on the same basis on the Union Street cars. It is therefore apparent that the company now desires to withdraw from their bid and to substitute another bid therefor. The question arises whether or not the Board of Supervisors can authorize the Board of Public Works to accept the compromise offered.

It is to be noticed that in the matter of selling privileges of this kind the Board of Supervisors is not limited by the provisions of the Charter relating to competitive bidding. Those provisions relate solely to the purchasing by the City of some article or the entering into contracts for the doing of public work. This is a case, however, of the City offering something for sale.

Subdivision 8 of Section 9, Chapter I, Article VI of the Charter provides that the Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors "Of any public utilities owned, controlled, or operated by the City and County, or which may hereafter be so owned, controlled or operated."

This is the only provision of the Charter concerning the operation of public utilities other than the public utility section which relates to the finances of a public utility. The Board of Public Works operates public utilities under the ordinances of the Supervisors, the Supervisors having the power to determine all matters of policy. In this respect the Supervisors occupy a position similar to that of directors of a corporation, the Board of Public Works being the managers of the utility. It is not incumbent on the Board of Supervisors in the first instance to have required that the advertising privileges in the municipal cars should be granted to the highest bidder after public bidding. The Board of Public Works could have obtained an offer from any person desiring the advertising privileges and the Board of Supervisors could have authorized the Board of Public Works to enter into a contract with that person on that basis. That being the case I am of the opinion that the Board of Supervisors can now consider the compromise offer of the R. C. Scott Advertising Company in the nature of a new offer for the advertising privileges and authorize the Board of Public Works to enter into a contract with the company on the basis of their compromise offer, or they can enter into any other arrangement with the company which meets with the approval of both the company and the Board of Supervisors.

This is a matter of judgment which should be determined by the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Hamilton Square May Be Transferred to Playground Commission.

February 20, 1914.

Gentlemen: I am in receipt of your request for an opinion of January 30, 1914, as follows:

"In consequence of requests received from Improvement Associations that the Park Commission transfer the whole of Hamilton Square to the Playground Commission, I have been requested to ask your opinion as to whether or not such a transfer would invalidate the City's ownership to Hamilton Square.

"An early reply is desired because of the urgent appeal to the Park Commission for the transfer of this square."

Opinion.

The Charter, Article XIVa, Section 9 provides that "the Park Commissioners shall have power to set apart either absolutely or for a definite period of time such parks and squares or portions thereof as they may see proper, other than Golden Gate Park and the Mission Park, for use as Children's Playgrounds and Recreation Centers, and the same shall, when so set apart for such use, be, to the extent of that use, under the exclusive control and management of the Playground Commissioners.

My understanding is that by resolution of your Board, passed June 16, 1911, that portion of Hamilton Square lying west of the westerly line of Pierce Street extended, was given over to the Playground Commission under authorization of the above section of the Charter.

I have not before me any abstract of title covering this property. However, it would appear from the statement contained in the decision of the Supreme Court of this State in Hoadley vs.

San Francisco, 50 Cal. 265, that title to the above property is to be traced from the old pueblo to the City and County of San Francisco, through the Van Ness ordinance and the confirmatory Acts of the State Legislature, of March 11, 1858 (Stats. 1858, page 52), and the Act of Congress of July 1, 1864, by which the title of the United States was relinquished and granted to the City for the uses and purposes specified in the Act of March 11, 1858.

The sixth section of the above Van Ness Ordinance provided that the City might reserve and lay out upon the lands west of Larkin Street and southwest of Johnston Street "public squares." The Act of March 11, 1858, recites that this was done, through the preparation of "a plan for the location of streets, public squares and lots for public uses," and that this plan had, by the City of San Francisco been declared to be "the plan of the City in respect to the location and establishment of streets and avenues, and the reservation of squares and lots for public purposes."

It would appear, so far as the above described record of the title to this property is concerned, that there is complete authority in your Board to make the transfer to the Playground Commissioners referred to in your request for an opinion. The property would still be used as "a public square for public uses," and might, under the above Charter section, be used as children's playgrounds and recreation centers.

If there is anything in the chain of title to this property which would forbid such a transfer to the Playground Commissioners, the data with reference to the same are not before me at this time.

Respectfully,

PERCY V. LONG,

City Attorney.

Park Commission.

Jefferson Square May Be Used for Electrical Station for Police and Fire Departments.

February 20, 1914.

Gentlemen: I am in receipt of a communication from your Secretary under date of February 11, 1914, as follows:

"I have been instructed by the Board of Park Commissioners to obtain from you an opinion as to whether the City and County of San Francisco would lose its rights to the ownership of Jefferson Square by virtue of the permanent use of a portion of the said square by the Fire Department of San Francisco for an Electrical Station building thereon, for the use of that Department. It was provided in the deed of gift to the City of San Francisco of Jefferson Square by the owner that the square must be used for all times for park purposes exclusively."

Opinion.

With reference to the above statement that "it was provided in the deed of gift to the City of San Francisco of Jefferson Square by the owner that the square must be used for all times for park purposes exclusively," I have not before me any abstract of title to the above property but my understanding is that the title to this property vested in the City and County from the old pueblo through the Van Ness Ordinance (Order No. 822), and the confirmatory Act of the State Legislature of March 11, 1858 (Stats. 1858, p. 52). Under the above ordinance and Act of the Legislature, Jefferson Square was set aside as a public square for public use and reserved for park purposes. At the last Charter Amendment election there was approved a certain amendment known and designated as Charter Amendment No. 32, which reads as follows:

"The Board of Supervisors shall have power and authority to select and set aside by ordinance, in that certain square or park known as Jefferson Square, bounded on the north by Eddy Street, on the south by Golden Gate Avenue, on the east by Gough Street and on the west by Laguna Street, a suitable and convenient site upon which may be erected by competent authority a central station for the fire alarm and police telegraph and telephone systems, said station when erected to be under the control and management of the joint commission of the department

of electricity, and said joint commission shall have power and authority, when said station is erected, to maintain across said square or park the necessary conduits, wires and lines leading to said station."

You will note that under this Charter Amendment authorization is given to the Board of Supervisors by ordinance to set aside a suitable site in Jefferson Square for the purposes specified in the amendment. This amendment was finally approved by the Legislature on March 28, 1913, and thereupon became a statute of the State.

While there is no authority in the municipality itself to change the use of property so dedicated as a park, it is within the power of the Legislature to so authorize such a change.

Mahoney vs. Board of Education, 12 Cal. App. 293;
Thayer vs. City of Boston, 206 Fed. 969.

The Act of the Legislature approving the amendment to the Charter constitutes such an authorization.

Mahoney vs. Board of Education, supra.

Assuming the chain of title to this property to be as above set forth you are therefore advised that the City and County would not lose its rights to the ownership of Jefferson Square by virtue of carrying out the terms of the above Charter Amendment. In the event that your Commission has information with reference to any deed, such as is referred to in your communication, I would be pleased to be informed of the same, that it may be considered in a further study of the above subject matter.

Respectfully,

PERCY V. LONG,

City Attorney.

Park Commission.

Spur Track at Municipal Asphalt Plant—Agreement to Construct.

March 2, 1914.

Gentlemen: I am in receipt of your communication of the 25th inst. enclosing track estimate and agreement, designated GMO 19088, dated January 30, 1914, between the Board of Public Works and the Southern Pacific Company, concerning the operation and construction of the proposed spur tracks of the Municipal Asphalt Plant, with the request that I advise your Honorable Board whether the City would be granting any undue privileges to the Railroad Company in allowing it the right of way described on the blue print as attached to your communication, showing the location of such proposed spur tracks.

Opinion.

Subdivision 3, Section 1, Chapter III, Article II, of the Charter empowers the Board of Supervisors to permit the laying down of spur or side tracks, and running cars thereon for industrial purposes only, etc., and prescribing that all the permits granted under the provision of said Subdivision 3 shall be revocable at the pleasure of the Board of Supervisors. Inasmuch as the City and County of San Francisco is one of the parties to said agreement, it is unnecessary to grant itself a permit for the privilege of laying down a spur track, and the City and County of San Francisco, in the execution of the contract referred to in your communication, would not be granting any undue privileges to the Southern Pacific Company, because the Charter itself provides that spur tracks may be constructed in accordance with Subdivision 3, supra.

I would suggest, however, that the contract contain the following clause: "It is understood and agreed by and between the City and County of San Francisco and the Southern Pacific Company that this contract shall be governed by the provisions contained in Subdivision 3, Section 1, Chapter III, Article II of the Charter of the City and County of San Francisco."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Proposed Laundry Ordinance.

March 5, 1914.

Gentlemen: I am in receipt of your communication of the 26th ult., as follows:

"I have been directed by the Fire Committee of the Board of Supervisors to submit to you the enclosed draft of a proposed ordinance to regulate laundries, with the request that an opinion as to its validity be furnished to said Committee on or before Thursday, March 5, 1914, at 2:00 p. m., if that be possible.

"Inasmuch as the City is at present without a laundry law, the committee is anxious to get one in shape at the earliest time."

Opinion.

Ordinances of a nature similar to the one submitted to me with your request have been the subject of varying decisions by the Courts of both the State of California and the United States.

In two cases decided by the Supreme Court of the United States (Barbier vs. Connelly, 113 U. S. 27; Sing Hoon vs. Crowley, 113 U. S. 703), an ordinance of the City and County of San Francisco, which prohibited the establishment, maintenance or carrying on of any public laundry or washhouse within certain designated limits without first obtaining a certificate from the Health Officer and Board of Fire Wardens, was held to be valid and a proper exercise of the police power vested in the municipality.

It must be admitted that the only question decided by the Court in the above cases was the validity of that part of the ordinance prohibiting the washing and ironing of clothes in laundries within certain limits between the hours of 10 o'clock at night until 6 o'clock in the morning of the following day.

The same Court, in the later case of Yick Wo vs. Hopkins, 118 U. S. 356, 30 Law Ed. 227, called attention to that fact and decided that Ordinance No. 1569 of the City and County of San Francisco, passed May 26, 1880, prohibiting the maintenance of a laundry within the corporate limits of the City, without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone,

was invalid, and reversed the decision of the Supreme Court of the State of California in the case of Yick Wo, 68 Cal. 303, and that of the Circuit Court of the United States for the District of California in the case of Wo See, 26 Fed. 471.

The Supreme Court of this State in Ex parte Fiske, 72 Cal. 125, took the view that the Supreme Court of the United States in the Barbier and Sing Hoon cases had passed upon and upheld the entire ordinance and also stated that the decision of that Court in the Yick Wo case, *as an authority,* went no further than to hold that, under a state of facts similar in character to the facts in that case, an ordinance similar in character to the one there passed upon would be invalid. The state of facts referred to was that it appeared from the proof in the Yick Wo case, which the Court looked into, that the ordinance was so administered as to exclude the subjects of the Emperor of China, *and none others,* from the business of keeping a laundry.

In the Fiske case, Section 40 of an ordinance of the City and County of San Francisco, entitled "To define the fire limits and making regulations concerning the erection and use of buildings," was upheld. It provided that no wooden building within the fire limits should be altered or repaired without the written permission of the Board of Fire Wardens, approved by a majority of the Committee on Fire Department and the Mayor.

The Supreme Court of the United States, in the case of Fischer vs. St. Louis, 194 U. S. 369, 48 Law Ed. 1018, decided May 16, 1904, held an ordinance valid which required a permit before a dairy or cow stable could be maintained.

In 1905, the same Court, in the case of New York vs. Van De Carr, 199 U. S. 550, 50 Law Ed. 305, held valid a section of an ordinance, which provided that "no milk should be received, held, kept, either for sale or delivered in the City of New York, without a permit in writing from the Board of Health and subject to the conditions thereof."

In re Dondero, 19 Cal. App. 66, the Court held that Section 197 of Ordinance 1008, the Building Law, was invalid. Two reasons were advanced by the petitioner:

1st. That the section made the right to construct and maintain a stable dependent upon the permission of the Boards of

Supervisors and Health, which might be granted or refused at the discretion of said boards; and 2nd, that it discriminated between stables in operation and such as might be established and maintained thereafter.

The Court dismissed consideration of the first proposition and confined its decision to the second, saying as to the first, that the authority to delegate such discretion to a board for that purpose is sustained by the great weight of authority.

In Ex parte Stoltenberg, 46 Cal. Dec. 103, the Supreme Court had the Tenement House Act of 1911 under consideration. The claim was made that the Act was invalid because it discriminated between tenement houses to be erected after the enactment of the law and those built prior to that time. The Court commented upon the cases of Ex parte Bohen, 115 Cal. 372; Los Angeles vs. Hollywood Cemetery, 124 Cal. 344 and In re Dondero, 19 Cal. App. 66. It said, concerning these cases, and the decisions therein, invalidating laws because they were discriminatory, that it might well be assumed that the same were correct, but that the question whether a classification of subjects for the exercise of the police power is proper is not to be determined upon any hard and fast rules, but must be answered after a consideration of the particular subject of litigation. The Court then proceeded to analyze the Tenement House Act, and found sufficient therein to justify its decision, holding that the Act was not invalid by reason of any discriminatory feature.

A fine exposition of the law relating to the police power of a municipality is contained in the case of In re San Chung, 11 Cal. App. 511. The City of Sacramento adopted an ordinance prohibiting the establishment or maintenance of a public laundry in any building used or occupied as a public hall, store, restaurant, lodging house or saloon, etc.

The Court upheld the ordinance in a very strong opinion, holding that it is not sufficient that the Court entertain a doubt as to whether the legislative body has exceeded its constitutional authority, but it must clearly appear that some fundamental right of the individual has been invaded and a personal privilege impaired or destroyed before an ordinance duly enacted can be declared invalid.

Again, that, while the laundry business is a common, ordinary

and useful occupation, yet, within the proper exercise of the police power, the operation of public laundries within the City limits could be entirely prohibited if such a measure could reasonably be said to promote the public health. The ordinance did not prohibit, but only regulated the laundry business, and it must be assumed that the evidence before the legislative body demonstrated that it was in furtherance of a beneficient design of the community. Under such circumstances, if they exist, the abstract right of the individual to pursue any lawful occupation, where it can be the most conveniently and advantageously carried on, must yield to the superior right of the public to be protected from the menace of disease.

In Ex parte Quong Wo, 161 Cal. 220, the Supreme Court held valid an ordinance of Los Angeles which provides for the division of that city into residential and industrial districts or zones. The ordinance prohibited the maintenance, among other businesses and occupations of public laundries and washhouses within a certain residence district.

The petitioner was a native of China, engaged for several years in conducting a laundry business, occupying premises under a lease. The Court said that there was nothing to indicate that the ordinance was intended to operate peculiarly against the Chinese or any other particular race, and that it was fair on its face, applying equally and uniformly to all engaged in the kinds of business enumerated. The case of Fischer vs. St. Louis was cited with approval, and the Court reviewed all the leading cases upon the point involved.

The substance of the decision is that the laundry business is of such a nature that it may be confined, in the lawful exercise of the police power, within defined limits in a city or town; and that the power to issue permits for the carrying on of a business may be delegated to a board of supervisors.

The District and Circuit Courts of the United States for the District of California, have taken views diametrically opposed to the views of the Supreme Court of this State, in the Stockton Laundry Case, 26 Fed. 611; Re Sam Kee, 31 Fed. 681; and In re Hong Wah, 82 Fed. 623.

In the first case the Court held that a public laundry is not a nuisance per se and cannot be made so by the legislative declara-

tion of a city council, and that an ordinance which prohibits the maintenance of a public laundry within the inhabited and inhabitable portions of the City of Stockton could not be sustained as a police regulation.

Judge De Haven, in the Hong Wah case, holds that the case of Re Hang Kie, 69 Cal. 149, cited with approval in the Quong Wo case, was overruled by the Supreme Court in the case of Ex parte Whitwell, 98 Cal. 73. The decision in the Hang Kie case upheld an ordinance of Modesto which prohibited the carrying on of any public laundry in that city, except within certain prescribed boundaries.

In the Quong Wo case the Court held that the Whitwell case did not overrule the Hang Kie decision. In view of the fact that the decision in the Quong Wo case is the latest expression of opinion by our Supreme Court, it may well be taken as conclusive upon the right of a municipality, not only to require a permit in order to carry on the business of a public laundry, but that such a business may be prohibited entirely within certain zones or districts. The Court undoubtedly was cognizant of the decisions of the Courts in the Hong Wah, Stockton Laundry case, and Re Sam Kee, because it said, on page 229, that "the correctness of the decision in the Hong Kie case has never, so far as we can ascertain, been questioned by this Court *or the United States Supreme Court,*" thus drawing a very marked distinction between the courts of the United States.

Therefore, an ordinance which seeks to regulate the business of conducting a public laundry or washhouse by requiring a permit from the Board of Supervisors, in order to pass the scrutiny of the Courts, must not discriminate between existing businesses and those to be established after the adoption of the ordinance; that is to say, it must be uniform and operate equally upon all those engaged in such business. It need not be uniform in the sense that that word is used in Section 11, Article I of the Constitution, which provides that "All laws of a general nature shall have a uniform operation," because, as was said by the Supreme Court, In re Zhizhuzza, 147 Cal. 324:

"This provision of the Constitution has no application to ordinances of a city of the character in question."

To the same effect is Hellman vs. Shoulters, 114 Cal. 146:

"The word 'uniform' in the constitution does not mean 'Universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the cases whose facts are substantially the same."

After examining the proposed ordinance, it is my opinion that it is free from the defect which induced the Court in the Dondero case to invalidate Section 197 of the Building Law, and that your Honorable Board has full authority and power to pass the same, and that when enacted, it will be a valid ordinance of this City and County.

I would suggest, however, that all of Section 2, after the word "discretion" be omitted, for the reason that it is unnecessary to specify the matters and things to be taken into consideration by the Board in the granting or refusal of a permit, and that the title of the bill be changed so as to read: "Providing for the issuance, by the Board of Supervisors, of revocable permits for the establishment, maintenance, operation or carrying on of public laundries or washhouses in the City and County of San Francisco."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Y. M. C. A. Cafeteria Subject to License Tax.

March 8, 1914.

Sir: I am in receipt of your communication inquiring as to whether, in my opinion, the cafeteria of the Young Men's Christian Association is liable to a license tax under the provisions of Ordinance No. 1677, "imposing a license tax on owners, agents, managers or keepers of hotels * * * or restaurants or places of refreshment."

Opinion.

A cafeteria is a restaurant, and as such is liable to a license tax under Ordinance No. 1677. Whether or not such a cafeteria is run for profit or merely as an adjunct to another institution, it is a restaurant liable to a license tax if it caters to the general

public. This the Young Men's Christian Association cafeteria does, even advertising its wares on billboards throughout the City.

You are therefore advised that the Young Men's Christian Association cafeteria is liable to the provisions of Ordinance No. 1677.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Corporation Yard Employees—Reorganization of Fire Department on Adoption of Charter—Members Thereafter Subject to Civil Service Rules.

March 11, 1914.

Gentlemen: My opinion has been requested as to the official rank and standing of certain machinists engaged in mechanical work at the Corporation Yard. Your communication of December 12th reads as follows:

"We have in this department a number of men engaged in mechanical work at the Corporation Yard, such as machinists, blacksmiths, painters, etc. These men were in the employ of the department at the time the Charter went into effect in January, 1900, in the capacities above stated and continued on in said service under the Charter.

"Former City Attorney Lane rendered an opinion in September, 1900, to the effect that these employees constituted a part of the force of the service of the department when the Charter went into effect and remain as such without civil service examination.

"In 1904 and at subsequent dates thereto, and at times when civil service eligible lists of hosemen were in existence, some of these employees were made hosemen in the department by the Board of Fire Commissioners, but continued to perform mechanical service at the corporation yard. Others of these employees were not made hosemen but continued also to perform the same mechanical service at the corporation yard.

"The question now arises as to what is the rightful standing of these members in the department: Whether they should rank as hosemen and entitled to all the rights thereof? Whether they

should rate as mechanics and entitled to the rights of hosemen, or whether they should rank as a part of the mechanical force of the department?"

Opinion.

When the Charter took effect in 1900, it contained the following provisions with reference to the Fire Department:

"The Board of Fire Commissioners shall immediately after their appointment and qualification proceed to reorganize the Fire Department in conformity with the provisions of this Charter. In so doing the Board shall make its appointments of officers and members from the persons constituting the force in the service of the Fire Department at the time this Charter goes into effect. Such officers and members shall not be required to pass any Civil Service examination. All future appointments and promotions shall be made subject to the provisions of Article XIII of this Charter."

This office in an opinion rendered by former City Attorney Lane, September 21, 1900, held that these employees constituted part of the force in the service of your department when the Charter took effect, and as such continued in their employment without the necessity of Civil Service examinations.

The Charter provision above provided for an immediate reorganization of the department. Officers and members were to be appointed by your Honorable Board from the force then in the service of the department and such appointments were to be made without conforming to the article of the Charter relating to Civil Service.

In that reorganization it therefore was within the power of your Honorable Board to appoint these men to whatever rank or position you then saw fit or to allow them to remain in the capacity in which they were employed as part of the force of your department. The rank, however, to which you so appointed them, or in which your Board allowed them to remain after completion of reorganization determined and continued to be their status thereafter unless changed in conformity with Article XIII of the Charter relating to Civil Service.

Those employees, therefore, remaining after reorganization in the capacity of mechanics so continued unless appointed to a different rank under the rules and regulations of Civil Service.

The appointments of 1904 are valid only if made in conformity to the rules of Civil Service. This fact your communication does not determine.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Operation of Street Opening Ordinance in Respect to the Pacific Gas & Electric Company.

March 12, 1914.

Gentlemen: I am in receipt of your communication of March 7, 1914, enclosing copy of a letter from George C. Holberton, manager of the San Francisco district of the Pacific Gas & Electric Company, in which he makes certain recommendations for adjusting the liability of the Pacific Gas & Electric Company under Ordinance No. 2201. You request my opinion as to the legality of Mr. Holberton's recommendations.

Opinion.

Taking up said recommendations seriatim, the first reads as follows:

"That Mr. Thompson and Mr. Keppelman, in connection with representatives of any other companies, meet with Mr. Donovan and thrash out the exact details to make this street opening ordinance a workable one, and so that this Company may be advised of your exact interpretation in order that everything may run smoothly and without any hitches."

There can be no question but that your Board is the authority charged with working out the details of the Street Opening Ordinance and any reasonable arrangements you may make with regard to the administration of its provisions and the enforcement of its requirements will be proper from a legal standpoint.

The second recommendation made by Mr. Holberton reads as follows:

"That having made a deposit of $2500 in gold coin, that the same be considered as provided in the ordinance, in lieu of individual deposits in each case, and that in view of your having this money on hand, that you bill us at the end of each month

for the openings made during that month, at $1.00 per opening, as provided. This bill will be checked up by us with our records of openings and if found correct, check will be drawn in your favor, thus to all intents and purposes replenishing the fund from month to month.

"This, I think, will simplify your bookkeeping as well as make it much more convenient for the companies having a great many openings during the month. I understood that this would have your approval, provided it did not conflict with the ordinance and that this suggestion would be referred to the City Attorney for his opinion as to whether it met with a reasonable interpretation of the ordinance."

In my opinion there can be no objection to having a monthly accounting and maintaining a deposit of $2,500 by a monthly check from the company of sufficient amount to cover all deductions made during the preceding month.

The third recommendation of Mr. Holberton reads as follows:

"During the time that the so-called 'Keppelman case' was in process of being tried, this Company, in common with others, made many openings in the streets. The ordinance having been upheld, I assume that there is due from this Company a sum of money equal to 50c per opening covering the irreparable injury to the street, and whereas we do not coincide as to this irreparable injury, still the ordinance having been upheld, as above stated, I presume that the money is due and we will be glad to transmit our check covering same.

"Had the ordinance not been contested, there would also have been due the sum of 50c per opening covering inspection, as 50c was to go into a fund known as the Inspection Fund, which was to be used to pay special Inspectors for this work. In view of the fact, however, that the ordinance was contested and the Board of Public Works did not hire these Inspectors, but the Company did maintain, at its own expense, Inspectors on the work, it seems to me unjust that we should bear a second burden of 50c an opening, and for which we did not receive the services of these special Inspectors."

From the standpoint of fairness to the Company and to the City it would seem that Mr. Holberton's recommendation points out an equitable adjustment, assuming, of course, that his state-

ment of facts is correct. However, I call your attention to the following language of Ordinance No. 2201:

"Section 9. The said City and County shall deduct from the deposit made for any excavation under the provisions of this Ordinance the sum of one dollar for each certificate under the authority of which the excavation was made. * * *"

"Section 12. One-half of all the moneys paid to the Board of Public Works under the provisions of this ordinance shall be deposited with the Treasurer to the credit of the General Fund as compensation for the permanent and irreparable injury to pavements by reason of excavations therein, and one-half of such moneys shall be deposited with the Treasurer to the credit of a special fund hereby created and designated 'Excavation Fund,' to be used to defray the cost of inspection made necessary by reason of such excavations.

"All costs of inspection shall be paid from said last-named fund, on a warrant drawn by the Auditor on demands approved by the Board of Public Works and returns of any deposit shall be made in like manner."

"Section 10. Each general deposit made pursuant to the provisions of this ordinance may be returned at any time to the person, firm or corporation making the same, * * * *after first making the deductions therefrom authorized by this ordinance.*"

Based on the foregoing language of the ordinance, which, of course, became effective from the date of its passage and not from the date on which the Supreme Court finally upheld it, I am of the opinion that you are required to deduct from any general deposit made by the Pacific Gas & Electric Company, the sum of one dollar for each excavation made during the period of litigation, the proceeds of which are to be deposited as aforesaid. The mere fact that no inspection of these particular street openings may have been made by the Board of Public Works during the period in which the ordinance was being contested in the Courts, does not in my opinion excuse the Company from making the deposit covering the same or permit your Board to return the amount which should have been paid out for inspection fees because that inspection was not made. When the Company undertaking to contest the ordinance, refused to comply with its provisions but made and paid for its own inspection during the

period in which the contest was pending, they did not thereby relieve themselves of any liability under the ordinance.

I am therefore of the opinion that you should require payment by the Company of the one dollar excavation fee for each opening made during said time in addition to such general deposit as may be made to cover future openings. With regard to the one-half of these payments which you must, under the provisions of the ordinance, deposit with the Treasurer to the credit of the Excavation Fund, but from which it seems likely that the City can derive little benefit as no costs of inspection were incurred thereunder, I suggest that you refer the Company's representatives to the Board of Supervisors, who may, if they see fit, authorize you to refund such one-half in final adjustment of the litigation.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Return of Forfeited Bail.

March 12, 1914.

Gentlemen: I am in receipt of your communication of March 7th, as follows:

"By direction of the Finance Committee I refer to you herewith petition for refund of bail, $250,000, of James P. Sweeney, and request advice as to whether this refund can be legally made."

Opinion.

This matter is governed by Section 1305 of the Penal Code, which reads:

"If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited. But if at any time within twenty days after such entry in the minutes the

defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just."

This provision, you will observe, limits the time within which the forfeiture may be discharged to a period of twenty days after entry in the minutes. It appears that the bail deposit in question was duly declared forfeited on December 4, 1913, and that the order vacating and setting aside the forfeiture was not made until March 5, 1914. A period of more than twenty days having elapsed, the Court, in my opinion, was without power to set aside the order of forfeiture, and I so advise you.

Respectfully,

PERCY V. LONG,

City Attorney.

Finance Committee,
Board of Supervisors.

Regulating Public Hauling.

March 13, 1914.

Gentlemen: I am in receipt of your communication of March 7, submitting two drafts of a proposed ordinance, requiring a record to be kept and filed weekly with the Chief of Police of all furniture, trunks and personal effects moved from place to place in the City and County. You ask to be advised with regard to your powers in this matter in several particulars.

Opinion.

1. In so far as these proposed ordinances undertake to control and regulate transactions between private individuals not regularly engaged in the business of hauling for hire, I am doubtful of their validity. To require anyone who may chance to transport the goods of another within the City and County to make out and file such a report as is here contemplated, might well be held to place an unreasonable and oppressive burden upon the individual. However, if the ordinance confines itself to the regulation of those who are in the business of hauling for hire, I believe that it will be within your power. Such persons who are in the business of hauling for hire are common carriers (Civil Code 2168), and

common carriers have always been subject to reasonable public regulation. The Board of Supervisors are invested with the entire police power of the State within the limits of the City and County, subject only to general laws. Odd Fellows Cem. Assn. vs. San Francisco, 140 Cal. 226. Under this power I believe that the proposed regulations if confined to common carriers would be valid.

2. The regulation requiring a written contract for every such transaction is entirely outside the powers of your Honorable Board. It would apparently serve no reasonable purpose and seems to be an unwarranted interference with individual liberty.

3. Under the Charter, Article II, Chapter II, Section 1, Subdivision 1, your Honorable Board is empowered

"To ordain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations."

As a reasonable means of enforcing this proposed ordinance your Honorable Board may require the Chief of Police to keep a register and issue blank forms as provided.

In Lawson vs. Connolly, 141 N. W. 623, the Supreme Court of Michigan upheld an ordinance requiring public moving van drivers to keep a record almost precisely similar to that required by the proposed ordinance here. I enclose a draft of an ordinance modeled upon that one, which is free from the objectionable features found in the ordinance submitted, and at the same time should accomplish every purpose for which those ordinances were designed.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Legality of Closing Portion of Eighteenth Street.

March 14, 1914.

Gentlemen: I am in receipt of your communication of the 3rd inst., enclosing a copy of Journal Resolution No. 1157 of the Board of Supervisors, as follows:

"Resolved, That the City Attorney advise this Board whether or not this Board can legally close Eighteenth Street, as provided in Resolution of Intention No. 10705 (New Series), adopted February 24, 1914."

Opinion.

Eighteenth Street from the Bay to Harrison Street was formerly known as Solano Street, and is of a width of one hundred and fifty feet from the water front to Illinois Street. In 1895, by Order No. 2833 of the Board of Supervisors, the name thereof, from Harrison Street to the Bay, was changed from Solano Street to Eighteenth Street.

Section 2524 of the Political Code gives to the Board of State Harbor Commissioners possession and control of that portion of the Bay of San Francisco bounded by the center line of certain streets lying contiguous to the water front, among which is mentioned Solano Street to Illinois Street to the water front line, established by the Board of State Tide Land Commissioners. Therefore, according to the wording of Section 2524 of the Political Code, the Board of Harbor Commissioners has possession and control of the outer seventy-five feet of Eighteenth Street, and the City and County of San Francisco has possession and control of the inner seventy-five feet of said street between Illinois Street and the water front.

Section 1 of Chapter III, Article VI, of the Charter, gives to the Board of Supervisors, whenever the public interest or convenience may require, full power and authority to order the closing up, in whole or in part, of any street, avenue, lane, alley, court or place within the City and County of San Francisco. The procedure necessary to be followed is contained in the subsequent sections of Chapter III.

There is no distinction made in the Charter between streets lying along the water front and those not so situated, and the determination of the Board of Supervisors as to the public in-

terest or convenience, requiring the closing up, in whole or in part, of any street, etc., is final and conclusive, and is not subject to review.

Therefore, you are advised that your Honorable Board has full power and authority to close that portion of Eighteenth Street mentioned in Resolution of Intention No. 10705 (New Series), adopted February 24, 1914, insofar as the jurisdiction of the City and County of San Francisco extends over the same.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Substitute Teachers Not Liable to Salary Deductions for Pension Fund.

March 20, 1914.

Gentlemen: I am in receipt of your communication, asking my opinion as to whether or not substitutes "serving during the absence of regular teachers, filling vacancies so caused for a few days or a few weeks" are subject to the burdens of the Act providing for the retirement and pension of teachers.

Opinion.

Section 13 of the Act provides that "every public school teacher who shall have served as a legally qualified teacher in public day or evening school teacher * * * for at least thirty school years * * * shall be entitled to retire. * * * Upon retirement * * * such teacher shall be entitled to receive, during life, an annual retirement salary of five hundred dollars."

Section 6 of the Act provides that to be eligible to receive the benefits of this Act a person shall have paid into the fund "an amount equal to twelve dollars for each year of service up to and including thirty years."

Obviously, substitutes who hold positions at irregular intervals and sometimes only for a very small fraction of a month are not "public school teachers" governed by the terms of this Act. It contemplates only those who teach throughout the year.

This being the case and since such substitutes derive no benefit from the fund in question they cannot be required to bear the burdens of a scheme in which they have neither interest nor profit.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Education.

Power of Election Board to Employ Carpenter.

March 21, 1914.

Gentlemen: In response to your communication enclosing a series of questions relative to the power and authority of your Honorable Board to employ a carpenter and the manner in which, and the fund out of which he is to be paid, if employed by you, after further consideration and further information I am of the opinion that the power to employ such carpenter is vested in the Board of Election Commissioners by the provisions of Section 1076 of the Political Code, giving to such Board the conduct, control, management and supervision of elections, and all matters pertaining to elections held within the City and County of San Francisco.

I am also of the opinion that the salary of a carpenter employed by you is not to be paid out of the Unapportioned Fee Fund, as provided for by Section 12, Chapter III, Article III of the Charter, but that the same should be paid as provided in Section 13, same chapter and article.

Holding this view it is unnecessary to answer your further questions for the reason that said questions are predicated upon Section 12, Chapter III, Article III, which section, as I have stated, does not control the payment of the salary of the carpenter to be employed by you.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Saloons Within 150 Feet of Churches or Schools.

March 23, 1914.

Gentlemen: I am in receipt of your communication of the 3rd inst., as follows:

"We respectfully request an opinion from you upon the following matter:

"Application has been made to this Board by Greer & Trau to open a saloon at the southwest corner of McCoppin and Valencia Streets.

"Section 6 of Ordinance No. 1038 (New Series) reads as follows:

"'Section 6. No permit shall be granted to conduct any newly established place or saloon where liquor is sold, to be consumed upon the premises, when the same is located within 150 feet of any church or school.'

"From the evidence presented before this Board it has been shown that a church owned a piece of property at this location and has sold one-half of the said lot, and still retains the other half, which is located within 150 feet of the proposed saloon location, and upon which the owners state will be erected a building devoted to social service work in which will be erected a chapel for church services.

"The points that we desire to be advised upon are whether or not this property, upon which no church has ever been erected, but which belongs to the church, comes within the meaning of the said ordinance, and whether the statements and declarations of the officials of the church that they intend to erect a building for social service work, upon one of the floors of which will be a chapel used for church services, comes within the meaning of said ordinance; in other words, a bare lot upon which there has been an announced intention to erect a church.

"In submitting this matter to you we desire to call your attention to the opinion of the City Attorney rendered on March 18, 1907, to this Board upon a similar question."

Opinion.

On August 15, 1913, I rendered an opinion to your Honorable Board on the question of whether or not the provisions of Ordi-

nance 777 prohibited the granting of a permit to conduct a kinetoscope parlor 200 feet from the front line of any church or school or within 100 feet of the property line on the sides or rear of any church or school.

In that opinion I advised your Honorable Board that Ordinance No. 777 applied only to church or school property when used as churches or schools. While the language of Section 6 of Ordinance No. 1038 is somewhat different from that of Section 4-a of Ordinance No. 777, in that there is no mention made in Section 6 of Ordinance 1038 as to the distance from the sides or rear of any church or school, yet the end to be accomplished by both ordinances is the same.

As I advised you in the kinetoscope opinion, "the context of the ordinance clearly indicates the purpose the Supervisors had in view in its enactment. The words 'church' and 'school' as used therein, immediately call to mind buildings used for church or school purposes and attended by worshippers in the one case and pupils in the other."

Ordinance No. 1038 (New Series) was enacted by the people, under the initiative provisions of the Charter, at an election held November 2, 1909, and Ordinance No. 777 was enacted by the Board of Supervisors on May 28, 1903. It is to be presumed that the people had in view the same end to be accomplished by the prohibitory section in Ordinance No. 1038 that the Supervisors had in Ordinance No. 777, enacted over six years before the election held in November, 1909.

Section 6 of Ordinance 1038 refers to churches or schools and not to church or school unimproved property. It is not my province to write into ordinances something not placed there by the legislative body of the municipality or by the people under the initiative, and therefore, basing my opinion on the wording of the ordinance, you are advised that Section 6 of Ordinance No. 1038 (New Series) refers only to church or school property when improved and used as such.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Ordinance Regulating Closing Time for Pawn Shops, Etc.

March 24, 1914.

Gentlemen: I am in receipt of your communication of March 18th as follows:

"Enclosed please find copy of proposed ordinance regulating the time of closing of pawn shops, etc., under consideration by the Police Committee of the Board of Supervisors.

"The Committee desires your opinion as to whether the Board of Supervisors has power under the Charter to enact an ordinance of this character, or is it discriminatory or an unreasonable interference with the rights of citizens?"

The ordinance submitted makes it unlawful to keep open any store, etc., for the transaction of the business of pawn broker, junk dealer, or dealer in second-hand goods, wares or merchandise other than furniture or household goods on any Sunday and certain enumerated holidays, or at any time except between the hours of 7:30 A. M. and 6:00 P. M. during the week and between 7:30 and 10:00 P. M. on Saturdays and the two weeks preceding Christmas day.

Opinion.

That pawn shop and second-hand dealers are, by the nature of their business, subject to the police power is too well settled for discussion. It is also unquestioned that in the proper case police regulation may take the form of forbidding the carrying on of certain businesses at prescribed hours or periods. Thus closing hours for saloons and liquor dealers have always been imposed. And in this State it has long been recognized as a proper regulation of the laundry business to forbid its conduct during certain hours of the night.

Ex parte Moynier, 65 Cal. 33;
Barbier vs. Connolly, 113 U. S. 27;
In re Wong Wing, 47 Cal. Dec. 162.

Ordinances forbidding the transaction of business by pawn brokers and second-hand dealers during certain hours have been upheld in the following cases:

City of Butte vs. Paltrovitch (Mont.) 75 Pac. 521;
Hyman vs. Boldrick (Ky.), 154 S. W. 369.

In the latter case the ordinance in question was quite similar to the proposed ordinance here. It provided that:

"Section 1. It shall be unlawful for any pawn broker, second-hand dealer, junk merchant or junk dealer to keep open his store or place of business for the transaction of any business pertaining to such occupations, or to engage in it, carry on or conduct any of said occupations, in whole or in part, or directly or indirectly, between the hours of 7:00 o'clock P. M. and 7:00 A. M., except from December 15th to December 25th of each year, and on Saturdays, when their said stores and places of business may remain open until, but not later than 10:00 o'clock P. M. for sale of their goods and wares, but for no other purpose."

In sustaining this ordinance the Court said, page 369:

"The proof for the City on the trial showed these facts: Thieves resort to second-hand stores, especially at night, to dispose of stolen goods, and, as they do this under cover of darkness, it is almost impossible to apprehend them. Housebreakers and other thieves follow their calling usually under cover of darkness, and when they get booty, try to dispose of it as soon as possible. If the second-hand stores are not allowed to remain open at night, they will be more easily detected, as they can safely carry things in darkness which the police could detect in the daylight; and when property has been once sold to a second-hand dealer it is often difficult to find the thief."

And again on page 370:

"The ordinance before us applies to all second-hand dealers, and obviously there is a reasonable basis for putting second-hand dealers in a different class from merchants handling new goods. If there were no places where second-hand goods could be sold, there would be little temptation for petty thieves to break through and steal them; and in a large city to require the traffic in these goods to be carried on in the daytime, and not at night, is a reasonable regulation in the exercise of the police power."

I agree with the reasoning of the Court in this case and I am satisfied that it is within your power to forbid the conduct of these businesses during the hours fixed in this proposed ordinance. However, I am very doubtful as to the validity of that part of the ordinance which prohibits the conduct of these businesses on Sundays and holidays. It is not readily apparent what purpose

would be subserved by such a regulation. Certainly, on the face of it, the danger from the pawning of stolen articles seems to be no greater upon Sundays and holidays than upon other days of the week.

In Ex parte Jentzsch, 112 Cal. 468, our Supreme Court held that Section 310½ of the Penal Code enacted in 1895, making it a misdemeanor to keep open and conduct a barber shop or to work as a barber on Sundays and holidays was invalid and unreasonable regulation. Said the Court in that case, at page 474:

"A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all."

In my opinion, while there is a substantial reason for singling out pawn brokers and second-hand dealers and forbidding the conduct of their business during certain hours of the night, it is very doubtful whether there is any such substantial reason for compelling them to close on Sundays and holidays.

I advise you, therefore, that it is within your power to prohibit the conduct of these businesses between the hours fixed in the ordinance submitted, but I suggest that it would be advisable to strike out that portion which forbids their conduct on Sundays and holidays.

Respectfully,

PERCY V. LONG,

City Attorney.

Police Committee,
Board of Supervisors.

Public Garages Within 200 Feet of a Public School or a Church.

March 25, 1914.

Gentlemen: I am in receipt of your communication of the 20th inst., as follows:

"The Fire Committee of the Board of Supervisors respectfully requests that you inform it at its next meeting on Thursday afternoon, March 26, 1914, at 2 o'clock:

"Whether under Ordinance No. 1864 (New Series), a public automobile garage may be constructed and maintained on the south side of Clay Street, on a lot of land, the westerly line of which is 191 feet 9 inches easterly from the easterly line of Van Ness Avenue. There is a church at the southeast corner of Van Ness Avenue and Clay Street. The entrance principally used by the congregation is on Van Ness Avenue, 29 feet southerly from Clay Street and 221 feet (measured on the sidewalk) from the westerly line of said garage and 230 feet from the nearest doorway of said garage. There is an entrance also on the Clay Street side of said church, 105 feet or thereabouts from the garage."

Opinion.

The law governing the erection of public garages, insofar as it prohibits them within a certain distance from a church or school, is contained in Section 13½ of Ordinance No. 746 (New Series) as amended by Ordinance No. 1864 (New Series) approved April 10, 1912, as follows:

"It shall be unlawful for any person, firm or corporation to hereafter construct and maintain within the City and County of San Francisco, within the boundaries of two hundred feet of the entrance of any school or church any public automobile garage."

The principal question to be here considered is the meaning of the language "the entrance of any school or church." It is admitted that on the determination of this question will depend whether the permit shall be granted or refused. The garage for which the permit is applied for is to be constructed on Clay Street, near Van Ness Avenue. On the southeast corner of the streets mentioned is a church having an entrance on Van Ness Avenue, and another entrance on Clay Street. Taking the distance given in your communication, it is 230 feet from the

westerly line of the proposed garage to the entrance principally used by the congregation on Van Ness Avenue, and it is 105 feet from the entrance on Clay Street to the westerly line of the garage.

It might be contended, as it undoubtedly is, by the applicant for the permit, that the entrance contemplated by the ordinance is the main or principal entrance used by the congregation on Van Ness Avenue and not the entrance on Clay Street. I am not advised as to the character of the entrance on Clay Street, but I assume from the tenor of your communication that it is an entrance used frequently by the congregation or others as another means of entrance to and exit from the church.

The ordinance is silent on the character of the entrance referred to, that is, there is nothing said as to its being the main or principal entrance. Even if it did, the character of the entrance might be changed from time to time by usage on the part of the congregation or by the rule of the church authorities and what might be a main entrance today would not be such tomorrow. Ordinances are not to be subjected in this way to influences beyond the control of the legislative body so that they may be operative one day and inoperative the next. Every effort should be made to sustain the uniform integrity of an ordinance to the end that it be effective at all times and under all conditions. Otherwise legislation intended to remedy certain conditions would be rendered nugatory in many instances.

Measured by what has been said, the language used in the ordinance respecting the entrance of a school or church, is not to be given any narrow or restricted meaning. The liberal construction, and the one evidently in the minds of the Supervisors, is that the construction of a public garage is prohibited within 200 feet of an entrance of any school or church for the manifest reason that the noise incident to the conducting of a garage, or any other reason moving the Supervisors to enact the ordinance, would be just as offensive to the senses of the parishioners of a church or the pupils of a school, whether the entrance was what might be termed a main entrance or a minor entrance. It is immaterial that the entrance is used or usable only by a small number of either parishioners or pupils; it is sufficient if it be an entrance.

A somewhat similar question was decided in the case of In re

McMonagle, 84 N. Y. S. 1071. There the Court decided that the phrase "entrance to the place where liquor is to be sold" must mean any entrance—front, side or rear.

It is my opinion that the entrance contemplated by the ordinance means any entrance, not necessarily what might be termed a principal entrance, but one used or usable by those attending either a school or church, and that under the ordinance a public garage may not be constructed and maintained on the premises mentioned in your communication.

Respectfully,
PERCY V. LONG,
City Attorney.

Board of Supervisors.

Permit for Excavating in Streets.

April 1, 1914.

Gentlemen: I am in receipt of your request for an opinion as follows:

"This Board is in receipt of numerous requests from public service corporations for permission to open streets for the purpose of extending its mains.

"Permission is granted by this Board in accordance with the provisions of Ordinance 2201 (New Series) of the Board of Supervisors.

"It is requested that you furnish this Board with an opinion as to whether or not it can grant permission to a corporation operating under a franchise to open the street for the laying of the main if the corporation contemplates laying this main the entire length of the block, some of which are 600 feet long."

Opinion.

Ordinance No. 2489 (New Series) of the Board of Supervisors provides that any corporation shall have the right to lay down, maintain and operate in the public streets and thoroughfares of this City pipes, wires and conduits and connections therewith

so far as may be necessary for introducing into and supplying said City and its inhabitants with gas and electricity for lighting, heating and power purposes upon certain conditions thereinafter stated.

There can be no question but that you have, under the authority of the foregoing ordinance, not only the right, but also the duty to grant permits for the purpose of opening streets to lay gas mains or electric conduits to applicants who comply with the terms of this ordinance and Ordinance No. 2201 (New Series).

Section 17 of Ordinance No. 2201 limits the grant of permits for *service* connections to a total length for any one service of 120 feet, which seems to conflict with the provisions of the later ordinance (No. 2489). From its language it would seem that said Section 17 was written in expressly to prevent corporations from making main extensions under the guise of service extensions before any permission was granted them so to do by the Supervisors.

However, since the passage of Ordinance No. 2489 (New Series), the reason for this limitation on the length of service extensions seems to have disappeared and the situation would undoubtedly be cleared by asking the Supervisors to repeal Section 17 of Ordinance No. 2201. At any rate this section does not limit you in granting permits for extensions of *mains* as Ordinance No. 2201 did not deal with main extensions at all, except where the Supervisors granted special permits to make them. As the law stands today I am of the opinion that there is no limit on the length of main extensions for which you are required to grant permits upon proper application. Permits for services, however, should be limited to 120 feet until some action is taken by the Supervisors on Section 17 of Ordinance No. 2201.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Meaning of the Word "Church" as Used in Section 6 of Ordinance No. 1038, New Series.

April 9, 1914.

Gentlemen: I am in receipt of your communication of the 31st ult., as follows:

"We respectfully request an opinion from you upon the following matter:

"Section 6 of Ordinance No. 1038 (New Series), reads as follows: 'Section 6. No permit shall be granted to conduct any newly established place or saloon, where liquor is sold to be consumed upon the premises, when the same is located within 150 feet of any church or school.'

"We would like to be advised as to whether or not a public hall such as the Knights of Pythias Hall, the lower portion of which is rented out for business purposes, and the second floor is rented out for fraternal, lodge and social purposes and on which floor the Second Church of Christ, Scientist, holds religious services on every Wednesday evening, twice on Sundays and conducts a Sunday school every Sunday morning, comes within the meaning of a church or school as laid down by Section 6 of the above ordinance."

The question of what constitutes a "church," within the meaning of laws of a nature similar to the section above quoted, has been presented and determined by the courts of jurisdictions outside of this State.

In the case of Starke vs. Prisque Isle Circuit Judge, 139 N. W. 29, the Supreme Court of Michigan held that a portion of a building in the business district, which had been previously occupied as a flour and feed store, leased by a religious order incorporated as a "Reorganized Church of Jesus Christ of the Latter Day Saints," did not constitute a "church" within the meaning of an Act providing that no license shall be issued to establish a new saloon within four hundred feet from the front entrance of a church, etc.

The Supreme Court of the State of New Jersey, in the case of George et al. vs. Board of Excise of City of Elizabeth, 63 Atl. 870, held that the fact that an organized body of persons known as "Faith Curists," who held meetings for Bible study and re-

ligious and secular instruction of the young in a building, the upper part of which was occupied as a dwelling and the downstairs rear portion of which was used for storage purposes, does not constitute such building or such body of persons a "church" within the meaning of the statute, providing that an inn and tavern could be licensed as "a new place" within the limit of 200 feet "ascertained by measurement from the nearest point of the church edifice."

The facts, as stated in your communication, show that the lower portion of the Knights of Pythias Hall is rented out for business purposes and the second floor is rented for fraternal, lodge and social purposes and on the same floor the Second Church of Christ, Scientist, holds religious services on every Wednesday evening, twice on Sunday, and conducts a Sunday school every Sunday morning.

The facts in the matter under discussion are almost identical with those in the two cases cited above and therefore it is my opinion that the Second Church of Christ, Scientist, is not a "church" within the meaning of Section 6 of Ordinance 1038 (New Series).

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Pensioned Police Officers Retired on Disability Entitled to Reinstatement When That Disability Ceases—Amount of Pension Depends Upon Rank.

April 13, 1914.

Gentlemen: I am in receipt of your communication of April 7, 1914, requesting my opinion on two separate questions, which will be answered in their order.

Opinion.

1. Your Board asks "whether a retired officer receives (as a pension) one-half of the salary as fixed by the Charter, or one-half of the salary received by him after the two dollars is re-

tained from his pay in accordance with the provisions of paragraph 9, Section 11, Chapter X, Article VIII of the Charter."

Paragraph 9, Section 11, Chapter X of Article VIII of the Charter reads as follows:

"The Treasurer shall retain from the pay of each member of the Police Force two dollars a month, which shall be forthwith paid into the Police Relief and Pension Fund."

Section 2 of Chapter X of Article VIII provides that:

"The Board of Police Commissioners may * * * retire and relieve from service any aged, infirm or disabled member of the Department who has arrived at the age of sixty-five years * * *. Such retired member shall receive * * * a monthly pension equal to one-half of the amount of the salary attached to the rank held by him three years prior to the date of his retirement."

In an opinion by Hon. Franklin K. Lane, ex-City Attorney, construing a similar charter provision as regards the pensioning of firemen, it was held that the amount of the pension depended upon the rank, and not the amount of money actually received. (Opinions of Franklin K. Lane, p. 336 ff.)

The said question on Section 2 of Chapter X of Article VIII of the Charter was likewise interpreted in my opinion to your Board on January 20, 1908. (Opinions of the City Attorney, 1908-09, p. 8.)

The ranks of police officers and the salaries attached thereto are set forth in Chapters V and VI of Article VIII of the Charter. Since Chapter X thereof provides that the monthly pension shall be one-half of such salary, you are advised that a police officer upon retirement is entitled to one-half the salary as provided in Chapters V and VI of Article VIII, irrespective of deductions retained by the Treasurer for the Police Relief and Pension Fund.

2. Your second query follows:

"If the Board of Police Relief and Pension Fund Commissioners should retire and relieve from service a Captain of Police for physical disability, as provided for in Section 3 of Chapter X of Article VIII of the Charter, and his place is filled by promotion from the next lowest rank, and at some subsequent time his disability shall cease, can he be restored to his former position and

pay, in view of the fact that his place has been filled and the Department has its full complement of captains, as provided for in said Section 2, Chapter V, Article VIII of the Charter, and if so, in what position does it leave the man promoted?"

I would call your attention to the last sentence of Section 3, referred to in your inquiry: "In case his disability shall cease his pension shall cease, and he shall be restored to the service in the rank he occupied at the time of his retirement." This, I believe, answers the first part of your inquiry.

If the place of a person retired on a pension has been filled by promotion, the person thus appointed has a vested right to his position, and can only be removed therefrom under the provisions in Chapter VII of Article VIII, with reference to suspensions, dismissals and disratements.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Preference Given to Articles of Local Manufacture.

April 14, 1914.

Gentlemen: I have been requested by your Board to advise you whether there is any legal objection to having inserted in contracts awarded by your Board, or the specifications therefor, the following stipulation:

"Preference will be given to articles of domestic production or manufacture, conditions of quality and prices being equal, and such preference will be given to articles of American production and manufacture produced on the Pacific Coast to the extent of consideration required by the public service thereof."

Opinion.

I see no use in inserting that portion of the suggested stipulation reading "and such preference will be given to articles of

American production and manufacture produced on the Pacific Coast to the extent of consideration required by the public service thereof." Such a stipulation is usually placed in proposals calling for bids by the United States and for the purpose of giving some particular locality where the goods are to be used a preference. All that is desired, however, as far as the City is concerned, is to give preference to goods produced or manufactured locally, conditions and quality and price being equal.

I see no objection to inserting the statement that "preference will be given to articles of domestic production or manufacture, conditions of quality and prices being equal." The Board of Public Works has that authority now. If prices are equal the Board can make its choice and there is no objection to the Board announcing beforehand that preference will be given to articles produced or manufactured locally where price and quality are equal.

I would suggest that the word "local" be substituted for the word "domestic." Domestic production usually signifies articles manufactured in this country. "Local" signifies articles manufactured in the immediate locality.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Legal Requirements of Marriage Certificates.

April 14, 1914.

Sir: I am in receipt of your communication of recent date asking my opinion as to whether or not the person who performs a marriage ceremony should, as a legal requirement, state his official title or position when signing his name to the certificate of marriage.

Opinion.

Section 70 of the Civil Code provides that "Marriage may be solemnized by either a justice of the Supreme Court, justice of

the District Court, justice of the peace, judge of any Police Court, City Recorder, priest or minister of the gospel of any denomination."

Section 73 of the Civil Code provides that "The person solemnizing a marriage must make, sign and indorse upon, or attach to, the license, a certificate showing: One. The fact, time and place of solemnization; and, Two. The names and places of residence of one or more witnesses to the ceremony."

By Section 74 of the Civil Code the person solemnizing the marriage must file the original of such license and certificate with the County Recorder within thirty days after the marriage.

The above Code section prescribes what the certificate of marriage must contain, and, in view thereof, you are advised that a person solemnizing a marriage is not legally required to state his official title or position.

Respectfully,

PERCY V. LONG,

City Attorney.

Recorder.

Employees in Department of Public Works Not Entitled to Salary During Illness.

April 16, 1914.

Gentlemen: I am in receipt of your communication of recent date, as follows:

"Mr. John J. Moriarty, Chief Stationary Engineer at the Asphalt Plant, has contracted sickness while working for the City, and has been unable to perform his duties during the months of February and March, 1914. He receives $150 a month and has been paid out of the Street Repair funds, Budget Item No. 73. Will you kindly give an opinion as to whether or not this Board is at liberty to pay him while sick."

Opinion.

In this connection I would refer you to my opinion in a similar case rendered the Department of Electricity January 31, 1910 (Opinions, 1910-11-12, p. 29).

In my judgment, the state of facts presented in your present communication warrants the same conclusion as reached therein, namely, that an employee of your Department is not entitled to his salary during the time of his illness.

In this connection, moreover, I would call your attention to Section 33 of Article XVI of the Charter, which reads as follows:

"No deputy, clerk or other employee of the City and County shall be paid for a greater time than that covered by his actual service."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Workingmen's Compensation Act Does Not Apply to Police Department.

April 16, 1914.

Sir: I am in receipt of your request for an opinion reading as follows:

"The question has been argued pro and con as to whether police officers of incorporated cities come within the provisions of the Workingmen's Compensation, Insurance and Safety Act, otherwise known as the Employers' Liability Act, and for a definite settlement of the question would thank you for a written opinion as to the true conditions under the Act in question, so far as the members of the police force and all other employees thereof, including patrol wagon drivers, hostlers, matrons, telephone operators and stenographers, of this City are concerned."

Opinion.

Referring to the Workingmen's Compensation Act I find that Sections 13 and 14 read as follows:

"The term 'employer' as used in sections twelve to thirty-five, inclusive, of this Act shall be construed to mean: The State, and each county, city and county, city school district and all public corporations therein, and every person, firm, voluntary associa-

tion, and private corporation (including any public service corporation), who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written, and the legal representatives of any deceased employer.

"The term 'employee' as used in sections twelve to thirty-five inclusive, of this Act shall be construed to mean: Every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service."

At first reading it would appear that the above sections are broad enough to cover all employees in your Department. However, upon a further examination of the Constitution and Charter I have reached a contrary opinion.

By the provisions of Article XI, Section 6 of the Constitution it is provided that chartered cities shall be subject to and controlled by general laws *except in municipal affairs* which are controlled exclusively by the Charter provisions. I take it that the management and control of the Police Department is solely a municipal affair.

Under the provisions of Chapter X, Article VIII of the San Francisco Charter, provisions are made for the pensioning of members of the Department who may become physically disabled in the performance of duty and for a monthly pension to be paid to the family of any officer, member or employee of the Department who may be killed while in the performance of duty, or who may die within one year from the date of injuries received while in the performance of duty.

While the above Charter provisions do not afford as large a measure of relief for death and disability as does the language of the Compensation Act, they appear to cover the question of municipal liability for injury to employees of the Police Department, and under the language of the Constitution above cited, would have exclusive application. The provisions of the Com-

pensation Act, which is a general law, would therefore be inapplicable. (People ex rel. Lawlor, vs. Williamson, 135 Cal. 415; Fragley vs. Phelan, 126 Cal. 383.)

In addition to the above compensation provisions of the Charter the City maintains hospitals for the prompt and careful treatment of the injured. The treatment which may be had free of charge at these hospitals appears to comply with the requirements of the Compensation Act so that it is unnecessary to determine whether the Act applies in this respect or not.

I do not think that the Charter and Compensation Act should be read conjointly where the Charter makes any provision at all for death or disability insurance. It would be confusing to attempt to apply the Compensation Act to the case of an injured stenographer employed by your Department and then if he or she died within a year from the date of receiving the injury, to say that the Charter provisions govern compensation to the family of the decedent. I think rather that the provisions of the Charter relating to compensation for injuries in the Police Department must be taken as the full expression of the intent of the framers of the Charter in reference to compensation for injuries suffered by employees of this Department, and that so long as these provisions stand the general law is inoperative in so far as this class of employees is concerned.

In conclusion I may add that this opinion is in entire accord with an opinion rendered by the attorney for the Industrial Accident Board last December in response to inquiries submitted to him by the Finance Committee of the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Chief of Police.

Permits, Department of Electricity.

April 18, 1914.

Dear Sir: I have before me your inquiry of the 9th instant reading as follows:

"I note in the daily press of April 7, 1914, a news item, viz.: 'Supreme Court decision on city streets knocks out amendment requiring corporations to get franchises in cities.'

"As you know this Department has been withholding permits from corporations who request authority to erect wires on poles, where it is shown, upon inspection, to be an extension of their system, in accordance with the opinions rendered by your office. If this newspaper item is correct, are we now instructed to issue permits for extensions of systems?

"I also desire to ask your valued opinion as to the interpretation of Section 3 of Ordinance No. 1564. We have always insisted that this section means that plans must be approved and permits issued before the work is installed. This has recently been disputed. A corporation claims that it can erect the work and file plan and obtain permit afterwards, and that, if our inspection discloses a violation of any law, same can be remedied when it receives notification to do so. If this contention is correct it would be bad practice as high tension pole leads might be run parallel to low voltage pole leads."

Opinion.

Your reference to the "Supreme Court decision" is undoubtedly to the case of Robert Russell, decided April 6, 1914, by the United States Supreme Court. The final conclusion of the Court in that case was expressed in the following language:

"As to the question of fact, the present case presents no controversy. It was averred, and not denied, that the works of the gas company were established and operated with the intent to furnish gas throughout the city, wherever needed, and that this enterprise had been diligently prosecuted; that a large investment had been made in a plant which was adequate to supply a much

greater territory than that reached by the distributing mains when the amendment of 1911 was adopted; that the expense of this installation made it impossible to supply at a profit the limited territory contiguous to the streets then actually occupied by the company; and that if it were confined in its service to that territory it would sustain a constant loss. The company, by its investment, had irrevocably committed itself to the undertaking and its acceptance of the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete.

"We conclude that the Constitutional Amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair this right, and that the company was entitled to extend its mains for the purpose of distributing its supply to the inhabitants of the city subject to the conditions set forth in the constitutional provision as it stood before the amendment."

The foregoing case involved the application of a gas company to lay underground pipes in the streets of Los Angeles. However, the Court gives as the grounds for its decision that the Constitutional Amendment of October 10, 1911, requiring express permission from the municipality for the establishing of works to furnish light, water, power, heat, transportation and telephone service, does not apply to public utilities having such works installed under the authority of the Constitution as it read prior to that date. It follows that the amendment would be equally inapplicable to a company having rights to overhead construction under constitutional Section 19, Article XI, prior to its amendment as aforesaid. (Pereria vs. Wallace, 129 Cal. 397.)

It should be observed that under this section prior to October 10, 1911, the privilege of using the public streets was granted to corporations or individuals, only for the purpose of supplying the City with "water or artificial light." It follows that the erection of poles or wires exclusively for power or telephone service is not affected by the Russell decision, and that corporations desiring to extend overhead construction for power or telephone service must first obtain authority from the Board of Supervisors.

I therefore advise you that upon receipt of an application for overhead construction permits for lighting purposes, you should grant the same upon ascertaining that the applicants were engaged in supplying artificial light in this City and County prior

to October 10, 1911. No permits for power or telephone lines should be granted however, unless the applicant shows authorization from the Board of Supervisors.

Your second inquiry involves the construction of Ordinance No. 1564. Section 3 of said ordinance reads as follows:

"The placing, installing, operating or maintenance of electrical wires, appliances, apparatus or construction in or on streets or sidewalks in the City and County of San Francisco shall be executed in accordance with plans and specifications *previously* approved in writing by the Chief of the Department of Electricity of said City and County; provided, however, that a copy of said plans and specifications as approved shall be placed on file in the office of the Department of Electricity."

The language of the above section clearly requires that the plans and specifications must be approved by you *before* the "wires, appliances, apparatus or construction" are erected. The ordinance further provides that the violation of any of its provisions constitutes a misdemeanor punishable by fine or imprisonment. I am of the opinion that the erection of such work without your approval first had as provided is a clear violation of the terms of the ordinance. The means of enforcing it are obvious.

Respectfully,

PERCY V. LONG,

City Attorney.

Department of Electricity.

Return of Forfeited Bail.

April 20, 1914.

Gentlemen: I am in receipt of your communication of the 17th inst., as follows:

"The Finance Committee has pending an application of George Rose, attorney, for refund of $1,000.00 bail in the case of Thomas Barlow; said bail being deposited April 16, 1913, in a grand larceny case. Barlow, the Committee is informed, is a bunko man,

and fled from the jurisdiction of the Court. Subsequently, May 2, 1913, bail was ordered forfeited.

"March 23, 1914, Barlow was arrested and is now in custody of the Sheriff. April 13, 1914, Judge Shortall vacated the order of forfeiture.

"The claimant, Rose, asserts that he was instrumental in securing the prosecution and conviction of Barlow, and went to considerable personal expense in connection with the extradition of Barlow and paying the expenses of the complaining witness, and therefore urges refund.

"Will you please advise the Finance Committee what its powers are in this matter, and make whatever recommendation you deem proper."

Opinion.

The facts stated in your inquiry bring it within the ruling which I furnished your Honorable Board in an opinion dated March 12, 1914, in which I advised you that Section 1305 of the Penal Code limits the time within which the forfeiture may be discharged to a period of twenty days after entry in the minutes of the Court, and that if not discharged within said period, the Court is without power to set aside the order of forfeiture.

Therefore you are advised that the law makes no provision for a refund of bail money under the circumstances set forth above.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Liability for Repairs to Building Occupied by Board of Health.

April 22, 1914.

Gentlemen: I am in receipt of a communication from Dr. William C. Hassler, Acting Health Officer of this City and County, requesting that I inform your Honorable Board as to who is responsible for repairs to a leak in the roof of a building occupied by the Health Department at 1085 Mission Street.

It appears from said communication that the above premises are under lease to the City from Mr. L. C. Coleman, and that a request was made of the owner to make the necessary repairs, and he claims that he is not responsible for the same. The clause in the lease regarding repairs to the building occupied by your Honorable Board is as follows:

"And the said party of the second part further agrees that it will pay all the water bills for water used upon said premises and will keep and maintain at its own cost and expense, the premises hereby demised and leased, in as good order, condition and repair as reasonable use of the same will permit during the said term, and the said party of the second part hereby waives all rights to make repairs at expense of the landlord as provided for in Section 1942 of the Civil Code of the State of California."

The party of the second part referred to above is the City and County of San Francisco, and it bound itself in the above clause to "keep and maintain at its own cost and expense the premises hereby demised and leased, in as good order, condition and repair as reasonable use of the same will permit during the said term;" and further, the City and County of San Francisco waived all right to make repairs at the expense of the landlord, as provided for in Section 1942 of the Civil Code.

As stated by the Supreme Court in the case of Polack vs. Pioche, reported in 35 Cal. 416, at page 422:

"A general covenant to repair is binding upon the tenant under all circumstances. If the injury proceeds from the act of a stranger, from storms, floods, lightning, accidental fire, or public enemies, he is as much bound to repair as if it came from his own voluntary act. * * * If the tenant desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant."

Therefore, it is my opinion that the City and County of San Francisco, under the terms of its lease with said Coleman, is liable for repairs to the building occupied by your Honorable Board, but that the liability of the City and County for such repairs does not extend beyond the building itself and, therefore, any repairs necessary to the sidewalk in front of said building must be made by the owner of said premises and not by the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Appropriation for Tourists' Association Purposes.

April 27, 1914.

Dear Sir: I am in receipt of your communication under date of April 11, 1914, as follows:

"There is pending in the Finance Committee a resolution introduced on behalf of the Tourists' Association, requesting an appropriation of $8,000 for printing pamphlets, booklets, etc., material for such pamphlets to be furnished by said Tourists' Association, and on the condition that the City will not be bound for the $8,000 appropriation unless $35,000 additional is procured from other sources, either by tax funds or private subscriptions, or both.

"The resolution further provides that this literature shall be distributed in a manner to be approved by the Publicity Committee of the Board of Supervisors.

"Question 1. The Finance Committee wishes to be advised if an appropriation of this character can be legally made from the tax funds of the City and County of San Francisco.

"Question 2. Has the City and County any legal authority to make appropriations for organizations other than municipal organizations created by law?

"Question 3. The Committee further wishes advice as to whether the inclusion of an appropriation for this or similar purposes in the budget could be designated as an 'Emergency,' and

whether if so included it would add to the difficulties of your office in sustaining the Emergency Tax over and above the dollar limit."

Opinion.

Question 1 is answered in the negative.

Question 2 is answered in the negative.

Answering question 3, I have to say that I do not believe an appropriation of this character could be designated as an "Emergency" and if so placed in the budget would very seriously hamper this office in sustaining the Emergency Tax over and above the dollar limit.

I take it from a reading of the resolution that its purpose is to secure from the Board of Supervisors a declaration of policy by way of encouragement, and financial aid, if this can possibly be rendered, in the matter of advertising the City and County of San Francisco and other counties contiguous to and near San Francisco Bay.

I cannot see any objection to the Board of Supervisors declaring the policy of the Board to be one of encouragement for the work of the Tourists' Association of San Francisco Bay and River Counties, nor can I see any objection to the Board of Supervisors expressing a desire to defray a portion of the cost of printing literature designed to advertise the City and County of San Francisco and the work of the administrative and other departments engaged in conducting the public affairs of the City and County.

The City and County of San Francisco is now engaged in issuing an official publication, known as the "Municipal Record," which is designed to present to the public a review of the proceedings of the various departments of the municipal government, together with such other items of interest concerning public improvements as might be of interest to the average reader. I see no reason why the Board of Supervisors could not authorize editions of this publication, which should be largely devoted to the purposes contemplated in this resolution. If the City can properly defray the cost of this publication as it is now doing I

see no reason why it cannot be used in aid of the purposes expressed in this resolution.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Proposed Ordinance Prohibiting the Establishment, etc., of Anatomical Museums.

April 27, 1914.

Gentlemen: I am in receipt of your communication as follows:

"At the request of the Public Health Committee, I herewith submit to you copy of an ordinance 'Regulating the establishment, maintenance and management of anatomical museums' and respectfully ask that you furnish said Committee with an opinion as to the validity and legality of the proposed law.

"Should you find that the ordinance submitted is not in legal form, the Committee asks that you draft another ordinance which would give the proper authorities the right to regulate the conduct of such museums.

"The contention is made that the ordinance in its present form does not 'regulate' and that the title is misleading."

Opinion.

The ordinance submitted to me with your communication is, as I understand, withdrawn from consideration, for the reason that another ordinance is proposed, a copy of which I herewith transmit to your Honorable Board.

I find that the title to the first ordinance, which was objected to as not regulating the business of anatomical museums, has been corrected in the second ordinance, and in my opinion the title of the second ordinance is correct, and free from any objection as to its being misleading.

In my opinion the second ordinance proposed will have the effect of prohibiting the establishment, etc., of anatomical museums in this City and County without a permit therefor from the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

A "Lease Contract" Is a Solvent Credit for Assessment Purposes.

April 28, 1914.

Sir: I am in receipt of your recent communication inquiring as to whether or not a so-called "lease" contract "for sales on the installment plan is a solvent credit" for assessment purposes, as provided for in Section 3628 of the Political Code.

Opinion.

The agreement between the parties to a contract that one or the other shall pay the tax is purely a matter of contract between the parties. In so far as the State is concerned, the tax on the instrument is payable by the person holding title thereto.

A solvent credit is, in the words of Section 3617 of the Political Code, a solvent debt "not secured by mortgage or trust deed, owing to the person, firm, corporation or association assessed." A lease contract is such a solvent credit, and is properly assessed to the person or firm to whom the debt is owing.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Sinking Test Wells for Integral Part Hetch Hetchy System—Bond Moneys May Be Used For.

May 4, 1914.

Gentlemen: I am in receipt of your request for an opinion under date of April 25th, as follows:

"Will you please advise the Finance Committee at your earliest convenience as to the legality of an appropriation of $2,500 for sinking test holes for water in the Richmond and Sunset Districts, the same to be charged against the Water Construction Fund of 1910.

"The City Engineer has reported and the Board of Works approved the construction of mains, reservoirs and appurtenances in the Richmond and Sunset Districts; this construction to be an integral part of the Hetch Hetchy Water System. For immediate use and necessity it is proposed to sink wells and ascertain if water would be available to give service to the districts now in need.

"The Board of Supervisors has approved this plan of development of water and the Finance Committee approves it along with the other members of the Board. The only question arising is:

"Can the $2,500 for sinking test holes be considered a proper charge against the Water Bond Fund?

"The Engineer recites that in his judgment this work will be an integral part of the Hetch Hetchy system."

Opinion.

On June 4, 1912, and September 4, 1912, I advised the Board of Supervisors that if any distributing system to be laid in the City and County of San Francisco could be properly considered to constitute an integral portion of the proposed Hetch Hetchy water supply system, for the construction of which the 1910 water supply bonds were authorized by vote of the people of this City and County, that the funds derived from the sale of such bonds could be used for the construction of such part of that system. Also, that whether such work would be a part of such proposed system is a matter for you to be advised upon by the City Engineer.

Basing my opinion upon the above statement that the City Engineer recites that in his judgment the proposed work will be an integral part of the Hetch Hetchy system, I advise that moneys derived from the sale of these Hetch Hetchy bonds may be used for the doing of such work.

Respectfully,

PERCY V. LONG,

City Attorney.

Finance Committee,
Board of Supervisors.

Application of Ordinance No. 2582 to Electric Lighting Companies.

May 8, 1914.

Gentlemen: I have before me your inquiry of April 29, 1914, reading as follows:

"I beg your valued advice and opinion as to whether or not Ordinance No. 2582, a copy of which I enclose, applies to the Pacific Gas and Electric Company, who has recently installed electric wires in buildings in the Chinatown district.

"For your information and guidance in forming your opinion, you will find enclosed copies of correspondence between this office and the Pacific Gas and Electric Company. You will note that defects in installations have been quite numerous. The installation of its service wires within buildings is no innovation. Our records show that the Pacific Gas and Electric Company and the old corporation, viz., San Francisco Gas and Electric Company, obeyed the provisions of Ordinance No. 1008 (New Series), Sections Nos. 271 and 272, which was recently rescinded by Ordinance No. 2582, which became effective March 1, 1914.

"On February 20, 1911, the Company filed a bond with this department, in accordance with Ordinance No. 1008 (New Series), Section No. 272, and registered, as required by Section 271, for the privilege of installing electric wires or apparatus during the fiscal year 1910-1911.

"On July 26, 1911, said Company obeyed the provisions of Ordinance No. 1008 (New Series), Sections Nos. 271 and 272, for the fiscal year 1911-1912.

"On August 26, 1912, the provisions of Ordinance No. 1008 (New Series), Sections Nos. 271 and 272, were obeyed for the fiscal year 1912-1913.

"In each case a $1000 bond (Massachusetts Bonding & Insurance Company) was filed as required by Section No. 272 of Ordinance No. 1008 (New Series)."

Opinion.

In view of the recent decision of the United States Supreme Court in the Russell case and the decision of the California Supreme Court in the Keppelmann case, I am of the opinion that Ordinance No. 2582 has only a modified application in the case of the Pacific Gas and Electric Company or of other Electric Light Companies engaged in business for supplying light and power in this City and County prior to the 10th day of October, 1911.

The Russell case (decided by the United States Supreme Court, April 6, 1914) held, in effect, that public service corporations having franchises vested under Section 19, Article XI of the State Constitution, as it read prior to October 10, 1911, could not be required to comply with additional conditions sought to be imposed upon the right to extend their lines, under authority of the amendment of said constitutional section, which became effective on the last named date.

The theory was that the company having contracted to supply service as a consideration for the constitutionally granted franchise could not be subjected to additional limitations upon its right and duty to supply that service, even in the matter of extensions.

There is also the additional consideration that public service corporations are exempt under the provisions of Article XIII, Section 14, from taxes and licenses of every kind upon their property except the state franchise tax. This was held to prohibit the imposition of a license tax on the telephone business.

> City and County of San Francisco vs. Pac. Tel. & Tel. Co., 135 Pac. 971.

The same principle applies to electric lighting companies.

I am therefore of the opinion that in so far as Ordinances

Nos. 2582 and 2637 purport to impose a license tax of $100.00 for the privilege of placing, installing or erecting electrical wires, fixtures, appliances, apparatus or construction, it cannot be made to apply to those companies who have already a vested right to make such installations or connections as a part of their business in supplying light and power. The contention advanced by the manager for the company, that his company is not engaged in the business of wiring houses or installing electrical fixtures except so far as is necessary to supply electricity to its consumers, I assume to be correct.

However, there are certain provisions of Ordinance No. 2582 relating to the registration, granting of permits, inspection of work and payment of inspection fees which it seems to me are applicable to all companies making electrical installations and connections. It was held in the case, In re Keppelmann, decided by the Supreme Court of California, January 8, 1914 (47 Cal. Dec. 65), that an ordinance requiring a permit for the installation of underground service connections and the payment of inspection fees was not a violation of the vested right of the Pacific Gas and Electric Company to use the streets of this City and County under the above cited constitutional section. In my opinion the same line of reasoning applies in the present case. If the provisions of Ordinance No. 2582 relating to the issuance of licenses and the payment of license fees as a condition precedent to operation be disregarded, Ordinance No. 2582 reads merely as a regulatory ordinance destined to protect the public from dangers of every sort arising from faulty electrical installation and connections and is clearly within the scope of the City's power to regulate such matters.

I am therefore of the opinion that upon application of the duly authorized agents of the Pacific Gas and Electric Company, you should register its name and place of business and issue permits for electrical connections and installations in compliance with Section B of Ordinance No. 2582; that upon completion of the work you should inspect the same in compliance with Section D of said ordinance; and that you are entitled to collect from said company inspection fees provided in Section O of said ordinance. You cannot, however, require them to present any license before issuing these permits, as they have already authority under their franchises to do this work subject only to reasonable regulation by the municipal department. I think that the Keppel-

mann case is sufficient authority for holding that the company can be required to pay inspection fees. The other provisions of the ordinance relating to the kind, character and quality of the work are also applicable.

Respectfully,

PERCY V. LONG,

City Attorney.

Chief, Department of Electricity.

Santa Rosa Avenue, Alemany to Capistrano Avenue, Is Not an Open Public Street.

May 9, 1914.

Gentlemen: I am in receipt of your communication of the 7th inst., as follows:

"By Resolution No. 28,979, Second Series, passed February 25, 1914, the City Engineer was requested to prepare a resolution of expediency for the paving of Santa Rosa Avenue between Alemany Avenue and Capistrano Avenue, and in the attached communication dated April 14, 1914, from the City Engineer, that official states that it is the opinion of his office that the roadway of the above mentioned avenue is not an open public street, and recommends that the matter be referred to you for an opinion.

"You are therefore requested to advise this Board whether the roadway of Santa Rosa Avenue between Alemany and Capistrano Avenues is an open public street."

Opinion.

On October 24, 1910, the Board of Supervisors passed Resolution No. 6781 (New Series), authorizing and instructing the City Attorney to institute condemnation proceedings against certain property for sewer rights of way. Two of the pieces of property set forth and described in said resolution were Parcels D & E, describing a strip or parcel of land sixty feet in width lying thirty feet on each side of the following described center line:

"Parcel D. All that strip or parcel of land sixty (60) feet in width lying thirty (30) feet on each side of the following described center line:

"Commencing at the point of intersection of the northwesterly line of Alemany avenue and a line passing through the point of intersection of the center line of Alemany Avenue and the center line of Croke Street and bearing north fifty-five (55) degrees forty-five (45) minutes west; thence along a line bearing north fifty-five (55) degrees, forty-five (45) minutes west to a point two hundred and eighty (280) feet at right angles northwesterly from the northwesterly line of Alemany Avenue; thence along a line bearing north fifty-five (55) degrees, fifty-one (51) minutes west and parallel with the northeasterly boundary line of the West End Map No. 1 for a distance of three hundred and one (301) feet, more or less to the boundary line of the Bernal property.

"Parcel E. All that strip or parcel of land sixty (60) feet in width lying thirty (30) feet on each side of the following described center line:

"Commencing at the point of intersection of the northwesterly boundary line of the Bernal property and a line passing through the point of intersection of the center line of San Jose Avenue and the center line of Jarnac Street and bearing north fifty-five (55) degrees fifty-one (51) minutes west and being parallel with the northeasterly boundary line of the West End Map No. 1; thence along a line bearing north fifty-five (55) degrees fifty-one (51) minutes west and parallel with the northeasterly boundary line of the West End Map No. 1 for a distance of seven hundred and ninety-five (795) feet, more or less, to the southeasterly line of San Jose Avenue."

Acting in accordance with said resolution a suit was commenced on the 18th day of November, 1910, in the Superior Court of the City and County of San Francisco, No. 32735, Dept. No. 1, against Jose Cornelio Bernal, as Executor of the last will and testament of Geronima De Bernal, deceased, Jose C. Bernal, D. B. McDonald, Carmelita J. McDonald, Elodie C. McDonald, et al., to acquire said property under proceedings in eminent domain. Certain proceedings were had and taken and on the 23rd day of January, 1911, Honorable James M. Seawell, Judge of the Superior Court, signed a decree of condemnation ordering, adjudging and

decreeing that an easement and right of way through, over, under and across the lots, pieces or parcels of land hereinabove described were condemned to the public use for the purpose of a sewer system of the City and County of San Francisco, and thereafter said Court made its final order and judgment of condemnation in said action and the City and County took possession of said sewer right of way under said decree and ever since that time the City and County has been and now is the owner of a right of way sixty feet in width for sewer purposes under and through said property.

The City and County of San Francisco never acquired the title to the fee in said property which would give said City and County the right to occupy the surface of said sixty foot strip for street purposes, and such being the case, the said sixty foot strip is not now a public street and cannot be used as such unless the owners thereof are willing to deed the same to the City and County of San Francisco for the uses and purposes of a public street, or it will be necessary for the City and County to condemn said property for said purposes and uses.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Ordinance No. 2582 Not Applicable to Telephone Motor Installation.

May 14, 1914.

Sir: I am in receipt of your communication of May 8th, reading as follows:

"Some days ago, I raised the question with the Western Electric Company why they did not report to this department their installation of some electric motors for the Pacific Telephone & Telegraph Company, as required by Ordinance No. 2582.

"Their Mr. Foley called and explained that they did not consider themselves bound by Ordinance No. 2582 as they are not master electricians or fixture men; that they only install work of this character for the Pacific Telephone & Telegraph Company

and are in no sense master electricians or electrical contractors. At the same time he stated that he believed that, if they were to do this work for a firm or individual, they would be liable.

"Ordinance No. 2582, Section 'A,' plainly says 'Every person, firm or corporation,' etc. Section 'N', as I understand it, exempts the companies mentioned from the necessity of reporting to this department each time they install for a client any of their apparatus as, for instance, the Telephone Company would not be required to file a report with this department and get its permission before installing telephones, neither would the messenger call box service companies, because the current supplied in the operation of these signal systems is not dangerous.

"On the other hand, the installation of motors, the question at issue, is on all fours with an electric light installation. If a registered electrical contractor did the work, he would, without question, have first reported the job to this office.

"The above information is set forth in order that you can intelligently understand the enclosed copy of correspondence.

"Your valued opinion as to whether or not the Western Electric Company is subject to Ordinance Nos. 2582 and 2636 (copies of which are enclosed) is requested."

Opinion.

I am satisfied that a reading of Section N of Ordinance 2582 exempts the Western Electric Company from the necessity of reporting to your office the installation of any wires, fixtures, appliances, construction or equipment of any telephone or telegraph system.

It is, of course, a question of fact whether motors constitute a part of such equipment or appliances. My impression would be that they do and that there is no legal obligation upon the Company to report.

I have communicated with counsel for the Telephone Company who states that the Telephone Company has an inspection made of this work by your officers before it is accepted and that a further inspection at the request of the Western Electric Company would be a needless duplication.

However this may be, I think that Section N of the ordinance covers the case in question and that the Western Electric Company is not liable to the penalties imposed for failure to report such installation.

Respectfully,

PERCY V. LONG,

City Attorney.

Chief, Department of Electricity.

Payment of City's Share of Stockton Street Tunnel Assessment.

May 15, 1914.

Gentlemen: I have before me the following communication from the clerk of your Board:

"The Board of Supervisors wishes to be advised before Monday as to what fund or funds may be used for payment of the City's assessment on the Stockton Street Tunnel.

"The Board wishes to know:

"1. Can this assessment be paid from Municipal Railway Bond Fund, 1913?

"2. Can the assessment be paid from the earnings of the Union Street Railway line?"

Opinion.

I.

I am compelled to answer the first question in the negative.

Section 10, Article XII of the Charter contains the following language:

"The proceeds of any sale of bonds shall be placed in the treasury to the credit of the proper fund, *and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished;* after which, if any surplus remains, such surplus may be transferred to the general fund, except that if such surplus exceeds the sum of two thousand dollars, then such surplus and the

whole thereof shall be transferred to the appropriate fund or funds to pay the interest and maintain the sinking fund or provide for the retirement of the bonded indebtedness in connection with which such surplus remains."

It seems quite evident from the above language that the proceeds from the sale of the 1913 Municipal Railway Bonds must be devoted *exclusively* to the objects and purposes mentioned in the ordinance authorizing that issue until such objects are fully accomplished.

Turning now to the language of Ordinance No. 2451 (New Series), under which said bond issue was authorized, I find the objects and purposes of said issue set forth as follows:

"That bonds shall be issued as aforesaid to the amount of three million five hundred thousand dollars for the purpose of the acquisition or construction of a public utility, to-wit: a system of municipal street railways over and along the public streets or rights of way from the Embarcadero to terminate at the Panama-Pacific International Exposition grounds and the Presidio Military Reservation; from various points in Market Street and in and through Stockton Street to the same terminals; from Market Street to a terminal in the Potrero District; on Van Ness Avenue and from such avenue along connecting streets to Church Street to convenient terminals; along California Street from Twenty-third Avenue to First Avenue and over connecting streets to Geary Street, and for such extensions and additions to the system as may be deemed necessary and to include equipment thereof, appurtenances thereto, and purchase of necessary lands."

I cannot construe the payment of the Stockton Street tunnel assessment as falling within the scope of any of the purposes recited in said ordinance. The only disposition provided for by the Charter section above quoted of surplus bond proceeds in excess of $2000, remaining in the treasury after providing for the specified purposes, is to transfer them to the interest and sinking fund account. In my opinion you are not authorized to use surplus proceeds for any other purpose, and moreover, the amount of any possible surplus could not be determined until the original objects of the bond issue are "fully accomplished."

There seem to be insurmountable legal objections, therefore, to the use of any part of the 1913 bond issue proceeds for payment of said assessment.

II.

The second proposition, to pay the assessment out of the earnings of the Union Street line, appears to me to be legally feasible.

Section 4, Chapter VIII, Article VI of the Charter, as amended in 1912, provides in relation to the payment for tunnel construction, as follows:

"The Board of Supervisors may, in its discretion, order that the whole or any part of the costs and expenses of any of the work or acquisitions in Sections 1 and 2 of this chapter mentioned, or the damages resulting therefrom, be paid out of the treasury of the City and County *from such funds as the Board of Supervisors may designate.* Such discretion may be exercised by the Board of Supervisors at any time prior to the time of making an assessment therefor."

In this case the Board of Supervisors, by approving the assessment against city lands have already determined that the portion of the cost of the work represented by the amount of that assessment shall be paid by the City and County. It remains only to designate the fund from which it shall be paid. In selecting the fund your Board must, of course, be governed by such Charter restrictions as are imposed upon the use of the various funds. I have already indicated that these limitations prohibit the use of the municipal railway bond funds, 1913 issue. There are perhaps two ways in which the payment could be legally made. One of these would be from the general fund, from which payment could be made by budget appropriation. The second, to my mind, would be the one suggested, namely, to use the Union Street railroad earnings.

With reference to disposition of receipts of municipally operated public utilities the Charter provides as follows:

"Article XII, Section 16.

"1. Whenever any public utility shall be operated by the City and County, the receipts from such utility shall be paid daily into the city treasury and maintained in a special fund set aside for such utility. The Supervisors may, from time to time, make appropriations from such funds for the following purposes:

"(a) For the payment of the operating expense of such utility;

"(b) For repairs and reconstruction;

"(c) For payment of interest and sinking fund on the bonds issued for the acquisition or construction of such utility:

"(d) For extensions and improvements;

"(e) For a reserve fund.

Reserve Fund.

"2. Whenever the Reserve Fund shall exceed one-half of the payment for operating expenses in the preceding fiscal year, the Supervisors shall have the power to appropriate such excess to the General Fund."

The construction of the railway line on Stockton Street was stated by the City Engineer at your last meeting to be a contemplated "extension" of the Union Street division of the municipal railway system. The tunnel is undoubtedly a necessary preliminary step to the completion of the Stockton Street line. It would therefore seem not inappropriate that the Union Street division should bear the City's proportion of the expense as determined by the assessment. I would suggest the following procedure, if you decide to use these earnings for such purpose, in order that there may be no question as to the legality of the use.

First: Create a reserve fund out of said earnings, as provided for in the last quoted Charter section, exceeding in amount one-half the payment for operating expenses during the present fiscal year. Then appropriate from said Reserve Fund to the General Fund the sum of $50,000 (or whatever the exact amount may be) for the purpose of paying this assessment. The assessment may then be paid out of the General Fund item so created.

I have assumed in outlining the above procedure that there are sufficient earnings from operation of the Union Street Railroad to first take care of items (a), (b), (c) and (d) in the order enumerated in Article XII, Section 16, of the Charter above quoted, and to permit the creation of a reserve fund in addition thereto of sufficient amount to cover the assessment. If the earnings should prove insufficient to cover all these items, in the

order mentioned, then clearly, your board can meet the assessment only by a budget appropriation.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Paving of San Bruno Avenue, Between Silliman and Felton Streets.

May 18, 1914.

Gentlemen: I am in receipt of your communication of the 12th inst. transmitting copy of Journal Resolution No. 1254 as follows:

"Resolved, That the City Attorney is hereby requested to inform this Board whether or not the City has been enjoined from doing the street work on San Bruno Avenue, between Silliman and Felton Streets."

Accompanying your communication were written objections and protests against any change in the contour of San Bruno Avenue from what it was prior to October 1, 1911, signed by the attorney for each and all of the protestants and by the protestants themselves.

In the protest signed by the attorney for said protestants reference is made to two actions, the first entitled: "John Schudel et al. vs. City Street Improvement Company" and numbered 43567 on the register of actions pending in the Superior Court of this City and County; the other action being entitled: "Hugo Stanke vs. City Street Improvement Company," number 43279.

Opinion.

I find on examining the record in said cases the following:

In the action entitled "John Schudel et al. vs. City Street Improvement Company, number 43567," that on September 4, 1912, a judgment was entered in said action following the verdict of the jury in favor of certain of said plaintiffs in said action in varying amounts. On the 31st day of January, 1913, the judgment and verdict were set aside by order of the court, and on April 17, 1914, a verdict was returned by another jury in favor

of the City Street Improvement Company, the defendant therein. In the Stanke case I find that a stipulation dismissing the said case, signed by the attorneys for the parties thereto, was filed on the 19th day of January, 1914.

The City and County of San Francisco was not made a party to either of said actions and therefore, this City and County is not enjoined from doing any street work on San Bruno Avenue, between Silliman and Felton Streets.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

New Positions Cannot Be Created by Budget Appropriations.

May 19, 1914.

Gentlemen: I am in receipt of Journal Resolution No. 1273, as follows:

"Resolved, That the City and County Attorney be, and he is hereby requested to inform this Board whether, in view of the provisions of Section 35 of Article XVI of the Charter of the City and County of San Francisco, the budget for the fiscal year 1914-15, which contains provisions for the creation of new positions and the compensation of the incumbents thereof, will require the affirmative vote of not less than fourteen members to pass the same."

Opinion.

Answering the query contained in said Resolution I have to say that "new positions and the compensation of the incumbents thereof" cannot be created by adopting a budget. The budget can merely provide salary funds for the various departments from which compensation can be paid.

In order to create new positions and fix the salaries therefor it will be necessary to follow Article XVI, Section 35 of the Charter, which provides the method by which additional deputies, clerks or employees shall be appointed by any officer, board or department. Application shall be made to the Mayor, who shall

investigate as to the necessity for such additional assistance, and if he finds the same necessary, he may recommend to the Supervisors that the Board authorize the appointment of such additional assistance; thereupon the Supervisors may, by an affirmative vote of not less than fourteen members, authorize such appointment and provide for the compensation of such appointees.

The budget ordinance for the fiscal year 1914-15 may be adopted by your Honorable Board in the manner provided in Section 9, Article II, Chapter I of the Charter, which provides that an ordinance may finally be passed by a majority of all of the members of the Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Public Property Cannot Be Exchanged for That Owned by Private Individuals.

May 20, 1914.

Gentlemen: I am in receipt of your communication under date of May 14th, requesting my opinion as to the power of the Board of Supervisors to transfer to private individuals real estate owned by the City and County in exchange for real estate owned by private individuals.

Opinion.

You are advised that there is no power in the Board of Supervisors to exchange real estate owned by the City and County for that owned by a private individual except such real estate as may be embraced in the Civic Center and covered by Charter Amendment No. 1, adopted on the 10th day of December, 1912, adding a new section known as Section 10, Chapter II, Article II of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Heirs Liable to Double Taxation on Estate Not Taxed in Hands of Executor.

May 20, 1914.

Sir: I am in receipt of your recent communication as follows:

"Under Section 3649 property that escaped taxation shall be assessed at double its value the next year if such property is in the *ownership* or under the *control* of the *same person*.

"A number of estates do not file an inventory or make correct returns, and the property is distributed before the next year's assessment. Under Section 3649 can I assess it at double its value to the heirs after it is distributed?

"Sometimes the inventory is filed after July, but before December. In that event could I, under Section 3881, add it to the roll after July 31st when the books are in the hands of the Tax Collector or Auditor?"

Opinion.

Section 1452 of the Code of Civil Procedure provides that "The executor or administrator is entitled to the possession of all the real and personal estate of the decedent * * * until the estate is settled, or until delivered over by order of the court to the heirs or devisees. * * *"

The Supreme Court of this State, in the Estate of Woodworth, 31 Cal. 595, at p. 604, held that:

"The title at the moment of the death of the testator, or intestate, vests in the heirs and devisees, subject only to the lien of the executor or administrator, for the payment of the debts and expenses of administration, with the right in the administrator of present possession, which continues till the estate is settled or delivered over to the parties entitled by the order of the Probate Court.

"The possession with the right to collect rents is only given to the executor or administrator to enable him to settle up the affairs of the estate in the mode prescribed by law."

You are therefore advised, in response to your first query, that for the purpose of taxation the estate of a decedent is under the control of the heirs or devisees from the moment of the death

of the testator, and if the taxes when due are not paid thereon while in the hands of the executor you are authorized to assess it at double its value after it is distributed.

Section 3881 of the Political Code provides that errors or defects in description or form in any assessment book, when they can be ascertained from the Assessor's maps or block books, or from the lists furnished by property owners may, with the written consent of the District Attorney (in San Francisco of the City Attorney) "be supplied or corrected by the Assessor *at any time after the assessment was made,* prior to the sale for delinquent taxes."

You are therefore advised that you may add such assessments to the roll after July 31.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Accidents in Playgrounds—Liability For.

May 22, 1914.

Gentlemen: I am in receipt of your request for an opinion as follows:

"In case of an accident to a visitor on the playgrounds, will you kindly inform this department to what extent the Playground Commission is responsible for same.

"We have asked for this opinion before, but would like to know just what our position is under the existing laws."

Opinion.

The request is in such a general form that it is impossible to determine just what character of accident your Honorable Commission has in mind.

I assume that you refer to a case where a visitor on the playground is injured by the children at play, for example, by being

struck by a ball thrown or batted by one of the children. There would be no legal liability upon your Honorable Commission for such an accident.

Respectfully,

PERCY V. LONG,

City Attorney.

Playground Commission.

Legal Proceedings Necessary to Bring Great Highway Under Control of Board of Public Works.

May 26, 1914.

Gentlemen: I am in receipt of the following Resolution:

"Whereas, many difficult engineering problems have developed on the Ocean Boulevard, or Great Highway, and

"Whereas, it is most necessary and essential that a magnificent boulevard or esplanade be constructed along the shore of the ocean, extending from the Cliff House to the County Line on the south; and

"Whereas, if such esplanade is to be built, the construction and control of said roadway should be under the jurisdiction of the Board of Public Works; therefore, be it

"Resolved, That the City Attorney be and is hereby requested to advise this Board as to the legal proceedings necessary to bring said roadway under the supervision and control of the Board of Public Works."

Opinion.

Under Section 1 of Article XIV of the Charter the Park Commission is given the exclusive management of the Great Highway and under Section 6 of the same article is given complete and exclusive control, management and direction, and the exclusive right to erect and superintend the erection of buildings and structures thereon, together with the exclusive management and disbursement of all funds legally appropriated or received from any source to be applied to the support and improvement of said Highway.

You are therefore advised that in order to bring the Great Highway under the supervision and control of the Board of Public Works it will be necessary to amend the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Merchandise Broker Distinguished From Commission Merchant.

June 4, 1914.

Dear Sir: I am in receipt of your recent communication inquiring as to your right to collect a license fee under Ordinance No. 752 in a case such as the following:

"Mr. 'A' has an office in an office building down town where he employs a force of clerks and bookkeepers to attend to his commission business. He has no stock of any kind on hand, except samples, and makes all his sales from a warehouse. For the business he does he receives a commission from the consignors."

Opinion.

Ordinance No. 752 imposes a graduated license on "every person, firm or corporation engaged in the business of buying or selling * * * on commission as broker for the owner or consignee thereof.

A broker is, strictly, a middleman between the parties to a sale, receiving as compensation a commission. He does not possess what he sells, but merely negotiates between the parties. (1 Words and Phrases, 879 ff; Hinckley vs. Arey, 27 Me. 362, 364; Southack vs. Lang, 52 N. Y. S. 687.)

A commission merchant may buy or sell in his own name, and is entrusted with the management, control or disposition of the goods to be bought or sold. (Edwards vs. Hoeffinghoff, 38 Fed. 635, 636; Delafield vs. Smith, 78 N. W. 170, 173.)

A factor is one who sells the property of others when he has such property in his possession, while a broker negotiates con-

tracts relative to property and makes sales of the same when he has no custody of the property. (Braun vs. City of Chicago, 110 Ill. 186, 194.)

Applying the doctrine enunciated in the cases above, I would advise you that if "A" has possession or control of the goods, he is not liable to a license tax as a merchandise broker; if, however, he merely receives and fills orders from a stock in the possession or control of the consignor, he is a merchandise broker, and is liable to a license tax in accordance with the provisions of Ordinance 752. The question is purely one of fact.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Assessment of Moneys in Litigation.

June 5, 1914.

Dear Sir: I have your inquiry of May 28th reading as follows:

"Section 3647 of the Political Code provides that, 'money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court.'

"Under a ruling of the U. S. District Court in the case of the Spring Valley Water Co. vs. City of San Francisco, in a dispute over the water rates, the court ordered the excess over the city rate to be deposited in banks in escrow subject to final decision of the case. The Water Company has not returned this money and it is escaping taxation; should I assess it to the banks holding it in escrow, as provided in Section 3647, or should I assess it to the Spring Valley Water Co.? If to the latter, have they the right to deduct debts they owe from this (see Secs. 3617-3647), and would the penalty provided in Section 3648 apply in a case like this?"

Opinion.

I am of the opinion that the money in question should be assessed to the several banks in which same is deposited in escrow

so that taxes thereon may be paid under the direction of the Court. It seems clear to me that the banks in this case stand in the position of a receiver for such moneys. Pending the determination of the litigation between the Spring Valley Water Company and the City and County of San Francisco the funds in question have been deposited there by order of Court or stipulation of the parties to the suit with the express understanding that the deposit shall be held subject to the Order of the Court. In my mind this establishes the banks as receivers of this money, whether they are designated as such by name or not.

If the money is assessed to the banks obviously the Spring Valley Water Company cannot be permitted to deduct debts owed by it from these funds.

I am of the opinion that the penalties prescribed in Section 3648 should not be applied unless you find that the property was "wilfully concealed, removed, transferred or misrepresented" by the party controlling the same during the past year. However, if this money has escaped assessment for the past preceding year it could be assessed at double its value under the provisions of Section 3649, which does not depend upon the negligence or wilful concealment by the owner for its operation.

San Luis Obispo vs. Pettia, 87 Cal. 499;
Biddle vs. Oaks, 59 Cal. 94-97.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Liability of City for Injury to Street Sweeper.

June 8, 1914.

Gentlemen: I am in receipt of your communication of June 2nd, as follows:

"On February 5th, Patrick O'Donnell, a street sweeper, was injured, while at work on the street, by an automobile belonging to Wyatt & Company. O'Donnell received treatment at the Emergency Hospital and left there after an hour's stay. Subse-

quently he went under the care of Dr. O'Connor and now presents a claim to the Board of Public Works for $104.00, loss of time at the rate of compensation fixed by the State Compensation Act.

"O'Donnell, through his attorney, George Connolly, made some claim upon Wyatt, but the matter has not been pressed.

"So far as the Finance Committee is advised, the Wyatt automobile ran into O'Donnell and Wyatt's attorney claims that O'Donnell was negligent and careless and that the Wyatt Company is therefore not responsible for any damage.

"The Finance Committee desires to know if the City is required to pay this demand of O'Donnell's, and if the City does pay it, can Wyatt be held responsible."

Opinion.

1. Section 12(a) of the Workmen's Compensation Act imposes a liability upon employers in the following terms:

"Liability for the compensation provided by this Act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employees by accident arising out of and in the course of the employment and for the death of any such employee, if the injury shall proximately cause death, in those cases where the following conditions of compensation occur:

"1. Where, at the time of the accident, both the employer and employee are subject to the compensation provisions of this Act.

"2. Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment as such.

"3. Where the injury is proximately caused by accident, either with or without negligence, and is not so caused by the intoxication or the wilful misconduct of the injured employee."

This case plainly falls within the terms of the Act and upon the facts stated in your communication the City's liability for loss of time is unquestioned.

2. Section 31 of the Workmen's Compensation Act reads:

"The making of a lawful claim against an employer for compensation under this Act for the injury or death of his employee

shall operate as an assignment to the employer of any right to recover damages which the injured employee, or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party. The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents is entitled, shall not be admissible in evidence in any action brought to recover damages, but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee or other person entitled."

Under this provision, if the City pays this claim, it will be entitled to enforce any right to recover damages which O'Donnell may have against Wyatt because of the accident.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Regulation of Steam Heating Business.

June 9, 1914.

Gentlemen: I am in receipt of your communication reading as follows:

"Will you please advise the Public Utilities Committee what power reposes in the Board of Supervisors to regulate rates and service of corporations or individuals supplying steam heat to consumers in this City. You were present at the discussion of this matter and are therefore advised as to the information the Committee desires."

Opinion.

1. Regulation of Rates.

There can be no question but that you have the power to fix the maximum or minimum or both rates to be charged by public

service corporations or other persons engaged in supplying steam for heating purposes to the inhabitants of this City and County.

Article II, Chapter II, Section 1 of the Charter provides that the Board of Supervisors shall have power:

"*To fix and determine by ordinance* in the month of February of each year, to take effect on the first day of July thereafter, the *rates or compensation* to be collected by any person, company or corporation in the City and County, for the use of water, *heat,* light, power or telephonic service, supplied to the City and County, or to the inhabitants thereof, and to prescribe the quality of the service. As amended November 5, 1907; approved by the Legislature November 23, 1907 (Statutes, Special Session, 1907, page 55)."

The language of the above section is self-explanatory and clearly defines your powers in the matter of fixing public utility rates.

2. Regulation of Service.

The same principle applies to the regulation of the quality of steam-heating service supplied and the location of appliances. The charter section just quoted provides that the Board may "prescribe the quality of the service." Paragraph 13 of the same section confers the power:

"Except as otherwise provided in this Charter, to regulate and control the location and quality of all appliances necessary to the furnishing of water, heat, light, power, telephonic and telegraphic service to the City and County, and to acquire, regulate and control any and all appliances for the sprinkling and cleaning of the streets of the City and County, and for flushing the sewers therein."

Under the law contained in this section you may order the removal or change in location of steam mains or services found to be unsafe to the public, an obstruction to municipal projects, or a danger to the pavements. I am of the opinion also that an action for damages would lie for injury to street pavements resulting from negligent installation of steam mains too near the surface.

3. Franchise Rights.

Public utility corporations engaged in the business of supplying steam for heating purposes have no franchise rights in the streets

of this city other than such rights as you may have heretofore granted by ordinance in special cases.

Article XII, Section 19 of the Constitution, prior to its amendment in 1911, made no provision whatever for steam heating service. The amendment of October 10, 1911, provided that:

"Persons or corporations may establish and operate works for supplying the inhabitants with such services" (includes heating service) "upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof."

The Board of Supervisors have, to the best of my knowledge, never made any attempt to grant regular franchises for steam heating service in this City and County. Ordinance No. 2489, which is a general ordinance relating to the installation of underground gas and electric mains, makes no provision for steam pipes. The general street opening ordinance of course applies to such installation of steam mains, but requires that the corporation seeking a permit shall first show legal authority to use the streets for the purpose contemplated. I am under the impression that the past practice has been for your Board to grant special permits of a more or less revocable character for steam pipe installations which served as authority for the subsequent grant of a street-opening permit by the Board of Works.

I conclude therefore that it is entirely within your power and discretion, (1) to prescribe by general ordinance or otherwise the conditions upon which steam mains may be laid in the streets, (2) to prescribe, within reasonable limits of course, the quality and location of the mains and other appliances, and the character of the service to be supplied, (3) to annually fix the rates, maximum or minimum or both, to be charged for the service supplied.

Respectfully,

PERCY V. LONG,

City Attorney.

Public Utilities Committee,
Board of Supervisors.

Auditor Liable for Payment of a Claim, the Illegality of Which He Has Knowledge, Even Though the Demand Be Regular Upon Its Face.

June 9, 1914.

Dear Sir: I am in receipt of yours of June 2, 1914, requesting my opinion as to the legality of the demand drawn in favor of Mrs. Susan E. Dougherty by the Fire Pension Fund in the sum of $125.00, for the month of May, 1914.

Susan Dougherty filed suit in the Superior Court of the City and County of San Francisco in the latter part of October, 1913, to compel the Board of Fire Pension Fund Commissioners to issue to her a pension in the sum of $125.00 a month as the widow of John Dougherty. The facts of the case are these: Mr. Dougherty was, on August 1, 1906, at his own request, retired from the Fire Department of the City and County of San Francisco for disability and upon his retirement was granted a pension amounting to $125.00 a month, under the provisions of Section 4, Chapter VII, Article IX of the Charter of the City and County of San Francisco, such sum being one-half of the salary held by John Dougherty three years prior to said date of August 1, 1906. John Dougherty never was returned to duty nor again reinstated in the Fire Department of the City and County of San Francisco and it is my opinion that on the 1st day of August, 1906, John Dougherty ceased to be a member of the Fire Department of the City and County of San Francisco by virtue of his retirement. It follows that on the date of his death, to-wit, on August 27, 1910, John Dougherty was not a member of the Fire Department of the City and County of San Francisco and had not been for some years prior thereto, and his widow was not entitled to receive a pension upon his death. These facts were set forth by me in the answer of the Board of Fire Pension Fund Commissioners to the petition for writ of mandate brought by Mrs. Dougherty in the Superior Court to compel the issuance to her of a pension. This petition was never brought to a hearing but was postponed from time to time at the plaintiff's request. Some time later the Board of Fire Pension Fund Commissioners voted to issue the pension to Mrs. Dougherty and thus made the question involved in the petition for a writ of mandate a moot one and the case was put off calendar.

The demand presented to you for your approval is no doubt

legal upon its face and bears nothing to warn you that the Board issuing it had not full authority so to do. However, as you are in possession of all the facts of the case I believe you would be authorized to reject the demand under the authority of Section 7, Chapter II of Article IV of the Charter, requiring the Auditor "to satisfy himself whether the money is legally due," inasmuch as the Board of Fire Pension Fund Commissioners were without power in the premises to grant the pension.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Contracts Acknowledged by One Party Entitled to Be Recorded.

June 9, 1914.

Dear Sir: I am in receipt of your communication as follows:

"Will you please inform me as to the following:

"When an agreement is executed by two parties, but acknowledged by only one of the parties:

"(1) Is the agreement entitled to record?

"(2) Should the Recorder index both names, or only the name of the party who has acknowledged?"

Opinion.

The answer to your first question is yes, and in reply to your second question you are advised that, as the instrument is entitled to be recorded, the Recorder should index both names.

Respectfully,

PERCY V. LONG,

City Attorney.

Recorder.

Lighting Contract.

June 10, 1914.

Gentlemen: You have submitted to me the specifications and bids for furnishing light, heat and power to public buildings for the fiscal year 1914-15. The specifications in question itemize the uses for which gas and electricity are to be furnished by specifying certain buildings in one group and all other buildings in another group for lighting purposes and a like division for power purposes. The Pacific Gas & Electric Company has submitted a bid on all the items of said specifications; the City Electric Company has submitted a bid on items 2 and 4 only and on both of these items is lower than the Pacific Gas & Electric Company. The latter company now claims before your Lighting Committee that its bid was submitted for the business as a whole and that particular items thereof should not be picked out and awarded to its competitor who is not in a position to bid on all the items. This contention is based, first, on the fact that the advertisement calls merely for separate bids for street lighting purposes and for lighting buildings, and on the further grounds that it submitted only one check to cover its entire bid, whereas, if the bid had been divisible separate checks should have accompanied the bid on each item.

In answer to this contention the City Electric Company relies on the provisions of Article II, Chapter III of the Charter which provides as follows:

"Any bidder may bid separately for any article named. The award as to each article shall in all cases be made to the lowest bidder for such article, and where a bid embraces more than one article, the Supervisors shall have the right to accept or reject such bid or the bid for any one or more articles embraced therein."

This company also relies on the language contained on page 2 of the specifications which reads as follows:

"**Electric Lighting:** Bids will be received for furnishing electric current for lighting purposes to each or any of the public buildings, offices, corporation yards, or places now being supplied with electric light for the year ending June 30, 1915.

"**Electric Power:** Bids will be received for furnishing electric current for power purposes to each or any of the public buildings,

offices, corporation yards or places now being supplied with electric power for the year ending June 30, 1915."

Page 3 of the specifications also contains the following language:

"It is also distinctly understood that the board reserves the right to award the lighting of the different buildings, offices, corporation yards or places above referred to separately with either gas or incandescent electric lights or both."

The questions submitted to me are:

1st. Can the bid of the Pacific Gas & Electric Company be accepted in part and rejected in part?

2nd. If the bid of the City Electric Company is accepted on items 2 and 4 can the Pacific Gas & Electric Company be held to its bid on the other items?

Opinion.

After some consideration I have come to the conclusion that both questions must be answered in the affirmative. While the language of the specifications, and likewise the intent of the Pacific Gas & Electric Company in submitting its bid in the form before me is not entirely free from doubt I think a reasonable construction of the language of the Charter and the language of the specifications requires that these items be considered as separate bids. Referring again to pages 2 and 3 of the specifications, "Each or any of the public buildings, etc.," to my mind implies "each or any" separately. "The right to award the lighting of the different buildings, etc., separately" hardly admits of any other construction. While the language of the advertisement is perhaps not entirely clear in this respect it specifically refers prospective bidders to "specifications detailing character of service to be rendered," which specifications it provides, may be obtained from the Clerk of the Board of Supervisors. Having bid upon these specifications I am of the opinion that the bidder will be bound by the language therein contained, nor is the mere fact that only one certified check accompanied each set of said specifications to my mind conclusive that the bidders intended to bid on them as a whole. I understand that it is a common practice where bids are submitted for any number of articles on a given list for each bidder to submit only one certified check covering the total deposit on his bids, for all articles.

It has been suggested that these specifications are identical with those rendered in the past years on which the Pacific Gas & Electric Company has been accustomed to bid for the entire business. In the first place I do not think that past practice in this regard can be taken as a basis for construing the specifications before us. In the second place I understand that this is the first year that there has ever been any competitive bidding. No letter of explanation accompanies the bid of the Pacific Gas & Electric Company to the effect that their bid was to be taken for the entire business, and despite their present contentions as to their intent in this regard, I see no legal reason for saying that their offer means anything more or less than what a fair construction of its language imparts to it.

I therefore advise you that in my opinion these items may be considered separately and that if the bid of the City Electric Company on items 2 and 4 is the lowest bid received for those items it is your duty to award the contract for the purpose specified in those items to the City Electric Company. If the bid of the Pacific Gas & Electric Company on the remaining items is the lowest bid received for these items it is your duty to award the contract for such items to them and I am of the opinion that you can hold them to the bids submitted thereon.

The only alternative is the one contained in the last paragraph of the specifications which reserves your right to reject any and all bids if the public good so requires and re-advertise. It is a matter of policy for you to decide whether you want to encourage or discourage competition by the arrangement of your specifications. If you believe that by reason of the peculiar position of the Pacific Gas & Electric Company in this community public interest can be best served by awarding it all the business at such rates as it is willing to make, your specifications should provide that bids will be received on the business as a whole. In the form before me each item appears to be open to competition.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

City Hospitals Cannot Be Located Outside of City Limits.

June 11, 1914.

Gentlemen: I am in receipt of your recent request for an opinion on the following questions:

1. Has your Board the power and authority to change the present location, within the City and County of San Francisco, of the Tuberculosis Hospital now situate on the site of the San Francisco Hospital?

2. Has your Board the power to place its location outside the City and County of San Francisco?

Opinion.

By Section 11, Chapter II, Article II of the Charter, your Board is empowered:

"To establish, maintain, and regulate, and change, discontinue and re-establish City and County jails, prisons and houses of detention, punishment, confinement and reformation, hospitals and almshouses."

This answers your first query.

In reply to your second question I would say that careful search has failed to discover any law or decision empowering your Board to locate a hospital outside the limits of the City and County of San Francisco.

I therefore cannot advise you that in the absence of such authority, your Board has power to establish a hospital outside the territorial limits of the City and County of San Francisco.

Respectfully,

PERCY V LONG,

City Attorney

Board of Supervisors.

Liability for Medical Expenses Under Workmen's Compensation Act.

June 19, 1914.

Gentlemen: I am in receipt of your request for an opinion under date of June 15, 1914, as follows:

"Civil Service laborer Patrick Norton, employed in the Pipe Yard of the Engineering Division of this Department, has requested compensation, in amount $43.30, for money expended by him for hospital treatment from March 27, 1914, to April 13, 1914.

"A copy of this invoice, together with a report concerning the status of Mr. Norton's case from Assistant Engineer, Mr. H. W. Kephart of the Engineering Division of this Board, are herewith enclosed together with communication from the Bookkeeping Department stating that Mr. Norton has already been paid the sum of $33.75 in accordance with the provisions of the State Compensation Act.

"Will you kindly inform the Board of Public Works what its liability is in the premises?"

Mr. Kephart's report reads:

"*Memo. to Mr. Leavy*:

"In connection with the attached bill of Patrick Norton for hospital attention, etc., I would state that Norton when hurt was sent to the Emergency Hospital and from there was sent to the German Hospital, which I believe they did at Norton's request. He was not sent to the City and County Hospital.

(Signed) H. W. Kephart."

Opinion.

The liability of the employer for medical treatment is imposed by Section 15(a) of the Workmen's Compensation Act, in the following language:

"Where liability for compensation under this Act exists such compensation shall be furnished or paid by the employer and be as provided in the following schedule:

"(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, as may reasonably be required at the time of the

injury and within ninety days thereafter, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same."

The Industrial Accident Commission has already been called upon to interpret the meaning of this provision in the case of Gardiner vs. State Printing Office, reported in Decisions of the Industrial Accident Commission, Vol. 1, No. 2, pp. 4-5. I quote from that decision:

"It appears from the testimony that the employer knew almost immediately of the injury to the applicant, and that the employer had the opportunity of providing necessary medical and surgical treatment, but neglected to do so. The obligation to furnish this treatment is fixed by Section 15(a) of the Workmen's Compensation, Insurance and Safety Act. It is not necessary in all cases that the employee should request the service required. The reasonable opportunity to furnish the service upon notice or knowledge of the injury is all that is required, and neglect to provide the service gives the injured employee the right to engage the service at the expense of the employer in a reasonable amount."

Under this decision it is the duty of the employer to furnish all necessary medical and surgical attention upon notice or knowledge of the accident and if he fails to do so the employee may engage such service at the expense of the employer in a reasonable amount. On the other hand, if the employer offers to furnish such service and the employee elects to refuse it and to engage other service of his own choosing, the employer is exempted from all liability for such treatment. On the latter point I refer you to my opinion to the Health Officer rendered February 3, 1914.

It is not clear from your communication into which class the claim of Mr. Norton falls, and so upon the facts stated I can not advise you as to your liability.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Method of Assessing Different Kinds of Street Work.

June 24, 1914.

Gentlemen: I am in receipt of your communication of the 20th inst., as follows:

"Will you kindly advise this Board concerning the assessment of property on Clover Street between 18th Street and Caselli Avenue for the purpose of defraying the cost of paving that block.

"The facts in the case are as follows:

"This portion of Clover Street has been paved with asphalt for a length of 182 feet, the remainder of the street being paved with basalt blocks for a length of 60 feet. Contract price for the asphalt pavement is 23 cents per square foot and that for the basalt block pavement is 39 cents per square foot.

"This Board wishes to be advised whether the cost of each character of pavement shall be assessed separately against the property fronting on the same or if the cost of the entire work is to be bulked and assessed at a uniform rate per front foot for the entire frontage of property along this block, regardless of the character of pavement constructed in front of any particular lot facing thereon."

Opinion.

The method of levying assessments to pay costs of any work in or upon any of the public streets, set forth in Section 7, Chapter II, Article VI of the Charter and incorporated in Ordinance 2439 (New Series) approved September 4, 1913, forming a portion of Section 16 of said ordinance, contemplates that the work done on any of said public streets shall be paid for by assessing the lots and lands fronting on said work at a uniform rate per front foot.

Section 7 of Chapter II, Article VI of the Charter and Section 16 of Ordinance 2439 (New Series) provides that the Board of Public Works shall make an assessment to cover the sum due for the work performed, including all incidental expenses according to the nature and character of the work. The term "nature and character of the work" means, in my opinion, that where the work done is, for instance, sewering, paving, curbing, etc., the Board

of Public Works shall make an assessment to cover the cost of each particular class of said work.

An ordinance of this City and County provides that on streets of a certain gradient the pavement thereon shall consist of basalt blocks from curb to curb and on streets with a gradient of eight per cent or less it shall be paved with asphalt from curb to curb. The owner of property fronting on the portion of the street which is paved with basalt blocks, costing more per square foot than a pavement of asphalt, should not be compelled to pay more for the doing of said work than the owner of property fronting on the portion of the street which is paved with asphalt, simply by reason of the fact that it is compulsory by reason of the provisions of the ordinance to pave that portion of the street with basalt blocks. The improvement of a street by laying thereon a pavement redounds to the benefit and advantage of every property owner on that street, and, therefore, the amount of the assessment per front foot on Clover Street, between Eighteenth Street and Caselli Avenue, should be totaled and assessed at a uniform rate per front foot for the entire frontage of property along this block, regardless of the character of pavements constructed in front of any particular lot facing thereon.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Location of Tuberculosis Hospital.

June 30, 1914.

Gentlemen: I am in receipt of your communication of June 12th requesting my opinion on the following question:

"Has the Board of Supervisors power and authority under the 1908 Bond Ordinance to change the location of the Tuberculosis Hospital now situate on the site of the San Francisco Hospital, the said hospital being authorized to be constructed out of the proceeds of the said 1908 bond issue?"

Opinion.

A careful examination of "Proceedings, San Francisco Bonds, 1908" fails to reveal any reference to the site of the proposed

hospital. In view of the failure of the said proceedings to refer specifically to any site your Board must rely on the powers granted it by Section 2, Chapter II, Article II of the Charter.

You will find your power to change the location of the hospital fully discussed in my opinion to you on this subject on June 11, 1914.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Refund of Penalty on Delinquent Taxes.

June 30, 1914.

Gentlemen: I am in receipt of your communication as follows:

"The Finance Committee requests an opinion as to whether the Board of Supervisors is vested with power to remit the 15 per cent penalty administered and paid on account of delinquency in the payment of taxes, and with special reference to the petition for refund of $151.34 paid on account of such delinquency by Suzanne Alferitz et al. Petitioner claims to have deposited certified check enclosed in an envelope, etc., in mail box in this city November 15, 1913, and that, through delay of United States mail delivery, same was not delivered to Tax Collector until November 26, 1913.

"Petitioner's affidavit and exhibits in corroboration you will find attached hereto, and which you are kindly asked to return to this office with the opinion."

Opinion.

The petition of Suzanne Alferitz et al. shows that the petitioners deposited in the United States mail a certified check, issued by the Crocker National Bank, in the sum of $1,991.48, drawn in favor of J. O. Low, former Tax Collector of this City and County on the 15th day of November, 1913; said sum representing both installments of taxes on real and personal property for the fiscal year 1913-14.

The petition further recites that, by reason of the failure of said check to reach the Tax Collector before the first installment of

taxes became delinquent, they were compelled to pay, as the penalty provided by law, on said first installment, the sum of $151.34, and demand is now made on your Honorable Board that the said sum be refunded to petitioners.

The facts recited in said petition do not bring this case within the provisions of Section 3804 of the Political Code, which section authorizes, and in fact compels, as the Supreme Court of this State has held, the Boards of Supervisors of the various counties of the State to refund "any taxes, penalties or costs thereon paid more than once or erroneously or illegally collected." No claim is made by the petitioners that the penalty which they seek to have refunded was "illegally or erroneously" collected. They do not set up any facts which would entitle them as a matter of right and of law, to the refund of the penalty paid; their only claim being that as a matter of equity and good conscience, this money should not be retained by the City and County of San Francisco, in view of the fact that they evidenced their good intention of paying the tax by depositing a certified check for both installments of taxes in the United States mail.

The petition discloses that the certified check was deposited with an agency for delivery in no wise connected with the Tax Collector's office or controlled by the municipality, and that agency failed to deliver to the Tax Collector the amount of the taxes before the date of delinquency. When the petitioners selected the United States Postoffice as a medium through which payment of taxes might be made, they accepted the responsibility for such agency and they are to be charged with all of the risk in case of failure of delivery.

Section 3888 of the Political Code provides that taxes must be paid in the lawful money of the United States. The Tax Collector of this City and County, however, for the convenience of tax payers, has been in the custom of receiving checks for the amount of taxes due the City and County, for a limited period fixed by him so that he may have an opportunity before the date of delinquency, of having the checks cashed and the money deposited in the Treasurer's office. This custom is for the accommodation of tax payers and the receipt of the Tax Collector of a check in payment for taxes is only a conditional payment, and the taxes will remain in force if the check is dishonored.

In the case of Moore vs. Auditor General, 81 N. W., page 561,

after a statement of the above doctrine, and the citation of cases in support thereof, the Court proceeds to say:

"The doctrine of those cases is where an attempt has been made to pay taxes by check, and for any reason the check is not paid, the tax continues to be a lien upon the land in question, and the land may be sold, as in ordinary tax proceedings, for the payment of taxes so remaining a lien."

Thus it will be seen that there was no legal duty imposed upon the Tax Collector to receive anything in payment for taxes, but lawful money of the United States. Here is presented a case where a penalty for delinquency is correctly and legally collected as provided by the statute, such penalty having attached at the date of said delinquency, by reason of the fact that the amount of the taxes was not paid to the Tax Collector within the time allowed by law.

The power of the Board of Supervisors of this City and County to refund taxes or a penalty thereon is limited to those cases where such a tax or penalty or costs, has been paid more than once, or erroneously or illegally collected, and the statute having defined the power, the Board of Supervisors cannot exceed the same and grant relief in cases other than those, the facts of which bring them within the purview of Section 3804 of the Political Code. The law looks upon a payment made in the manner as was the payment in this case, as a voluntary one, and the Supreme Court of this State has decided many times that a voluntary payment of taxes cannot be recovered.

In the case of Warren vs. City and County of San Francisco, reported in 88 Pac. Rep., page 712, the plaintiff paid to the Tax Collector a certain sum of money to prevent a sale of a certain piece of property, the taxation of which he claimed was illegal, by reason of the fact that said property formed a portion of Caroline Street in this City and County. The Court said:

"The payment of the money by the plaintiff with full knowledge of the facts under which it was made, was voluntary, and under well established rules cannot be recovered."

You are advised, therefore, that your Honorable Board has no power under the law to refund the penalty as prayed for herein.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Parking Station for Automobiles—Whether Public Garage.

June 30, 1914.

Gentlemen: I am in receipt of your communication as follows:

"I have been directed by the Fire Committee to submit to you the following petition and accompanying explanatory letter, with the request that you inform said committee whether under any existing ordinance the Board of Supervisors has the legal right to grant a permit for such parking station, whether the Fire Marshal is the person to grant such permit, or whether such business may be conducted without a permit from either the Supervisors or the Fire Marshal.

" 'Gentlemen: The undersigned hereby petitions your Honorable Board for permission to maintain and operate during the pleasure of this Honorable Board, three (3) portable filling tanks, or buggies, each containing not more than fifty (50) gallons of gasoline, as is provided for in Section 6 of Ordinance No. 746 (New Series), approved April 26, 1909, of the Board of Supervisors of the City and County of San Francisco, State of California, upon that certain vacant lot situate on the northeast corner of Powell and Post Streets, San Francisco, being One Hundred and Sixty (160) feet on Post Street by a uniform depth of One Hundred and Thirty (130) feet on Powell Street, for the purpose of supplying gasoline to automobiles upon said premises. This permit is requested only for so long as there shall be no buildings erected upon said premises.

Respectfully,
(Name) T. T. Cox,
(Address) 406 Golden Gate.'

" 'To the Honorable the Board of Supervisors of the City and County of San Francisco.

" 'Gentlemen: In presenting my petition for permission to maintain and operate three portable filling tanks or buggies on the vacant lot situate on the northeast corner of Powell and Post Streets, I beg to urge the following in support thereof:

" 'My desire is to maintain at the above mentioned location a place where automobiles can be temporarily cared for during the business hours, thereby affording to the owners additional security and minimizing the opportunities for theft. This will remove

automobiles from the street and relieve the congestion which has so long existed in this populous neighborhood. It is the desire of the Police Department to keep the streets as free from idle automobiles as possible and I believe that my plan will greatly aid in that direction. I wish to be in a position to supply gasoline to such automobiles as may need the same, and, of course, will only handle a comparatively small quantity. This lot is vacant; there will be no buildings erected thereon and therefore there will be no danger of any fire.

"'The plan which I have outlined for this work has been adopted in other cities very successfully and has been greatly encouraged by the authorities. It makes the streets safer for life and property and I therefore respectfully urge that this permission be granted.

Very respectfully yours,

(Signed) T. T. Cox.'

"The Committee respectfully requests that the information asked be furnished on or before the next meeting of the Fire Committee on Thursday afternoon, June 18, at 2 o'clock."

Opinion.

Ordinance No. 746 (New Series), approved April 26, 1909, regulates the construction of buildings used as public automobile garages and provides for the storage and use of gasoline in public and private automobile garages.

Section 1 thereof defines a public garage to be a building where automobiles are kept and stored by the public; where automobiles are rented out to hire by the public; where a charge is made for the use of or for the storage and the keeping of automobiles.

Section 5 thereof pertains to the construction of buildings used as public garages and specifies that all such shall be of class A, B or C construction.

No provision is made in said ordinance for the maintenance of an open-air automobile parking station, such as is applied for in the petition herein and the question arises whether or not such a proposed establishment is to be a public garage.

This is the primary question to be determined by your Honorable Board. If your determination is that it is to be a public garage then it must be constructed as provided for by Ordinance

No. 746 and the petitioner must comply with all of the regulations pertaining to the construction of such a garage and the storage of gasoline therein and you are advised accordingly.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Purchase of Automobile by Playground Commission.

July 8, 1914.

Gentlemen: I am in receipt of your communication of June 29, 1914, as follows:

"I have been directed by the Playground Commission to ask if this Department can purchase an automobile out of the funds appropriated by the Board of Supervisors. If the purchase of this machine can be made is it necessary to advertise for bids should the purchase price exceed one thousand dollars?"

Opinion.

The Charter, Article XIV-A, Section 10 thereof, provides:

"The Supervisors shall, for the purchase, development, equipment and maintenance of the aforesaid playgrounds and recreation centers, annually appropriate to the Playground Commissioners at the time of making the budget, such amount as may in their judgment be necessary or proper, and the funds so appropriated shall be credited to the Playground Fund of the General Fund, and the Playground Commissioners shall have the exclusive management and disbursement of the same."

In an opinion rendered to your Honorable Commission on November 23, 1908, to be found at page 227 of the bound volume of Opinions of the City Attorney for 1908-9, I passed upon this section as follows:

"Under the provisions of this section there is no question as to the power of the Playground Commission to make disbursements from the sums annually appropriated by the Board of Supervisors without any further action or approval of such Board.

The only limitation upon the powers of the Commission is that contained in this section, to-wit: That the moneys so appropriated must be used for the 'Purchase, development, equipment and maintenance of the playgrounds.'"

If an automobile is necessary for the proper development and maintenance of the playgrounds of the City and County, as, for example, to facilitate the proper and necessary inspection and supervision of the playgrounds, then I advise you that your Honorable Commission has the power to purchase such automobile out of the funds appropriated by the Board of Supervisors under Article XIV-A, Section 10 of the Charter, above quoted.

There is no provision of the Charter which requires your Commission to let contracts in any particular manner, either by bid or otherwise. On this point see my opinion of October 8, 1910, Opinions of the City Attorney, 1910-11-12, p. 193, wherein your Honorable Commission was advised as follows:

"Article XIV-A of the Charter, relating to the powers and duties of the Board of Playground Commissioners, does not provide any method or procedure to be followed in the letting of contracts by the Playground Commissioners. * * * I know of no principle of law which will make the other provisions of the Charter relating to the letting of contracts applicable to the letting of contracts by the Playground Commissioners. Such being the case, the Playground Commissioners may adopt such rules and regulations for the letting of contracts as in their discretion they may deem advisable."

It will not be necessary to advertise for bids unless, in the discretion of the Playground Commissioners that should be deemed the preferable course.

Respectfully,

PERCY V. LONG,

City Attorney.

Playground Commission.

Proposed Ordinance Licensing Dance Halls.

July 9, 1914.

Gentlemen: I am in receipt of your communication of June 25, 1914, as follows:

"Enclosed please find copy of proposed ordinance imposing a license on dance halls and regulating the same.

"The Police Committee of the Board of Supervisors desires your opinion as to whether an ordinance of this kind, segregating dances into classes, is legal and will be sustained by the courts."

Dances are classified in Sections 2 and 3 of the proposed ordinance in the following language:

"For the purposes of this ordinance, dances as herein defined shall be classified in divisions as follows:

"Division 'A' shall include (1) all dances of bona fide social character to which admission is limited strictly on invitation of the person, organization, society, or corporation, acting as host and for which no fee, either by way of admission or in any other manner, is charged; (2) classes in which instruction in dancing is given for hire.

"Division 'B' shall include any dance given by any bona fide fraternal, charitable, religious or benevolent organization having a regular membership associated primarily for mutual social, physical and mental welfare, to which admission is limited to members and guests, but for which a fee is charged and the revenue accruing to such organization.

"Division 'C' includes all dances for which admission is or is not charged and to which the public is promiscuously invited, and all other dances within the scope of this ordinance not classified in Divisions 'A' and 'B.'

"Section 3. Every person, firm, corporation, association or club who owns, leases, maintains, conducts or keeps a dance hall, as in Section 1 described, shall pay a license as follows, to-wit:

"Dances included in Division 'A,' as above defined, no license fee.

"Dances included in Division 'B,' as above defined, two (2) dollars per night, or twenty-five (25) dollars per quarter.

"Dances included in Division 'C,' as above defined, two and one-half (2.50) dollars per night or fifty (50) dollars per quarter."

Opinion.

The Supreme Court of this State has frequently passed upon ordinances dividing businesses and occupations into classes and imposing license fees in varying amounts upon the several classes. In many cases the ordinances have been upheld. In others the Court has held the classification to be unreasonably discriminatory and so unconstitutional.

In Ex parte Heylman, 92 Cal. 492, the Court considered an ordinance of the City and County of San Francisco imposing upon peddlers of meat from vehicles or baskets a tax of $75.00 per quarter, and upon peddlers of fish, vegetables, fruit, game, poultry, etc., $10.00 per quarter. The Court, in a very brief opinion, held this ordinance valid.

Ex parte Haskell, 112 Cal. 412, involved the validity of an ordinance of the City of Chico which imposed upon persons selling goods with no fixed place of business a higher tax than that upon those selling at a fixed place of business. In that case the Court said, pp. 416-17:

"It is urged, in effect, that the particular provision in question is unreasonable and oppressive, and that it is unequal and unlawfully discriminating. But we are unable to regard it as open to either or any of these objections. A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the Courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the Courts to uphold such regulations, except it manifestly appears that the ordinance or by-law transcends the power of the municipality and contravenes rights secured to the citizen by the Constitution or laws made in pursuance thereof. That the ordinance in question violates any such right we are unable to perceive. * * * The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades and between essentially different meth-

ods of conducting the same general character of business or trade."

Similarly in Bramman vs. Alameda, 162 Cal. 648, in passing on an ordinance imposing a graduated license tax upon butchers depending upon the number of vehicles used in the business, the Court said:

"While, of course, the municipality in the imposing of taxes may not discriminate in doing so by imposing different license taxes upon persons similarly situated and exercising the same privilege, still it is well settled that it may classify occupations, and in doing so may distinguish between different occupations, and likewise distinguish between those engaged in similar occupations. In adopting a classification with reference to the persons engaged in the same general occupation or business for the purpose of imposing a license-tax any standard or rule of gradation may be adopted which is fair and reasonable."

The very recent case of Pacific etc. Co. vs. Conrad, decided June 26, 1914, contains the latest expression of our Supreme Court on this subject. In that case it was claimed that an ordinance of the City of Alameda imposing a license-tax of $100 per annum upon the business of displaying advertisements in street cars and steam cars was oppressive and discriminatory because of the fact that no license was required of those conducting billboard displays, and upon those conducting newspapers displaying similar advertisements the tax was only $25 per annum. The Court, however, held the ordinance valid in the following language:

"The ordinance is clearly a revenue measure within the power of the municipality to pass. The limitations upon the exercise of this power are familiar ones, that a legitimate business such as this shall not be subjected to oppressive or unjustly discriminatory burdens. Within that limit there is full play for municipal discretion. (Citing cases.) It is only when such an ordinance is clearly unjustly oppressive and discriminatory that the power of a Court may be invoked to right the wrong. Manifestly there is and must be a broad zone dividing and delimiting upon the one hand those ordinances which are clearly reasonable and just from those which are as clearly unreasonable and unjust. In all that broad zone legislative discretion operates. It is doubtful territory. Ordinances falling within it cannot be set aside by the courts, for then there is a clear substitution of the judgment of

the courts for the judgment of the Legislature and thus plain judicial legislation. It would add nothing to this consideration to analyze and discuss the many cases presented for consideration by opposing counsel. The result of the consideration, however, may be declared in this—that the ordinance in question falls within the indicated zone where the view of a court may not be substituted for the determination of the Legislature."

On the other hand there are cases in which the classification for taxing purposes has been deemed so arbitrary and unreasonable as to render the ordinance invalid.

So in Ex parte McKenna, 126 Cal. 429, an ordinance of the City of Fresno, imposing a higher tax upon merchants giving trading stamps than upon other merchants was declared unconstitutional, the Court saying that "the persons to whom it applies pay the same rents and local taxes as other merchants, and it is not perceived how the issue of trading stamps makes theirs an essentially different business or furnishes any justification for a discriminating ordinance."

And in Los Angeles vs. Lankershim, 160 Cal. 800, an ordinance imposing a license tax upon persons engaged in the business of letting office rooms "for every building containing more than 30 rooms," but imposing no tax for buildings containing a less number of rooms was held invalid. The Court said in that case, pp. 803-4:

"The true principle repeatedly affirmed in this State is thus expressed by the Supreme Court of Georgia:

" 'The Legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and excepting others, or imposing a tax not operating uniformly upon all * * * .' (Singer Mfg. Co. vs. Wright, 97 Ga. 114.) This ordinance therefore is unjust and discriminatory in making an unwarranted exception in favor of members of the same class, or what is the same thing phrased differently, imposing upon a part of a class artificially created, a burden not imposed upon all who stand in the same relation to the same subject matter."

Under the principle announced in these decisions it is necessary to determine in every case whether the classification adopted is a fair and reasonable one, or purely arbitrary and artificial. I am

satisfied that the classification in the proposed ordinance falls into the former class.

Subdivision 1 of Division "A" is clearly distinguished from Division "B" because of the fact that in "A" the dances are not given for profit, and from Division "C" because the dances under "A" are not open to the general public, and the teaching of dancing in classes is patently a different occupation from the giving of dances. The difference in the tax imposed upon Divisions "B" and "C" is justified by the fact that in Division "C" there is a clear exercise of the police power, inasmuch as Section 4 of the proposed ordinance requires a permit from the Police Committee of the Board of Supervisors for the conduct of dances in Division "C." Said the Court in In re Guerrero, 69 Cal. 88-91:

"There is no doubt of the power of municipalities to impose licenses for the purpose of regulation, or revenue, or for both regulation and revenue."

The license upon dances under Division "C" is obviously imposed both for regulation and revenue, and the higher tax is reasonable in view of the necessary expense of such regulation including the issuing of the permits required, etc.

I therefore advise your Honorable Board that the classification of dances in the proposed ordinance is reasonable and valid.

Respectfully,

PERCY V. LONG,

City Attorney.

Police Committee,
Board of Supervisors.

Arrearage in Street Opening Deposits.

July 10, 1914.

Gentlemen: I have before me your communication of June 30th in which you state that the several public utility corporations operating in this City are in arrears in the matter of their payments to your Board for street opening permits. In this communication you do not state what reason is given by any of these companies for the non-payment of the amounts due and if there is no question affecting the legality of their obligation to pay

these amounts you are certainly entitled to hold up future payments until the several deposits are restored to the authorized amounts.

I have been furnished, in addition to your communication, with a copy of a letter from Mr. George C. Holberton, Manager of the San Francisco District of the Pacific Gas and Electric Company to your Honorable Board, in which he sets forth various objections to the present method of administering the street opening ordinance, presumably as the ground for non-payment of the amounts which you allege to be due from his company. As these objections are for the most part germane to the question which you have submitted in your communication I will briefly refer to each of them in order that you may be advised as to any modifications which may be necessary in the amounts you have charged against his company:

1. His objection that the decision of the Supreme Court of the United States in the Russell case in any way affects the enforcement of Ordinance No. 2201 (New Series) is, in my opinion, not well grounded. The validity of Ordinance No. 2201 (New Series) was upheld in the Keppelmann case, 166 Cal. 770, and the State Supreme Court decided the case irrespective of any rights which the Pacific Gas and Electric Company may or may not have established at that time under Article XI, Section 19 of the State Constitution as amended October 10, 1911. In other words, Ordinance No. 2201 (New Series) has nothing to do with the validity of the franchise rights of any public utility and relates only to the care and protection of the streets and reasonable regulations therefor, all of which were provided for under said Section 19 of the Constitution prior to its amendment and hence were in no wise affected by the decision in the Russell case.

2. The other objections stated in Mr. Holberton's communication relate to the administration of the present ordinance. Some of said objections, if they are justified, can only be cured by an amendment of the ordinance. For instance, his objection to the exemption of side sewers from the provisions of this ordinance and the limiting of service connections to one hundred feet in length. If your Board feels that those objections are justified a recommendation to the Board of Supervisors to meet them would probably receive consideration, but in my opinion they could not affect the liability of the Company for excavations heretofore made.

3. The remaining objections of Mr. Holberton seem to go to what he claims is a very rigid enforcement by your Board of the letter of some of the provisions of the ordinance. For instance, the cancellation of a certificate at the expiration of sixty days, although excellent reasons may exist for work not having been performed within that time; the impracticability, in some cases, of cutting letters in the curb; the impracticability of continuous construction on brick manholes; the exaction of one-half of the dollar deposit for irreparable injury to pavements where no irreparable injury could, under any circumstances, exist and the exaction of such payment for irreparable injury to streets which have no pavement at all, such as those in some of the outlying districts; the exaction of inspection fees where in fact no inspection is made by your Board; the exaction of street opening fees where the street is opened in connection with improvements ordered by the Board of Supervisors; the limiting of the length of an opening to one block, although as a matter of fact the opening may cover several blocks.

It is manifestly not the function of the City Attorney to advise you in the matter of administration. However, I am able to state that the validity of any ordinance such as No. 2201 (New Series) depends upon the reasonableness of the regulation which it imposes. Moreover, the ordinance is to be construed as a whole. If it provides payments for damages which do not exist, or for services which as a matter of fact are never rendered then, of course, it may be subject to further attack in the courts on the grounds that it is unreasonable. For example, the ordinance provides that one-half of the dollar charge per opening shall be retained as compensation for irreparable injury to the pavements. To my mind this does not mean that this charge should be retained where, under no conceivable circumstances, could any irreparable injury to the pavements be done. I am not advised whether, as a matter of fact, such charges are made in such cases, but if they are, that would seem to be an unreasonable interpretation of the ordinance.

Again, I advised you in an opinion under date of March 12, 1914, that the Company must pay for inspection of these openings. This presupposes that the inspection will be actually done. If, as a matter of fact, it could be shown in a legal proceeding that this inspection is habitually not made by the proper

employees of your Board, that, of course, would militate against the reasonableness of the ordinance in its actual application.

No law can be made to fit every conceivable circumstance. If it is impossible for the Company to perform its work within sixty days, or impracticable to maintain the identity of the street openings through letters cut in the curb, these matters, in special instances, should be taken care of by your Board in administering the ordinance. The same would apply to the continuous construction of brick manholes.

An opening in a street cannot, as a matter of law, be limited to one block in length. As the word is used in the ordinance, in my opinion, it refers to any continuous aperture in the pavement. If, in the opinion of your Board, the charge should be made for each block opened, the ordinance should be amended to that effect.

In conclusion, therefore, and as a basis for a defense against any action which the companies may possibly take if you hold up future permits, I advise you to review the items making up the totals of the charges which you have submitted to me and ascertain whether any of those items are due to improper and arbitrary deductions from the Company's deposits made to cover conditions which, as a matter of fact, do not exist and which were not contemplated by the language of the ordinance taken as a whole. When you have done this in each case and ascertained the totals of the charges which are actually and properly due from each of these utilities, in my opinion you are justified in refusing to grant further permits until these charges are paid.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Liability for Medical Expenses Under Workmen's Compensation Act—Claim of Patrick Norton.

July 28, 1914.

Gentlemen: I am in receipt of your communication of July 3, 1914, as follows:

"Referring to your opinion of June 19th, concerning request for liability for medical expenses filed with this Board by C. S. laborer Patrick Norton, employed in the Pipe Yard of the Engineering Division of this Department, your attention is respectfully directed to attached communication from the City Engineer dated July 1st, furnishing such data as you state should be furnished, in the last paragraph of your opinion above referred to.

"Will you kindly consider this communication of the City Engineer in connection with our request of June 15th in this matter, and advise this Board further of its liability in the premises?"

The report of the City Engineer reads:

"Norton was injured on March 27th and was sent to the Potrero Emergency Hospital for medical attention. The Emergency Hospital records show that his injuries were attended to and that he was discharged. He subsequently of his own accord, apparently, went to the German Hospital for further attention and treatment, instead of returning to the Emergency Hospital for what further attention he required. He remained in the German Hospital from March 27th to April 13, 1914. As in the first instance he was sent to the City Hospital, it was assumed that he would return there if he required further treatment, although he was not directed, when he was discharged from the Emergency Hospital, to use the City Hospitals thereafter if needed."

Opinion.

Since my former opinion in this matter was written the Industrial Accident Commission has again had occasion to lay down the rule with regard to the employer's liability for medical attention under Section 15-a of the Workmen's Compensation Act. In Bassett vs. Aetna Life Insurance Company, decided May 7, 1914, the Commission said:

"The law gives the employer the right to select the surgeon and treatment, but he must not sleep on that right. When an employer knows that an employee is injured it is his duty to take the initiative in the matter of supplying treatments. * * * If the employer does not act, the employee may do so and hold the employer or his insurance carrier responsible for the reasonable expenses of the treatment."

This plainly puts the burden of supplying the treatment upon the employer. However, in this case it appears from the report of the City Engineer that Norton was taken to the Emergency Hospital, treated and discharged. Under these circumstances, when Norton found that he needed further treatment he could not impose a liability for that treatment upon your Honorable Board without first giving an opportunity to supply it.

I therefore advise you that your Honorable Board is under no liability to pay for this treatment. It might be advisable, however, in order to prevent similar questions from arising in the future, to adopt a general rule in your Department that in case of accidents to employees they must go for treatment to the hospitals of the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Validity of Resolution No. 11062 (New Series)—Proposed Permit for "Fighting the Flames" Amusement Illegal.

August 4, 1914.

Sir: I am in receipt of your communication of the 30th ult., as follows:

"I am enclosing herewith copy of a resolution, No. 11062 (New Series), and would request that you kindly examine this resolution and advise me whether it is in legal and proper form.

"My attention has been called to the granting of permit to owners or lessees of property without mentioning the name of the person who is to conduct the privilege granted under the resolution. I would like to know if this is sufficient in form for

the City to retain proper control over the entertainment proposed to be given by the terms of this permit.

"I should like to be informed, also, if the fees required are in accordance with existing laws and ordinances; also, if the conditions required comply with the requirements of the Charter and the building law."

Opinion.

Resolution No. 11062 (New Series) is as follows:

"Resolved, That permission, revocable at the will of the Board of Supervisors is hereby granted to the owners or lessees of the property bounded by Van Ness Avenue, Grove, Franklin and Hayes Streets to build, maintain and operate an amusement enterprise known as 'Fighting the Flames' from August 4, 1914, to December 4, 1915, under the following conditions, to-wit:

"The grand stand to be well and suitably constructed of wood, and in a thoroughly workmanlike manner, from plans approved by the Board of Public Works, and to be adequately provided with aisles and exits; that in conjunction with said performance the grantees are hereby allowed to operate amusement and selling concessions in booths and buildings all of which will be built and decorated in a substantial manner satisfactory to the Board of Public Works and in conformity with the general architectural scheme of the structure, and that these concessions are to be unobjectionable, clean and moral in every way and to consist of only the regular regulation concessions as are operated at indoor and outdoor expositions and carnivals, such as soft drinks, peanut and popcorn, candies, cane and knife racks, ball throwing games, rides, freaks (not repulsive or objectionable), ice cream, souvenirs, games of skill; that no intoxicating liquor is to be sold or offered for sale on the grounds; that the amusements and concessions are not to be operated except between the hours of 8 a. m. and 12 o'clock midnight and are all to be conducted in an orderly and legitimate manner under the supervision of the Police Committee of the Board of Supervisors and the Police Department of San Francisco; that a license fee of $1000.00 per annum be charged, payable quarterly in advance, for operating the 'Fighting the Flames' and a license fee of $50.00 per quarter be charged for each and every concession operated within said enclosure."

I find on examination of the ordinances of the City and County of San Francisco that there exists Ordinance No. 72, approved May 16, 1900, entitled: "Imposing a License on Keepers of Ball or Ring-Throwing Games or Cane Racks." Section 1 of said ordinance imposes a license of $5.00 per quarter on every keeper of a ball or ring-throwing game or cane rack. Resolution No. 11062 (New Series) imposes a license fee of $50.00 per quarter for every concession contemplated to be operated under said resolution, and among the concessions named in said resolution are cane racks and ball-throwing games, and in that particular the fee required for the concessions named is in conflict with Ordinance No. 72.

It is impossible to tell from the resolution the nature or character of the amusement enterprise known as "Fighting the Flames," but in this connection I desire to draw your attention to Ordinance No. 777, approved May 28, 1903, entitled "Imposing a License on Public Roller Skating Rinks, Revolving Wheels, Chutes, Toboggan Slides, Museums, Kinetoscope and Phonograph Parlors, Panorama and Cyclorama." Said ordinance imposes a license fee of $25.00 per quarter on every person, firm or corporation maintaining or conducting any panorama or cyclorama; and it further provides that the Tax Collector shall not issue a license to conduct any such panorama or cyclorama until the applicant therefor shall have first obtained from the Board of Police Commissioners a permit to conduct the same.

If it should develop that the amusement enterprise known as "Fighting the Flames," comes within the purview of said ordinance and is, as a matter of fact, a panorama or cyclorama, then Resolution No. 11062 (New Series) is in conflict with said ordinance for the reasons, 1st; that the ordinance prohibits the Tax Collector from issuing a license to conduct such an amusement enterprise unless the applicant for such license shall have first obtained a permit to conduct the same from the Board of Police Commissioners, and 2nd; there is a variance in the license fees imposed.

I am not advised as to the extent of the control desired to be retained by the City over the entertainment proposed to be given by the terms of the permit, and therefore, I am unable to say whether the resolution is sufficient in form for the City to retain proper control over said entertainment.

Resolution No. 11062 (New Series) makes no attempt to define the manner of construction of the buildings to be used in the conduct of said enterprise, other than to provide that the grand stand shall be built of wood from plans approved by the Board of Public Works. In advance of being informed as to the said plans, it cannot be determined whether or not the conditions comply with the building law. However, that point is of no consequence, because, in so far as Resolution No. 11062 grants permission to build the grand stand and booths to be used in the amusement enterprise named therein, it is in conflict with Ordinance No. 1008, Section 5 of which provides that:

"Before the erection, construction, alteration, enlargement, repair, removal or demolition of any building or structure or part thereof, the person, firm or corporation performing the work shall obtain a permit for doing the same from the Board of Public Works."

Section 9 of Chapter I, Article VI of the Charter provides that the Board of Public Works shall have charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors. 5. "Of the supervision of any and all buildings constructed in the City and County." The Supervisors, having enacted Ordinance No. 1008 (New Series), giving to the Board of Public Works the power to issue permits for the construction of any building or structure, has not the power to set aside the provisions of said ordinance in favor of any person, firm or corporation, for the reason that it would be a special privilege granted under the resolution, and in my opinion Resolution No. 11062 discriminates between individuals similarly situated, and for that reason is invalid.

Respectfully,

PERCY V. LONG,

City Attorney.

The Mayor.

In Re Construction of Viaduct by Ocean Shore Railway.

August 11, 1914.

Gentlemen: I have your request of June 18, 1914, as follows:

"At its meeting held June 17, 1914, this Board decided to take such legal steps as are necessary to enforce the construction of a viaduct to carry the tracks of the Ocean Shore Railway Company over Ocean Avenue. In this connection the provisions of Ordinance 1623 relating to the construction of said viaduct are embodied in the attached letter of the City Engineer on this subject dated June 16, 1914.

"The Board desires to request that you notify it what are the necessary legal steps to be taken to enforce the construction of a viaduct at this location by the Ocean Shore Railway Company, according to the plans approved by the Board of Public Works."

Opinion.

It appears to be the well-settled rule in the American courts that when by the ordinance granting to a public service company a franchise to operate within the municipality certain duties of a public nature are imposed upon the company, the proper performance of these duties by the company may be compelled by mandamus.

The remedy of mandamus has been invoked to compel a street railroad company to pave portions of the streets upon which its tracks were laid, as required by the ordinance granting its franchise, in the following cases:

Rutherford vs. Hudson etc. Co., 63 Atl. 84 (N. J.);
Pleasantville vs. Atlantic City etc. Co., 68 Atl. 60 (N. J.);
State vs. Jacksonville etc. Co., 10 So. 590 (Fla.)

Mandamus has lain to enforce the performance of similar duties by railroads as follows: to construct a viaduct, Chicago etc. Co. vs. People, 53 N. E. 986 (Ill.); to grade streets at crossings, Railroad Co. vs. State, 37 Ind. 489; to extend lines as ordered by City Council, State vs. St. Paul etc. Co., 78 Minn. 331; State vs. St. Paul etc. Co., 135 N. W. 976; and to keep certain lights illuminated during the hours of darkness, Grosse Pointe vs. Detroit etc. Co., 90 N. W. 42 (Mich.).

Other cases might be cited to the same effect. The rule has been well stated by the Illinois Court as follows:

"It is urged that the writ is here sought to be availed of for the purpose of securing the fulfillment of the terms and conditions of a private contract, and that it is the fundamenal law that mere contract obligations cannot be enforced by mandamus. The appellee is a quasi public corporation. The sovereign power when granting a public franchise to corporations of that character, may declare that certain acts, in the nature of duties to the public, shall be performed by the corporation to or upon whom the franchise is conferred, and may provide that the investiture of the franchise shall be conditional upon the acceptance of the burden of performing such acts or service. It is now well settled that, when there is a grant and acceptance of a public franchise involving the performance of such acts or service, the corporation accepting the franchise may be compelled by the writ of mandamus to perform the duty so enjoined by the grant, and consented to by the acceptance thereof."

People vs. Suburban R. Co., 53 N. E. 349, 351-2.

Since the duty of the Ocean Shore Railroad to construct the viaduct in question is of this character, I advise your Honorable Board that the proper remedy is by suit for a writ of mandate brought in the name of the City and County as plaintiff.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Permits for Construction of Patent Chimneys.

August 11, 1914.

Gentlemen: I am in receipt of your communication of the 27th ult., as follows:

"We desire to enclose herewith copy of communication dated July 24, 1914, and addressed to this Board by Fabius T. Finch, 901 Hearst Building, relative to the issuance of a permit to E. C. Nelson for constructing a patent chimney at 943 Cole

Street, a portion of the contract being sublet to the Ingleside Sheet Metal Works.

"Kindly inform this Board whether it has the authority to grant said permission to E. C. Nelson, without violating the provisions of Ordinance No. 2328 (New Series), or Ordinance No. 2329 (New Series), of the Board of Supervisors."

Opinion.

Sections 5, 6 and 7 of Ordinance No. 1008 (New Series), known as the "Building Law," provides that a permit shall be obtained for the erection, construction, alteration, enlargement, repair, etc., of any building or structure, or part thereof from the Board of Public Works, upon the application of the owner or the lessee direct, or acting through an architect, engineer, contractor, or other agent, which application shall state the location of the proposed building or structure and which shall be accompanied by plans and specifications which shall clearly show all parts of the construction. In any case where the estimated cost of erecting, altering or repairing any building or structure does not exceed $1,000 the person, firm or corporation proposing to make such improvements shall file with the Board of Public Works in lieu of the plans and specifications, a statement in writing setting forth what repairs, alterations or improvements are contemplated and describing the general character, nature and extent of the same. When an application is filed in accordance herewith the Board of Public Works shall, after ascertaining whether such plans and specifications embody all requirements of law issue a building permit to the applicant.

Permits for the construction or repair of buildings are issued in accordance with the provisions above quoted and they are the only provisions relating to the issuance of such permits. All work or repairs contemplated to be done in or about any building must, in accordance with the above provisions, be embodied either in the plans and specifications where the estimated cost of said repairs or construction exceeds the sum of $1,000, or in a statement in writing where the estimated cost does not exceed $1,000, and in the event that a patent chimney is to be constructed or repaired in any building it must be shown upon such plans and specifications or statement as afore-

said and the permit granted by the Board of Public Works authorizes the construction or repair of a patent chimney in the same manner as it authorizes the construction or repair of any other part or portion of the building described in the permit so granted. In other words, the permit granted by the Board of Public Works under the ordinance is a general permit authorizing the person applying for the same to construct or repair the building as described in the plans and specifications, or in the statement in writing above referred to, and no special permit need be granted, nor is the same authorized by the ordinance, for the construction or repair of a patent chimney, which forms part of the general scheme of construction or repairs contemplated to be made as set forth in the plans and specifications or in the statement. In the event that the only repair or construction contemplated is the construction or repair of a patent chimney the application for the permit to do said work must be made in accordance with the provisions of the ordinance already quoted.

Ordinance No. 2328 (New Series) specifies the manner in which patent chimneys may be constructed, the material to be used therein, and prohibits the construction, installation, erection and repair of any patent chimney or fireplace connected with a patent chimney unless the corporation, copartnership, or individual doing any of said work shall first obtain a certificate of registration from the Board of Public Works, as provided in Section 1 of said Ordinance No. 2328 (New Series). Nowhere in said Ordinance No. 2328 does it authorize the Board of Public Works to issue any permit for the construction or repair of any patent chimney or fireplace.

Any person, firm or corporation engaged in conducting a business or constructing, erecting, installing or repairing brick, stone or patent chimneys in this City and County may make an application in person or by a duly authorized representative at the office of the Board of Public Works and register the name and place of business of said person, firm or corporation and make an affidavit that said name and place of business are correctly stated. Upon doing so the Board of Public Works shall forthwith issue to said person, firm or corporation a certificate of said registration and any person, firm or corporation obtaining such certificate and paying the license fee of $125.00 per annum,

as provided for in Ordinance No. 2329 (New Series) is entitled to erect, or repair patent chimneys or fireplaces in any building for which a permit is granted by the Board of Public Works.

The same ordinance provides also that no patent chimney or fireplace hereafter constructed or repaired shall be used until a certificate and report has been made and filed by the Board of Public Works certifying that the work of construction has been done in compliance with the provisions of Ordinance No. 1008 (New Series) nor shall any building hereafter constructed wherein patent chimneys or fireplaces connected with patent chimneys have been installed be plastered until such certificate and report shall have been made and filed.

The duty, therefore, is imposed upon your Honorable Board, of ascertaining whether or not patent chimneys or fireplaces constructed or repaired have been so constructed or repaired in accordance with the provisions of law and if it shall be ascertained by your Honorable Board that such chimneys or fireplaces have been constructed in violation of the law, then your Honorable Board shall not issue the certificate mentioned in Section 244 of Ordinance No. 1008 (New Series), as amended by Ordinance No. 2328 (New Series). It makes no difference, so far as your Board is concerned, who does the work of constructing or repairing any patent chimney or fireplace as long as the same is done by some person, firm or corporation who has obtained a certificate of registration as specified in the ordinance. Therefore, if the Ingleside Sheet Metal Works has the certificate of registration specified in Ordinance No. 2328 (New Series), and has paid the license fee of $125.00 per annum, as specified in Ordinance No. 2329 (New Series), and constructs or repairs the patent chimney mentioned in your communication and observes all of the laws and ordinances in respect to the construction and repair of said patent chimney, then your Honorable Board may issue the certificate specifying that the work has been done in compliance with the provisions of the ordinance. Your Board is not concerned with any agreement made between the Ingleside Sheet Metal Works and E. C. Nelson. Your only concern is to see that the patent chimney mentioned in your letter is constructed in accordance with the law and if said chimney is constructed by any person, firm or corporation who has not qualified under Ordinance No. 2328 (New Series),

it will be your duty under the ordinance to refuse to specify that said work has been done in compliance with the provisions of the ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Resolution of Intention for Street Work—Validity Of.

August 11, 1914.

Gentlemen: I am in receipt of your communication of the 29th ult., as follows:

"On July 22nd this Board received bids for the paving of the uncompleted portion of San Bruno Avenue from Army Street to Oakdale Avenue, one bid having been received for said work from the Federal Construction Co.

"In the communication which we attach hereto, the City Engineer outlines the circumstances connected with the probable award of this contract to the Federal Construction Co., referring in his letter to two communications dated July 28, 1914, from Mr. J. J. McDade, copy of which communications are attached for your information.

"Will you kindly inform us whether, admitting that the Resolution of Intention describing this work was defective, this Board may legally award this contract to the Federal Construction Co. and whether the same would be a valid contract.

"This Board will consider the matter at its meeting to be held August 3, 1914, and is desirous of procuring a report for that meeting.

"We desire to ask that you have whatever Assistant City Attorney this matter is entrusted to, confer with Commissioner Fraser thereon before said day."

Opinion.

Section 4 of Ordinance No. 2439 (New Series), commonly known as the "Street Improvement Ordinance," provides that

the Board of Public Works shall pass a resolution of its intention to recommend to the Supervisors any improvement, which, in the judgment of the said Board of Public Works, the public interest or convenience requires. After the said resolution of intention shall have been published and posted, as in said Section 4 prescribed, the said Board of Public Works shall recommend to the Supervisors that they order such improvement to be made and therefore the Board of Supervisors shall, by ordinance, in the manner provided in Chapter I, Article II of the Charter, order the improvement.

It has been held by the courts on numerous occasions that the proceedings prescribed by law for the performance of street work must be strictly followed, otherwise there is no lien created by such proceedings. The identical question raised by the protest in the matter under consideration has been passed upon by the Supreme Court of this State, one of the leading cases being Kutchin vs. Engelbret, 129 Cal. 637, in which the Court said:

"Evidently the work which the Council may order done is that which they proposed in the resolution of intention; and it is provided, 'before passing any resolution for the construction of said improvements, plans and specifications and careful estimates of the costs and expenses thereof shall be furnished,' etc. Then notice inviting sealed proposals or bids 'for doing the work ordered' must be given. When such bid is made and accepted the contract is virtually made. (Argenti vs. San Francisco, 16 Cal. 255; Dougherty vs. Hitchcock, 35 Cal. 512; Chambers vs. Satterlee, 40 Cal. 526.) In preparing and executing the formal contract the Superintendent of Streets acts ministerially. The bid, then, is to do the work ordered, and the contract is for such work. The Superintendent of Streets can only enter into the formal contract already agreed upon. It seems, therefore, that all subsequent proceedings are, in a sense, dependent upon the resolution of intention. If work is ordered in excess of the resolution of intention, the latter order may be void only as to the excess, if severable. (Gafney vs. San Francisco, 72 Cal. 146.) But if the contract is for less work than was proposed in the resolution of intention it is void. (Dougherty vs. Hitchcock, supra; Stockton vs. Whitmore, 50 Cal. 554; McBean vs. Redick, 96 Cal. 191; Warren vs. Chandos, 115 Cal. 382.)"

I am of the opinion that the resolution of intention describing

the work, in so far as the same described more work than that called for in any contract which might be made under the proceedings in this matter, is defective and that no lien would attach by reason thereof.

It necessarily follows, therefore, that your Honorable Board may not legally award any contract under proceedings initiated by a defective resolution of intention, as in this case.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Refund to Purchaser at Void Tax Sale.

August 13, 1914.

Gentlemen: I have at hand the petition of Patrick J. O'Reilly asking for the refund of $2,650 paid by Mr. O'Reilly as purchaser at a tax sale, held October 10, 1912, of the following described property:

"Commencing at a point on the northeasterly line of Ninth Street distant thereon one hundred and seventy (170) feet southeasterly from the southeasterly line of Harrison Street; running thence southeasterly and along said northeasterly line of Ninth Street thirty (30) feet; thence at right angles northeasterly one hundred (100) feet; thence at right angles northwesterly thirty (30) feet; thence at right angles southwesterly one hundred (100) feet to the point of commencement."

Mr. O'Reilly also asks for $118.82, the amount of taxes paid by him on said property for the fiscal years of 1912 and 1913.

It appears that this property was assessed to unknown owners in 1906 and upon the taxes becoming delinquent the property was sold to the State. Thereafter the time for redemption having run and a deed of the property having been executed to the State, said property was put up at public auction, pursuant to Section 3897 of the Political Code, and bought in by Mr. O'Reilly for $2,650. Subsequently, in a quiet title action brought by Mr. O'Reilly in the Superior Court for this City and County, numbered 33047, and entitled Patrick Joseph O'Reilly vs. All Persons, etc.,

it was determined by the judgment of said Court that said property was a part of Blackwood Street, a public highway of the City and County of San Francisco, and as such highway the property of the City and County, and that consequently Mr. O'Reilly never obtained any title or interest in said property by the purported tax sale of October 10, 1912.

Opinion.

On November 30, 1910, I had occasion to advise your Honorable Board with regard to a petition very similar to this. (Opinions of the City Attorney of San Francisco, 1910-11-12, p. 223.) In that case Mr. Aitken petitioned for the return of $1,275 taxes paid by him as purchaser at a tax sale held on August 20, 1909, which tax sale followed from the delinquency of taxes for the year 1902-3 upon, and the sale to the State of, the property there in question. That property had been assessed to the California Investment and Financial Co., which company, subsequent to Mr. Aitken's purchase from the State at the aforesaid tax sale, brought an action in the Superior Court, in which action Judge Seawell enjoined the issuing of a tax deed to Mr. Aitken upon the ground that the tax of 1902-3, which was the basis of the tax sale, was illegal and void. At that time I advised your Honorable Board that under Section 3804 of the Political Code Mr. Aitken was entitled to the refund requested. The reasoning of that opinion is controlling in this case and so I will quote from it briefly:

"This petition is filed under Section 3804 of the Political Code, which provides that:

" 'Any taxes, penalties or costs thereon, heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, * * * may, by order of the Board of Supervisors, be refunded by the County Treasurer. * * * '

"In the case of Hayes vs. The County of Los Angeles, 99 Cal. 74, the Supreme Court of this State held that the word 'may' in this section was to be construed as 'shall' and that the Supervisors shall have no option to refuse to provide for refunding the money so paid. In that case the plaintiff was a purchaser at a tax sale who had paid the taxes after the owner had previously paid them, and his payment, therefore, was a payment made 'more than once,' as above provided for in Section 3804, and

it was held by the Supreme Court that this section of the Political Code is not limited in its application to taxpayers alone, but includes and protects the purchaser at a tax sale who pays the taxes.

"The language of the Court, at page 81, is as follows:

" 'The purchaser at a tax sale pays the taxes as effectually as could have been done by the owner without a sale, and if they have been previously paid by the owner of the property, and it was therefore sold for the same tax, and the taxes again paid by the purchaser, it is a payment more than once within the purview of the statute, for which the purchaser or his assignee may recover from the county, as provided in Section 3804.'

"And so, too, of course, the payment made by Mr. Aitken in this case was, under the ruling of Judge Seawell, the payment of a tax 'erroneously or illegally collected' under Section 3804. Therefore, under that section, your Honorable Board is bound to return such money."

In the same way the payment of $2,650 by Mr. O'Reilly at the tax sale was the payment of a tax "erroneously or illegally collected," since the property in question was a public street and not subjected to taxation. So, for the same reason was the payment of $118.82 for taxes upon this property in 1912 and 1913. I therefore advise your Honorable Board that Mr. O'Reilly is entitled to the refund asked for in his petition, but without interest, there being no provision for interest in said Section 3804.

With regard to the part of this amount which has been paid to the State as its pro rata permit me to call your attention to this provision of said Section 3804:

"Whenever any payment shall have been made to the State Treasurer by the County Treasurer as provided by section thirty-eight hundred and sixty-five and section thirty-eight hundred and sixty-six of this code, and it shall afterwards appear to the satisfaction of the Board of Supervisors that a portion of the money so paid should be refunded as herein provided, said Board of Supervisors may refund such portion of the said taxes, penalties and costs so paid to the State Treasurer, to the person paying the same, or to his guardian, or in case of his death, to his executor or administrator, out of the general fund, and upon the rendering of the report required by section thirty-eight hundred

and sixty-eight of this code the Auditor shall certify to the Controller, in such form as the Controller may prescribe, all amounts so refunded, and in the next settlement of the County Treasurer with the State, the Controller, if satisfied of the legality of such refunding by the said board, shall give such Treasurer credit for the State's portion of the amounts so refunded, as prescribed in section thirty-eight hundred and seventy-one of this code."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Status of Redwood Street.

August 20, 1914.

Gentlemen: In your communication of July 31st, request is made that this office advise the Board of Supervisors whether or not Redwood Street (formerly Locust Avenue) is an open public street, and it appears from the appended communications that your inquiry is specifically directed to that portion of Redwood Street (formerly Locust Avenue) that is included in W. A. Block No. 136, bounded by Franklin and Gough Streets, McAllister Street and Golden Gate Avenue.

Opinion.

Locust Avenue (now Redwood Street), a street thirty-five feet wide and four hundred and twelve feet six inches in length, as laid out on certain city maps in Western Addition Block No. 136, does *not* appear on the Van Ness Map. It was therefore not reserved for street purposes in the early plans of the City and in the settlement of titles in this section of the City.

As I pointed out to your Honorable Board in a previous opinion the mere fact that this street is delineated on the Humphreys Map of 1870, and City maps subsequent thereto, does not determine it to be a City street.

Opinions of City Attorney 1910-11-12, pages 266, 267:

This question depends chiefly upon proof whether the land mapped as a street has been dedicated by the owners thereof as a

street and accepted by the City. The question of long continued use as a street by the general public might also be involved, and also the question whether or not the southerly half of this street, constituting a portion of 50 Vara Lot 2, in W. A. Block 136 (a school lot), namely, 17½ feet wide by a length of 137½ feet was dedicated to public use as a school lot, by reservation under the *Van Ness Ordinance* is also to be considered.

These several matters will be taken up in order:

1. The following described strip of land constituting what is mapped as the easterly portion of Locust Avenue in W. A. Block 136, namely:

"Commencing at a point in the westerly line of Franklin Street, distant thereon 120 feet southerly from the southerly line of Golden Gate Avenue; running thence southerly along said westerly line of Franklin Street 35 feet; thence at right angles westerly 226 feet 6 inches to a point; running thence northwesterly to a point in a line drawn at right angles westerly from said westerly line of Franklin Street, at a point therein 120 feet southerly from said southerly line of Golden Gate Avenue, 325 feet and 4 inches westerly from said westerly line of Franklin Street; thence running easterly along said line drawn at right angles to the westerly line of Franklin Street 325 feet and 4 inches to said westerly line of Franklin Street and point of commencement;"

was on the 31st day of January, 1861, and long prior thereto, included in the lands belonging to I. C. Beideman, and a map of the said Beideman tract was at the request of I. C. Beideman, filed and recorded in the office of the Recorder of the City and County of San Francisco on the 31st day of January, 1861, (see Map Book 2 A and B, page 55); on which said map the said portion of Locust Avenue is delineated and dedicated as a public street. This constituted a dedication by Beideman of the tract of land last described. This dedication was accepted by the City by the adoption of the Humphreys Map of 1870.

2. As to the remaining portion of what is delineated on certain city maps, including the Humphreys Map of 1870, as Locust Avenue, in W. A. Block No. 136, namely:

"Commencing at a point in the easterly line of Gough Street 120 feet southerly from the southerly line of Golden Gate

Avenue, running thence southerly along said easterly line of Gough Street 35 feet; thence running at right angles easterly 186 feet; thence running northwesterly to a point in a line drawn at right angles easterly from said easterly line of Gough Street at a point therein 120 feet southerly from said easterly line of Golden Gate Avenue 87 feet and 2 inches easterly from Gough Street; thence running along said line drawn at right angles to Gough Street and 120 feet southerly from the southerly line of Golden Gate Avenue 87 feet and 2 inches to the said easterly line of Gough Street and point of commencement;"

The tract of land last described belonged in the year 1853 to Thomas Hayes, in the same year, and seven years before he filed his map of the Hayes Tract, on which Locust Avenue is delineated through W. A. Block 136, Thomas Hayes conveyed the tract of land last described along with other lands to Adele Martinez and the same is claimed in private ownership. It follows that this last described tract of land was never offered for dedication by the filing of the Hayes Map, and the subsequent adoption of the Humphreys Map of 1870 could not constitute an acceptance of what was never dedicated or offered for dedication by the real owners of the land, Adele Martinez and her successors. (Opinions City Attorney 1910-11-12, pages 266, 267.)

It may be added that actions under the McEnerney Act have been brought and the title established to the last described tract of land by private owners, among which actions are Khuner vs. All Persons, No. 5835.

I have already called your attention to the fact that 50 Vara Lot No. 2 in W. A. Block 136, under the Van Ness Ordinance, was reserved to the City as a school lot and that this reservation covered the southerly and middle 137½ feet x 17½ feet of what on certain city maps is mapped as Locust Avenue in W. A. Block 136.

Statutes 1867-8, Sections 2 and 6, pp. 379-80;
Merrit vs. Barta, 158 Cal. 377.

The adjoining 50 Vara Lot to the northward, namely: 50 Vara Lot 5, has been owned by the City as a school lot since the year 1910 and both of these 50 Vara lots, namely, Lots 2 and 5, were subsequently built upon and are fully occupied by the School Department of the City as and for the John Swett School.

We have seen that the westerly end of what has been mapped as Locust Avenue in W. A. Block 136, is now and has long been in private ownership, thus converting this street or avenue into a cul-de-sac westerly from Franklin Street. The action of your Honorable Board in effecting a sale to the City of 50 Vara Lot 5, and the subsequent construction of the John Swett School on 50 Vara Lots 2 and 5 in W. A. Block 136, is in effect a closing by your Board of Locust Avenue, so far as it ever existed, through and along said 50 Vara Lots 2 and 5. Even if this action of your Board did not constitute such closing it is within the power of your Board now, or at any time, to close the portion thereof occupied by the John Swett School, by resolution, especially as the southerly half of Locust Avenue, as mapped through 50 Vara Lot 2, is indisputably reserved for school purposes, under the Van Ness Ordinance.

My conclusion is that the tract of land commencing at a point in the westerly line of Franklin Street 120 feet southerly from the southerly line of Golden Gate Avenue, and running thence southerly along said westerly line of Franklin Street 35 feet by a uniform depth westerly of 137½ feet constitutes the whole of Redwood Street (formerly Locust Avenue) in W. A. Block 136.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Liability Under Workmen's Compensation Act for Disease Caused by Occupation.

August 21, 1914.

Gentlemen: I am in receipt of your request for an opinion under date of August 19, 1914, as follows:

"We enclose herewith a copy of communication dated July 23, 1914, and addressed to this Board by Dennis Leahy, in which he requests compensation during his enforced absence from work from June 21, 1914, until such time as he shall be able to resume the performance of his duties in the Street Repair Department.

"There is also enclosed a report on Mr. Leahy's request from

Superintendent D. J. McCoy of the Street Repair Division, dated August 10, 1914.

"The Board of Public Works desires to request that you advise it whether, under the circumstances mentioned in Mr. Leahy's request for compensation, his case is covered by the Employer's Liability Act and whether the Board may allow him a portion of his compensation during the time he was indisposed from the performance of his duties."

It appears from Mr. Leahy's request that he is a laborer in the Street Repair Department and that his work required him to empty dry cement from sacks each day, with the result that large quantities of the dust have been taken into his system. On June 20th of this year he contracted pneumonia and has ever since been incapacitated for work. He believes that the pneumonia followed upon a cold because of the presence of the cement dust in his system.

Opinion.

In the case of Johnson vs. Bauer Pottery Co. et al., Decisions of the Industrial Accident Commission of California, Vol. I, No. 5, p. 11, a question similar to this was considered. That opinion is very brief and I will quote it in full.

"This is an application for compensation for total disability resulting from lead poisoning caused by immersing the hands and arms in chemical glaze while glazing pottery at the Bauer Pottery Company's works in Los Angeles. Held that the disability complained of was not caused by an industrial accident, but was the result of occupational disease. Compensation was denied."

Under the rule of this case Mr. Leahy's sickness is clearly an occupational disease and does not entitle him to compensation under the Workmen's Compensation Act.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Outdoor Park—Legality of Proposed Resolution Granting Special Permit.

August 24, 1914.

Gentlemen: I am in receipt of your communication under date of August 22 as follows:

"The Police Committee of the Board of Supervisors desires your opinion as to the validity of the enclosed resolution submitted to the Committee by the Board of Supervisors."

The resolution enclosed with your communication is as follows:

"Outdoor Park Permit.

Resolution No. ..... (New Series)

"Resolved, That permission, revocable at the will of the Board of Supervisors, is hereby granted to the owners or lessees of the property bounded by Van Ness Avenue, Grove, Franklin and Hayes Streets in the City and County of San Francisco to conduct an outdoor park upon the said premises, upon the payment of license fee required by Ordinance No. 1764.

"Before the construction of any building or structure on said premises a permit for doing the same shall be obtained from the Board of Public Works and the plans and specifications of the same shall be approved by the Board of Public Works."

Opinion.

Enterprises of the character mentioned in the resolution require no permit from the Board of Supervisors of this City and County. Ordinance No. 1764, approved March 12, 1906, imposes a license of $200 per annum upon every person, firm or corporation engaged in the business of conducting an outdoor park. Section 2 of said ordinance defines an outdoor park to be a "place wherein there is situated, or connected therewith, and conducted a theatre, regardless of seating capacity, and divers concessions and places of amusement regardless of their kind and number."

Therefore any person, firm or corporation paying the license fee specified in Ordinance No. 1764 may conduct an outdoor park without any permit from the Board of Supervisors and consequently a permit in the form contained in the proposed resolution adds nothing to the right of the persons referred to to conduct

an outdoor park. The only permit required is a permit from the Board of Public Works to erect the buildings used in the enterprise.

Section 5 of Ordinance No. 1008 (New Series) provides that before the erection, construction, alteration, etc., of any building or structure, the person, firm or corporation performing the work shall obtain a permit for doing the same from the Board of Public Works. Section 6 of said ordinance provides that the application for the permit shall be accompanied by the plans and specifications, which shall show clearly all parts of the construction, but when the estimated cost of the building does not exceed the $1000, a statement in writing may be filed in lieu of the plans and specifications.

Section 192 of Ordinance No. 1008 (New Series) is as follows:

"Buildings for fair and exposition purposes, towers for observation purposes and structures for similar purposes, outside of the fire limits, whether temporary or permanent in character, shall be constructed in such manner and under such conditions as the Board of Supervisors may prescribe."

I am not advised as to whether or not the Board of Supervisors has adopted an ordinance providing for the manner of construction and prescribing the conditions under which buildings of the character mentioned in Section 192 may be constructed. If an ordinance has been adopted, such buildings must be constructed in accordance therewith and if not, then your Honorable Board may adopt an ordinance to carry out the purpose expressed in Section 192.

The language used in Section 192 does not contemplate that the Board of Supervisors may grant special permits of the nature of the one proposed. It means that an ordinance of general application covering construction required in outdoor parks, together with the manner and under the conditions to be specified, shall be adopted by the Board. Until such an ordinance is adopted it is impossible for the Board of Public Works to approve plans and specifications for the buildings for the obvious reason that there exists no law governing the erection of such buildings.

I can find nothing in the charter which would prohibit the Board of Supervisors from adopting the resolution set out in full in your communication. It is, however, an idle act and carries with it no authority.

It is my opinion:

1st. That the owners or lessees of the property mentioned in the proposed resolution do not require a permit from the Board of Supervisors to conduct an outdoor park upon the property mentioned, as the existing ordinance provides for the payment of a license fee and upon the payment of that fee said persons would be entitled thereby to conduct said business.

2nd: That if the Board of Supervisors has not adopted an ordinance contemplated by Section 192 of the Building Law, there exists an hiatus in the said Building Law for the reason that until such ordinance is adopted the Board of Public Works is powerless to approve the plans and specifications for such buildings.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Webb Place Is a Public Street.

September 3, 1914.

Gentlemen: I am in receipt of your communication of the 14th ult., as follows:

"An obstruction exists across Webb Place off Mason Street between Green and Union Streets.

"You are requested to advise this Board whether Webb Place is an open, public street of the City and County of San Francisco."

Opinion.

Webb Place commences at a point on the westerly line of Mason Street 60 feet southerly from Union Street and has a width of 10 feet by 137½ feet in depth.

It is delineated on the Humphreys Map of 1870, on the Tilton Map of 1899, on the City Engineer's Map of 1906, and on the Assessor's Block Books it appears as a public street and is not assessed. I made an examination of the Lis Pendens in the Recorder's Office filed by those owning property fronting on Webb Place and

find that the descriptions in each case run either to the northerly or southerly line of Webb Place. I also find no record that the street was ever closed and therefore am of the opinion that Webb Place, as described herein, is a public street of the City and County of San Francisco and therefore if an obstruction exists across said street you have the power under the Charter to remove the same.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Validity of Bid of Edward R. Bacon Company.

September 5, 1914.

Gentlemen: I am in receipt of your request for an opinion as follows:

"By direction of the Board of Supervisors I send you the record in the matter of proposal for bids for two concrete mixers.

"The Supplies Committee of the Board recommended that the award be made to Edward R. Bacon Company.

"The bidder—Bacon Company—signed their bid by typewriter and accompanying it was a certified check duly signed and certified.

"A technical point has been raised that the typewritten signature was not a legal compliance with the Charter. The Supplies Committee, however, are of the opinion that the bid was made in good faith as the certified check was properly made out. Please advise the Board as to whether there is any legal reason why the bid of the Bacon Company should not be accepted."

Opinion.

The record in this matter discloses these facts: that in response to an advertisement calling for proposals for two concrete mixers to be opened in open session of the Board of Supervisors on August 17, 1914, at 3 P. M., the Edward R. Bacon Company submitted a proposal on a blank furnished by the Clerk of the Board of Supervisors, wherein said company agreed to furnish

and deliver the said mixers for the sum of $1,546.50 each. The proposal and bid have the name of "Edward R. Bacon Company" in typewriting. Accompanying said proposal and bid was a certified check made payable to the Clerk of the Board of Supervisors for the sum of $335.00, in accordance with the provisions of the Charter requiring the same.

Also accompanying the proposal was a letter of even date therewith signed "Edward R. Bacon Company, E. R. Bacon," President, in which reference was made to the bid submitted, and contained particulars of the equipment to be furnished with each mixer.

These several documents, each containing the name of the bidder and submitted together, seem to me to form part of the same transaction, viz., the submission of a proposal called for by the advertisement. They constitute sufficient basis, in the event that Edward R. Bacon Company should fail or neglect to enter into the contract within five days after an award, to warrant the Clerk to draw the money due on the check and pay the same into the Treasury. Therefore, it follows, that the proposal, being binding and valid as against Edward R. Bacon Company, is valid and binding for all purposes, including that of being sufficient as a basis for the award of the contract.

It is the law that if there is no bid the Board of Supervisors has no jurisdiction to award a contract. If the proposal submitted in this case bore no name or did not contain information sufficient to identify the bidder, I would unhesitatingly find against it. But if, as here, the proposal does contain the name of the bidder and the bidder at the same time accompanies the same with a letter, duly signed by its President and submits a check in proper form, it is my opinion that the whole record sufficiently complies with the requirements of the Charter as to the formal requisites of a valid bid.

This view is upheld by the Supreme Court in the case of Williams vs. Belser, 129 Cal. 461, at page 464. There, as here, the contention was made that there was no bid. A proposal was submitted by Williams & Belser, which did not contain their names on any statement from which it might appear on its face that they were the bidders. The Court said on this point: "It will be seen that the names of Williams and Belser do not appear in this blank, nor are the names filled as to make it suitable for a

contract, if it had been signed. It would still have been necessary to supply something by intention."

In the matter under discussion, it is not necessary to supply anything by intendment. All the documents are so linked together that they leave nothing to be supplied. It is my opinion that there exists no legal reason why the bid of Edward R. Bacon Company should not be accepted.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Liability for Runaway Caused by Paving Machine.

September 12, 1914.

Gentlemen: I am in receipt of your request for an opinion as to the liability of the City and County for an accident to Mr. James H. Dunn caused by his horse running away after becoming frightened at a paving machine. The engineer in charge of the paving machine reports the accident as follows:

"We were re-surfacing Market Street in the above mentioned block, using two Lutz surface heaters and one steam roller. I was in charge of Heater No. 48. The machines were working on the south side of the street and the man who had the accident was driving east. There were "Street Closed" signs at the corner of Guerrero Street, which the man in the buggy pulled around to the left of, getting into the outer tracks of the United Railroads. The horse, upon seeing the machines, began to get nervous.

"The driver tried to keep the horse close to the machines, but he became very frightened and looked as though he were going to run away. When I first saw the accident I had just removed Engineer Campbell's machine back one hood width. This machine was close to the street car track. I had by this time walked up the track to my own machine which was near the curb. Just as the horse was opposite Engineer Campbell's machine the horse gave a jump and tipped over the buggy on the tracks of the United Railroads. Running over, I saw the driver lying in the

street. The buggy was tipped over and the horse down. The driver was still holding the reins and calling to the man to hold the horse and not let him do any more damage. I helped carry him to the office of a veterinary surgeon and rang for the ambulance. The man's leg was broken just above the ankle. He told me his name was Williams. While lying on the street the driver was mumbling and cursing to himself, and putting the entire blame for the accident upon the horse."

Opinion.

In the case of Lane vs. Lewiston, 39 Atl. 999, the Supreme Court of Maine passed on a very similar question. In that case the plaintiff was suing the City of Lewiston for damages for injuries caused by a runaway horse which had been frightened by a steam roller. I quote from the opinion of the Court at page 1000:

"The machine was in operation at the time for the purpose of repairing one side of the street, leaving the other side open and unobstructed for the passage of travelers upon it. This appliance is one of the most modern and useful in building and maintaining permanent and durable streets. The city is bound and obliged by law to keep its streets safe and convenient, and this is one of the instrumentalities obtained by the city at large expense for that very purpose. Certainly there can be no liability on the part of a city or town for using the means necessary and proper for carrying on its duty in this respect, where notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use. Such obstructions, while they may necessarily impede travel over the street to a greater or less extent, cannot constitute a defect within the meaning of the statute, and neither can the legitimate and proper use of such appliances afford any ground for a recovery. To be of any use whatever, the machine must be operated, and the necessary noise and motion attendant upon its operation cannot, in a legal sense, constitute a defect, especially where the traveler has reasonable notice of the same, but does not use due care to avoid it."

The case here is even stronger than the Maine case quoted, since here the precaution had been taken to put up "street closed" signs. It does not appear that there was any negligence in the

operation of the paving machines, and in the absence of negligence the City and County is clearly not liable for the accident.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Salary Roll—Civil Service Commission Cannot Delegate Power to Approve.

September 16, 1914.

Gentlemen: I am in receipt of your request for an opinion under date of September 12, 1914, as follows:

"Section 19, Article XIII, requires that the Civil Service Commission shall examine pay rolls or demands and shall approve the demands of all persons appointed or employed in accordance with the provisions of said article.

"Will you kindly advise us at your earliest convenience, as to whether or not we have the legal right to provide for the approval of pay rolls, in the manner outlined in the following resolution:

"Resolved, That the Secretary of this Commission is hereby instructed to approve in the name of the Commission all pay rolls presented for approval between regular or special meeting days, provided that he shall first check such pay rolls and strike therefrom all items not in conformity with Article XIII of the Charter and the records of the Commission, and further,

"Resolved, That all pay rolls so checked and approved shall be reported by the Secretary to the Commission at the first meeting of the Commission held after such approvals have been made."

Opinion.

Article XIII, Section 19 of the Charter, as amended at the last session of the Legislature, provides as follows, with reference to the verification of the pay rolls by the Civil Service Commission:

"The pay rolls or demands for salaries, wages or compensation of all deputies, assistants, clerks and employees of every class or

description, without regard to the name or title by which they are known, for each department, board, office or bureau subject to the provisions of this article, shall be transmitted to the Civil Service Commission before presentation to the Auditor. *The Commission shall examine* said pay rolls or demands and shall approve the demands of all persons appointed or employed in accordance with the provisions of this article. The pay rolls or demands thus approved, with notation of any item thereof disapproved, shall be then certified by the Commission and transmitted by it to the Auditor. The Auditor shall not approve and the Treasurer shall not pay any demand or warrant for salary, wages or compensation unless said demand shall have been approved *by the Civil Service Commission.*"

You will note that this section requires that the pay rolls of salaries or compensation for all boards and departments subject to the provisions of the Civil Service article of the Charter must be submitted to the Civil Service Commission for its approval before the Auditor can approve the same and also before the Treasurer is authorized to pay the same.

The language is very sweeping: "*The Commission* shall examine said pay rolls or demands and shall approve demands for all persons appointed or employed in accordance with the provisions of this article * * *. The Auditor shall not approve and the Treasurer shall not pay any demand or warrant for salary, wages or compensation unless said demand shall have been approved *by the Civil Service Commission.*" The evident purpose of this section of the Charter, as amended, was to make real and effective the control of the Civil Service Commission over the appointments to positions in different offices subject to the Civil Service article of our Charter.

The proposed resolution, as suggested in your communication, would delegate this power of control away from your Commission and to the Secretary thereof. I do not believe that any power is vested in your Commission to so delegate its authority to its officers in the face of the clear mandate of the Charter amendment. The act of its officer could not be the act of the Commission until approval by the Commission, and your proposed resolution would authorize the approval by your Secretary, and the subsequent approval of the demands and the payment thereof by the Auditor and Treasurer prior to any "examination of said pay

rolls or demands" or "approval of the demands" by "the Commission" as required in the Charter.

You are therefore advised that in my opinion your Commission has not the legal right to provide for the approval of pay rolls in the manner outlined in the resolution above described.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Refund of Forfeited Bail Money.

September 22, 1914.

Sir: I am in receipt of your communication of the 15th inst. enclosing petition of A. Caggiari for the return to him of the sum of $500 deposited by him as bail for the appearance of one De Angelis in the Police Court on June 6, 1913, and which sum was on said date declared forfeited by Judge Sullivan, who stated that he had no objection to the return of the bail money inasmuch as the claimant had been instrumental in procuring the return of the defendant to custody; likewise enclosing letter from Assistant District Attorney Edwin A. Cunha to the same effect, together with a demand for this amount of $500 on the Treasury of the City and County of San Francisco in favor of A. Caggiari, duly approved by the Mayor and the Board of Supervisors.

You ask me whether I consider this a just claim against the City and County and whether or not you should approve the demand. Of the justice of such a demand, under the circumstances stated, I have no doubt, but as to whether or not you are legally authorized to pay it is quite a different matter.

In this connection permit me to direct your attention to two opinions rendered by this office to the Board of Supervisors upon the same subject, under date of March 12, 1914, and April 20, 1914, respectively, copies of which are enclosed, which opinions fully cover the law on the subject.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Printing Orders in Cases of Great Necessity.

September 26, 1914.

Sir: I am in receipt of your request of September 3, 1914, in which you refer to certain demands on file in your office, awaiting your approval, for printing furnished to different departments of this City and County.

My understanding is that each of these demands is in an amount of not more than $200 and that the said printing was ordered by officers or heads of departments with the consent of the Mayor, that the demands were regularly approved by the Supervisors and that the furnishing of said printing was absolutely necessary in order to meet the requirements of law which imposes certain duties upon said officers and departments. That said departments and officers could not have performed the duties of their offices as required by the Charter and by law unless said printing had been ordered in the amounts specified.

You inquire whether, under such circumstances, such demands are legal demands against the City and County, in view of the fact that there has not been awarded by the Board of Supervisors the annual contract for printing as required by the Charter.

You are advised that in my opinion such demands are legal demands against the City and County in view of the language of Section 13, Chapter I, Article II of the Charter, which provides that "in cases of great necessity the officers and heads of departments may, with the consent of the Mayor, expend such sums of money, not to exceed Two Hundred Dollars, as shall be necessary to meet the requirements of such necessity."

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Authority of Civil Service Commission Over Suspensions.

September 28, 1914.

Gentlemen: I am in receipt of the following communication from your Chief Examiner:

"This Commission has been notified by the Tax Collector that on September 21, 1914, he suspended, for a period of thirty days, James A. Code and Edwin B. Tripp, deputies in his office, for insubordination and for the benefit of the service. These men claim that they have not been guilty of the offenses named and that their suspension is unjust and have asked this Commission to investigate their cases. The San Francisco Municipal Civil Service Association has also requested this Commission to make an investigation.

"Section 12 of Article XIII of the Charter provides that 'the appointing officer or officers of a department may, for disciplinary or penal purposes, suspend a subordinate for a period not exceeding thirty days, and such suspension shall carry with it the loss of salary for the period of suspension.'

"Will you kindly advise this Commission at your earliest convenience as to whether or not it has the right to investigate suspensions made under this provision of the Charter?"

Opinion.

The procedure adopted by the Tax Collector in suspending without pay the employees named is not stated in your communication and for the purposes of this opinion I will assume that the Tax Collector pursued his authority regularly and will confine myself to a discussion of the question presented by you, namely: Has the Civil Service Commission the *right to investigate suspensions* made pursuant to the provisions of Section 12 of Article XIII of the Charter quoted in your communication?

Whether Section 12 by its terms confers that power upon your Board is by no means clear. If that section does give you that authority it is because suspensions for "disciplinary or penal purposes" are to be treated exactly the same as "removal or discharge for cause" in which case an appeal would lie to your Board. Such an interpretation of the section would likewise require a trial upon written charges before an employee could be legally

suspended. It is not necessary, however, for the purpose of this opinion to pass upon that question.

Before an employee can be disciplined by suspension some cause must exist. The section does not leave it to the whim or absolute discretion of the suspending officer. That cause must be one of the causes enumerated for which an employee may be removed or discharged, namely; habitual intemperance, immoral conduct, insubordination, discourteous treatment of the public or inattention to duties. Any other construction would place it within the power of an officer to suspend an employee for reasons purely personal to the officer and in no way connected with the public service. That would enable the officer to entirely circumvent the principles of Civil Service and break down the whole system so carefully built up to avoid that very thing. It is fundamental that a construction is never given a law which leads to an absurd conclusion, or ruinous results to its purposes. Where a law is susceptible of different construction or interpretation, then such liberality of construction is justified as within a fair interpretation of the language will affect its apparent object.

In re George Mitchell, 120 Cal. 386;

City of San Buenaventura vs. McGuire, 8 Cal. App. Rep. 500-501.

A suspension, therefore, for any cause other than one above enumerated would be illegal. That of itself, however, does not authorize you to deal with the matter. Authority to prevent illegal suspensions must be conferred upon you by the organic law.

We come to the question: What authority has been placed in your Commission in regard to investigation of suspensions?

Section 14 of Article XIII provides:

"The Commissioners shall investigate the enforcement of the provisions of this article, and of its rules, and the actions of the examiners herein provided for, and the conduct and action of the appointees in the classified service in the City and County, and may inquire as to the nature, tenure and compensation of all places in the public service thereof."

This section was not affected by the recent Charter amendment. The power to suspend being one of the provisions of Article XIII,

it follows that under Section 14 you have the power to investigate suspensions made pursuant to the provisions of Section 12.

Civil Service having been created to do away with the spoils system and personal appointment, it is one of the principles of that system that all matter connected with that system be controlled and directed by a Commission whose sole duty is to administer the affairs of Civil Service, and this theory is carried out in our Charter. In the matter of suspensions "for disciplinary or penal purposes" a limited authority has been placed in officers and commissions. That authority is limited both as to the extent of the punishment which can be imposed and as to the causes for the suspension as above pointed out.

I therefore advise that your Board, under the provisions of Section 14 of Article XIII of the Charter, has authority to investigate suspensions made pursuant to the Charter to determine whether the authority of the suspending officer has been regularly pursued or not.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commissioners.

Sale of Intoxicants During Recall Election.

October 1, 1914.

Gentlemen: I am in receipt of your communication of September 29th as follows:

"We respectfully request an opinion from you upon the following matter:

"On October 8, 1914, an election will be held in the Nineteenth Senatorial District in this City and County to recall Senator Grant, and we would like to be advised as to what action we should take in regard to the sale of intoxicants in this City and County on the said date."

Opinion.

The law governing the sale of intoxicating liquor on election days is to be found in Section 63-b of the Penal Code, which reads:

"Every person keeping a public house, saloon or drinking-place, whether licensed or unlicensed, who sells, gives away, or furnishes spirituous or malt liquors, wine, or any other intoxicant, on any part of any day set apart for any general or special election, in any election district or precinct in any county of the State where an election is in progress, during the hours when by law the polls are required to be kept open, is guilty of a misdemeanor."

In an opinion which I rendered for the Mayor on December 29, 1909, relative to the closing of saloons during a special election, I pointed out the purpose of the code in forbidding the sale of liquor during elections. I quote from that opinion:

"The general purpose of the law forbidding the sale of liquors on election days is to prevent candidates for office from improperly influencing voters by giving or encouraging the giving of liquor in sufficient quantities to deprive the voter of his judgment and reason. This law is in force in every State and territory of the United States and has been extended by many of the State courts to primary elections in order that the individual voter might be free from such influences as the law is designed to eliminate when it comes to the expression of the elector at elections to fill offices or vacancies in offices.

"The correction of this abuse was what was undoubtedly in the minds of the Legislators when, in 1874, the original statute was adopted which has since been re-enacted into the Penal Code." (Opinions of the City Attorney, 1908-9, p. 493.)

It appears that these reasons would apply with equal force to a recall election, and although the provision for recall elections was adopted long after the passage of Section 63-b of the Penal Code, still I am satisfied that a recall election is a special election within the contemplation of this section. I therefore advise you that during the time when the election to recall Senator Grant is in progress it will be unlawful to sell intoxicants in any election district or precinct in the Nineteenth Senatorial District.

Respectfully,

PERCY V. LONG,

City Attorney.

Police Commission.

Replacement of Drinking Cups on Native Sons' Monument Not Within the Province of Park Commission.

October 1, 1914.

Gentlemen: I am in receipt of your communication of September 29th, as follows:

"The question of equipping the Native Sons' Monument at Market and Mason Streets with sanitary drinking appliances has been considered by this Board and estimates of the cost of this work furnished by the Superintendent of Public Buildings of this Department.

"The matter was then referred to the Board of Park Commissioners as it was believed that the alteration of any such monuments was under their jurisdiction.

"On September 25, 1914, the Board of Park Commissioners notified the Board of Public Works that the fountains on the Native Sons' Monument did not come under the jurisdiction of the Park Board.

"Will you kindly inform us whether the replacement of the present drinking cups on the Native Sons' Monument at Market and Mason Streets is a matter within the province of the Board of Park Commissioners or of the Board of Public Works and how far the jurisdiction of the Park Commission in making alterations or additions to any public monument extends?"

Opinion.

The jurisdiction of the Park Commissioners is set out in Section 1, Article XIV of the Charter and an examination of said section discloses the fact that the Park Commissioners are not vested with jurisdiction over the Native Sons' Monument at Market and Mason Streets.

You are advised therefore that the replacement of the present drinking cups on the Native Sons' Monument is a matter without the province or jurisdiction of the Park Commissioners and that said replacement is a matter within the province of the Board of Public Works.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Extent of Liability of Paving Streets by Street Railroads.

October 1, 1914.

Gentlemen: I am in receipt of your communication of the 28th ult., as follows:

"The Street Repair Division of this Department is now reconstructing O'Farrell Street between Franklin and Fillmore Streets.

"The Board of Public Works believes that at one time or another the United Railroads Company of San Francisco maintained a double track on this portion of O'Farrell Street.

"In order to protect the City's interest in this matter the Board of Public Works desires to request that you advise it what portion of O'Farrell Street between Franklin and Fillmore Streets should be reconstructed by the United Railroads Company."

Opinion.

The Market Street Railway Company, its successors and assigns, were, on the 23rd day of March, 1896, by Order No. 2978 of the Board of Supervisors, granted a franchise to construct, lay down, maintain and operate for the unexpired terms of the respective franchises theretofore granted on the streets between which the connections were made, as an extension of and adjunct to and in connection with street railroads then owned or operated by the Market Street Railroad Company, a single or double track street railroad along and upon, among other streets, O'Farrell Street from Hyde Street to Scott Street.

The franchise was granted upon several conditions, the second of which was to plank, pave or macadamize the entire length of the street used by their tracks between the rails and for two feet on each side thereof and between the tracks if there be more than one, and to keep the same constantly in repair, flush with the street and with good crossings.

In view of the fact that the grantee under said franchise was permitted by the terms thereof, to construct either a single or double track street railroad along and upon O'Farrell Street between the points indicated in your communication, it is my opinion that the obligation to pave the portion of the street occupied by said railroad company is to be measured by the character of construction maintained by it or its successors at

the time it is desired to either pave or repair the street. Therefore the United Railroads, the successor of the Market Street Railway Company, the grantee under said franchise, is obliged to pave the entire length of the street used by their tracks between the rails and for two feet on each side thereof and between the tracks, if there be more than one. Your communication intimates that the United Railroads of San Francisco is maintaining a single track on O'Farrell Street between Franklin and Fillmore streets; in view of what has been stated herein said company is obliged, under its franchise to pave or repair that portion of the street used by their tracks between the rails and for two feet on each side thereof, according to the character of construction now maintained by it.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Police Officers—No Appeal to Civil Service Commission After Dismissal by Police Commission.

October 2, 1914.

Gentlemen: I am in receipt of your communication of September 12, 1914, as follows:

"Section 12, of Article XIII of the Charter, as amended, provides that Civil Service employees who have been dismissed by the Heads of Departments, for cause, may appeal to the Civil Service Commission.

"Will you kindly advise us at your earliest convenience whether or not employees of the Police Department and Fire Department, who have been dismissed for cause may, under said section, appeal to this Commission?"

Opinion.

The answer to your inquiry depends upon whether the recent amendment, to the Civil Service article of the Charter, to-wit, Section 12 thereof, which describes a new method of dismissal of Civil Service employees, and of appeal by such employees to your Commission, is to be construed as an attempt to change the

rule existing prior to such amendment, which gave to the Police and Fire Commissioners sole and exclusive power in the matter of the trial and dismissal of the employees of the Police and Fire Departments.

Former City Attorney Lane (Opinions of Lane, 1899-1902, at page 570) held that the powers given in the Charter to the Police Commission with reference to the dismissal of members of the Department were so complete, in the procedure outlined for the filing of charges, the giving of a hearing, and the finding of the Police Commission, that it could not possibly be held that the Civil Service Commission had any control over this matter whatever.

At that time Section 12 of Article XIII of the Charter provided that the Civil Service Commission had power to investigate charges made against any Civil Service employee and that the finding and decision of the Civil Service Commission should then be certified to the appointing officer or board who must then forthwith enforce the decision of the Civil Service Commission. This was a very sweeping power given to the Civil Service Commission to investigate such charges in the first instance and to arrive at a decision with reference thereto.

City Attorney Lane held, however, that despite this sweeping language that the provisions of Article XIII, dealing with the Police Department, showed a clear intention of the Charter framers to vest the power of removal of members of the Department in the Board of Police Commissioners. This power is shown in Article VIII, Chapter III, Section 1, Subdivision 1, which gives to the Board of Police Commissioners the power to "suspend, disrate or dismiss any member of the Department in the manner hereinafter provided." Also in Chapter IV it is stated that the Chief of Police shall have "power to suspend temporarily any member of the Department. In all cases of such suspension, he shall immediately report the same to the Board (of Police Commissioners) with the reasons therefor in writing."

In Chapter VII particularly it is provided, Section 2, that "Any member of the Department guilty of any offense, or violation of rules and regulations, shall be liable to be punished by reprimand, or by fine to be fixed by the Commissioners, or by dismissal from the Department." In Section 3 of said Chapter VII it is provided that:

"No member of the Department shall be subject to dismissal for any cause, or to punishment for any breach of duty or misconduct therein, except after a fair and impartial trial before the Commissioners upon a verified complaint filed with the Board setting forth specifically the acts complained of, and after such reasonable notice by him of the time and place of hearing as the Board may by rule prescribe. The accused shall be entitled upon such hearing to appear personally and by counsel; to have a public trial; and to secure and enforce free of expense to him the attendance of all witnesses necessary for his defense."

Similar provisions are found in Article IX dealing with the Fire Department. See Chapter I, Sections 7 and 8; Chapter II, Section 2, Chapter III, Section 2.

It was manifestly intended by the Charter to give to the members of the Police and Fire Commissioners complete control of the dismissal of members of the Police and Fire Departments.

When we turn to the recent amendment to Section 12 of the Civil Service article of the Charter we find that rather than attempting to increase the power of the Civil Service Commission with reference to the dismissal of Civil Service employees, there is a clear intention to vest the primary power in the appointing boards and officers, thus relieving the Civil Service Commission of any jurisdiction in the matter until after the appointing officials have taken some action on charges which might be filed. This was a new power given to the appointing boards and officers. The amendment goes on to reserve, however, in the Civil Service Commission, the right of review of the findings of such appointing officers and departments, by prescribing a procedure by which a Civil Service employee so dismissed may appeal to the Civil Service Commission from any such findings adverse to himself. And also, in the event that the appointing power does not investigate any charges which may be so filed, the Civil Service Commission reserves the right to itself to hear and determine such charges. These provisions as to appeal to the Civil Service Commission, and action by that Commission in the event of an appointing board or officer failing to act are, of course, intended simply as security for the proper discipline of, and guaranty of the rights of, Civil Service employees in the event of an appointing officer or board failing in the performance of their duties.

Surely, however, there cannot be implied from such increased

power given generally to appointing boards and officers throughout the City, any intention to take away from the members of the Police and Fire Commissioners the particular and certain prerogatives which have always been vested in these boards in the matter of the dismissal of the employees of the Departments under their control. To so construe the amendment would in effect not only take away from the Police and Fire Commissioners the powers vested in them, without any express intention so shown in the amendment, but would also be in clear conflict with the spirit of the amendment which was to increase rather than to decrease the powers of the appointing boards and officers generally throughout the City and County.

You are therefore advised that the employees of the Police and Fire Departments who have been dismissed for cause in accordance with the provisions of the Charter giving control to such Departments, cannot appeal to your Commission, under the language of the amendment to Section 12 of Article XIII of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Transfer of City Lot to Playground Commission.

October 8, 1914.

Gentlemen: I am in receipt of your communication of September 30th relative to the present status of the City's title to the tract of land referred to in your communication as situated on the west line of Eighteenth Avenue and running through to Nineteenth Avenue, between California and Lake Streets, being a part of Block 89 of the Richmond District.

Opinion.

It appears from the authorities you cite that in the year 1872 the Board of Supervisors of San Francisco were empowered by the Legislature to authorize the Mayor to execute, on behalf of said City and County, a deed to the San Francisco Ladies' Protective and Relief Society to this particular lot of land, to be held

in trust for the City and County (Stats. 1871-2, page 765); that such resolution authorizing a conveyance of this lot by the Mayor was passed (Resolution No. 3332, New Series, Board of Supervisors). You also state that the Mayor of San Francisco, in 1872, did make the conveyance authorized.

This deed is not before me. The limitation upon the conveyance authorized by the Legislature is that the land be held in trust for the City and County. The society does not appear to exist and the trust seems never to have been assumed by the society. The lot of land referred to is entirely vacant and the expense of improving both Eighteenth and Nineteenth Avenues to the extent of the frontage of this lot on each avenue has been borne by the City.

The trust appears to have wholly failed if it may be said to have been ever assumed. The conveyance authorized was for the benefit of the City and County. Nothing appears to have been done by the trustees for a period of over forty years. This then becomes an abandoned trust on the part of the trustee and the City may so treat it. Now, if the City was contemplating a sale of this property it is possible that it might be incumbent on it to endeavor to find the trustee (the Society) and bring suit to quiet title as to such trustee. But a sale by the City is not in contemplation. The only purpose appears to be to place this lot under the jurisdiction of the Playground Commission to the end that it be applied to playground purposes. As the matter stands this appears to be well within the power of your Board.

Another view, leading to substantially the same result, may be found in the case of the California Academy of Sciences vs. San Francisco, 107 Cal. 334. In the case cited the City conveyed certain pueblo lands, set aside to the City under Order No. 800, to the Academy of Sciences. The Supreme Court, upon familiar principles held such conveyance beyond the power of your Board. The Court in that case, in part, says:

"The plaintiff herein is a private corporation, with limited membership, and can in no respect be regarded as invested with the care of the public, or subject to public control. The laws under which it is incorporated clearly indicate that it is essentially private and has none of the characteristics of a public corporation. It is undoubtedly the fact that the public derives a benefit from its labors and its contributions to science, but this

is merely an incidental result of its organization and existence and it is not the essential object for which it was incorporated. The public derives similar benefit from the organization and labors of any association for scientific or sociological investigation, whether incorporated or not; but this fact does not render such organization a public body, or its object a public purpose, within the meaning of the ordinance and statutes referred to." (Supreme Court Rep., Vol. 107, pp. 339-40.)

My conclusion upon the facts stated to me in your communication and upon such information as I have been able to obtain is that your Board, without any suit to quiet title (under the provisions of Section 8, Article XIV-a of the Charter) may properly place the land referred to under the jurisdiction of the Playground Commission for playground purposes.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Liability Under Workmen's Compensation Act for Injury to John Hannon.

October 10, 1914.

Gentlemen: I am in receipt of your communication of October 8, 1914, transmitting certain papers relative to an accident to John Hannon, a street sweeper, and asking to be advised as to whether or not the City is liable to Mr. Hannon under the Workmen's Compensation Act.

It appears that on May 20, 1914, while actually engaged in his employment, Mr. Hannon was struck by a runaway horse. He was taken to the Central Emergency Hospital, and after being treated, returned to his work, and also worked the next day, but after that was compelled by his injuries to cease work and has been unable to do any work since.

Opinion.

Section 20 of the Workmen's Compensation Act provides as follows:

"No claim to recover compensation under this Act shall be maintained unless within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and the address of the person injured, the time and the place where the accident occurred and the nature of the injury, and signed by the person injured or some one in his behalf, or in case of his death, by a dependent or some one in his behalf, shall be served upon the employer; *provided, however*, that actual knowledge of such accident and injury on the part of such employer, or his managing agent or superintendent in charge of the work, upon which the injured employee was engaged at the time of the injury, shall be equivalent to such service; *and provided, further*, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recover under this Act if it is found as a fact in the proceedings for the collection of the claim that there was no intention to mislead or prejudice the employer, and that he was not in fact misled or prejudiced thereby."

It does not appear from any of the papers submitted whether there was any notice of this accident served within thirty days of the accident as called for by this section, or whether actual knowledge of the accident was imparted to any one in charge of Mr. Hannon's work. However, in any event, it does not appear that, if there was no such notice or knowledge there was any intent on Mr. Hannon's part to mislead or prejudice the City and County, or that the City and County has been misled or prejudiced. Even in the absence of such notice or knowledge, unless there is such an intention or the employer is actually misled or prejudiced the employee is entitled to a compensation.

I therefore advise you that John Hannon is entitled to compensation under the Workmen's Compensation Act, unless it actually appears that the City and County did not have the notice or knowledge of the accident required by Section 20, and in addition that the failure to give notice was intended to mislead and prejudice the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

City Not Liable in Damages to Automobile Colliding with Unlighted Surface Heating Machine.

October 10, 1914.

Gentlemen: I am in receipt of your communication of the 1st inst., transmitting for my consideration reports on accident sustained by S. H. Susskind by collision with a surface heating machine operated by your Department.

From an examination of the reports submitted to me it appears that at or about two o'clock A. M. of August 28, 1914, said Susskind was driving an automobile in a southerly direction along Van Ness Avenue in the neighborhood of Pacific Street, and said automobile collided with a steam roller belonging to your Department, resulting in damage to said automobile.

The question of liability in matters of this kind is no longer an open question in the State of California. The courts have been called upon to pass upon the matter on numerous occasions and the principles to be deduced from the decisions in this State are that municipal corporations are not liable for dereliction or remissness of municipal officers or agents in the performance of public or governmental functions of the City, or the performance of duties imposed upon those officers which are prescribed and limited by express law, and that the doctrine of *respondeat superior* cannot be invoked to render the City liable.

In the case of Stockton Automobile Company vs. Confer, reported in 154 Cal. at pages 402 et seq., the plaintiff brought the action to recover damages for injuries occasioned to an automobile belonging to plaintiff. The accident happened about two o'clock A. M. of January 10, 1908. It appears that the Board of Public Works had employed a contractor to build a cross-walk of bitumen at the intersection of two of its streets, in the performance of which work he had placed a pile of bitumen upon the highway about two feet eight inches in height and extending from the curb of the street about a distance of sixteen feet towards the center and about the same distance lengthwise of the street.

The Court said that the responsibility of the Street Superintendent, Confer, and not the municipality, was fixed by the provisions of the general street law (Vrooman Act, Statutes 1885, pages 160-1, Sections 22 and 23.) Said Act provides that no recourse for damages suffered by any person injured either in his

person or property through any defect in any graded street or public highway should be had against the City, but if such defect in the street or public highway had existed for the period of twenty-four hours or more after notice thereof to the Superintendent of Streets, then the person or persons upon whom the law may have imposed the obligations to repair such defect in the public street or highway and also the officer or officers through whose official negligence such defect remains unrepaired shall be jointly and severally liable to the party injured for the damage sustained; provided that said Superintendent has the authority to make said repairs under the direction of the City Council at the expense of the City.

Attention is here called to the fact that the Charter, Section 5, Article I, provides that "when any portion of the roadway of a public street which has been accepted by the Supervisors shall be in such defective condition as to endanger persons or property in the use thereof * * * it shall be the duty of the Board of Public Works to cause any such defect in such roadway * * * to be remedied or repaired. And, if through the official negligence of said Board such defect remains unremedied or unprotected and in consequence thereof damage or loss to persons or property is sustained or suffered the said Board shall be liable to the party injured for the damage sustained," under certain conditions which it is unnecessary here to set forth.

The Court further said that in view of the section of the Vrooman Act which placed the responsibility for the safe condition of the streets on others than the City itself, an obligation was imposed upon the Superintendent of Streets to erect guards and place lights.

In the case of Chope vs. Eureka, 78 Cal. 588, the plaintiff brought his action to recover damages for personal injuries by falling into an excavation for a sewer within the corporate limits of the defendant municipal corporation. The Court held that it is the law of this State that a municipal corporation is not liable for personal injuries to individuals such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability; that in California the doctrine above stated has been clearly and continuously adopted; and if any change in the law is desirable that change must be made by the Legislature. And so far at least the Legislature has shown no

disposition to make the change. Citing Winbigler vs. Los Angeles, 35 Cal. 36; Tranter vs. City of Sacramento, 61 Cal. 275; Barnett vs. Contra Costa, 67 Cal. 77; Crowell vs. Sonoma County, 25 Cal. 315; Hoffman vs. San Joaquin County, 31 Cal. 430.

The same Court, in the case of Arnold vs. City of San Jose, 81 Cal. 618, reiterated the doctrine expressed by the Court in the Chope case.

The case of Doeg vs. Cook, 126 Cal. 213, concerned an action for damages for personal injuries sustained by plaintiff by falling into a culvert on a public highway of the town of San Buenaventura. In that case the Court decided that the municipality was not liable.

In the case of Schindler vs. Young, 13 Cal. Ap. 18, at page 21, the Court said:

"We know of no provision of law in this State under which the City could be required to pay damages to one injured in consequence of a defective street."

Arnold vs. San Jose, supra;
Chope vs. Eureka, supra.

My conclusion in this matter is that the City and County of San Francisco is not liable for any damage sustained as alleged herein.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Havelock Street at Southern Pacific Crossing Not a Public Street.

October 14, 1914.

Gentlemen: I am in receipt of your communication of the 3rd ult., as follows:

"This Board has received a complaint from property owners in the Ingleside District concerning the reconstruction of a fence by the Southern Pacific Company across Havelock Street between San Jose Avenue and the westerly termination of San Jose Avenue, after this fence had been taken down by property owners.

"Under date of April 10, 1912, former City Engineer Marsden Manson reported to the Board of Public Works as follows:

"'Havelock Street is an open, public street from San Jose Avenue to its westerly termination, 1,783.3 feet westerly from San Jose Avenue, and the Southern Pacific Railroad right of way crosses Havelock Street midway between San Jose Avenue and the westerly termination of said Havelock Street.'

"Will you kindly inform this Board whether Havelock Street, where it is crossed by a fence of the Southern Pacific Company, is an open, public street?"

Opinion.

From an examination of a map prepared by William P. Humphreys, City and County Surveyor in 1870, as per Order No. 966 of the Board of Supervisors approved October 26th of the same year, I find that the street now called Havelock Street was known as Henry Street. Henry Street was located at the southern boundary line of the Belle Roche City Tract, extending along the House of Refuge Tract from the old San Jose Road westerly to the right of way of the Southern Pacific Railroad Company. In 1882 the Supervisors passed an Order, No. 1684, changing the name of Henry Street, from the old San Jose Road to the Southern Pacific Railroad, to Havelock Street.

Neither the map prepared by Mr. Humphreys in 1870, nor the one prepared by him in 1878 delineates any street westerly across the right of way of the Southern Pacific Company along the northerly line of the House of Refuge Tract. The line of the San Francisco and San Jose Railroad Company, the predecessor in interest of the Southern Pacific Railroad Company, was located in 1862 and therefore, there being no official declaration of the existence of Havelock Street across the right of way of the Southern Pacific Company between that time and 1870, when the first Humphrey May was made, it seems to me that Havelock Street did not and does not extend across the right of way of the Southern Pacific Company.

The extension of Havelock Street across the right of way of the Southern Pacific Company could only be made by dedication to that effect by the Southern Pacific Company or by appropriate proceedings to accomplish the same end and the records do not disclose any such dedication or proceedings.

You are therefore advised that Havelock Street does not cross the right of way of the Southern Pacific Railroad Company.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Jurisdiction of Board of Public Works to Hear Charges Dates from Approval of Charter Amendment No. 3, March 28, 1913.

October 19, 1914.

Gentlemen: I am in receipt of your communication of recent date, requesting my opinion on the following:

On March 26, Frank Forcada, a Civil Service watchman, was suspended by resolution of the Board of Public Works for thirty days for failure to report for duty. In April 21, 1913, the Board of Public Works heard charges against Forcada on account of inattention to duty, and by resolution of your Board he was dismissed from its employ.

Forcada has petitioned your Board that he be reinstated, on the ground that your Board had no jurisdiction over the trial of the charges preferred against him at the time they were heard.

Your Board has requested my opinion as to whether or not it has legal authority to reinstate Mr. Forcada in its employ.

Opinion.

Under the provisions of Section 12, Article XIII of the Charter, both before and after its amendment in 1912, the appointing officers of a department are granted the power to suspend a subordinate for a period not exceeding thirty days. There is no question as to the power of the Board of Public Works to act as it did in suspending Forcada by resolution.

The sole question for consideration is: At the time of Forcada's trial did the Board of Public Works have the jurisdiction to try charges filed against him? Before the Charter Amendments of 1912 were approved by the Legislature, the jurisdiction over Civil Service employees was vested in the Civil Service Commission.

By Charter Amendment No. 3, ratified by the voters of the City and County of San Francisco, December 10, 1912, this jurisdiction was taken from the Civil Service Commission and vested in the appointing officer or officers of the department in which the employee serves. The finding of such officer is final unless a written appeal against such finding is made to the Civil Service within thirty days thereafter.

This Charter Amendment was approved by the State Legislature in Assembly Concurrent Resolution No. 1, adopted in the Assembly, March 20, 1913, and in the Senate, March 28, 1913. Article XI Section 8 of the State Constitution, with relation to the ratification of charters by the Legislature, that "such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, such charter shall become the charter of such * * * city and county and shall become the organic law thereof and shall supersede any existing charter."

Further, in the same section, it is provided that amendments to such a charter, if favorably voted upon by the people of such City and County shall "be approved by the Legislature, as herein provided for the approval of the Charter" and "such Charter shall be amended accordingly."

Following these provisions of the State Constitution the Legislature approved Charter Amendment No. 3, conveying jurisdiction over departmental Civil Service employees to the appointing officers thereof, on March 28, 1913. On that date the Board of Public Works was vested with the authority to hear charges against its subordinates.

Clothed with this power, the Board, after trial, dismissed Forcada. His only remedy was a written appeal to the Civil Service Commission. As he does not appear from record to have availed himself of this remedy within the time prescribed by law he has forfeited his rights to do so.

You are therefore informed if the trial before your Board was held in accordance with the provisions of Section 12 of Article XIII of the Charter, as amended, you have no legal authority to reinstate Forcada in your employ.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Public Works.

Power of Board of Public Works Over Improvement of Public Streets.

October 20, 1914.

Gentlemen: I am in receipt of the following communication from the Clerk of your Board:

"The Board of Supervisors adopted a motion requesting a formal opinion from you as to whether the Board of Public Works can do street work in excess of $500.00, appropriation having previously been made by the Board of Supervisors. I think you are familiar with the scope of this question as you were present at the meeting of the Street Committee when the matter was discussed.

"The Board also desires to be informed in this connection as to whether the work of paving the streets throughout the Civic Center can be done by the Street Repair Department of the Board of Public Works, said work costing in excess of $500.00.

"The discussion in the Board on this matter was as to the interpretation of Section 14, Article VI, Chapter I of the Charter."

Opinion.

Two sections of the Charter bear upon the question presented in your communication, namely, Section 14, Chapter I, Article VI, and Section 30 of Chapter II, Article VI.

Section 14 reads as follows:

"All public work authorized by the Supervisors to be done under the supervision of the Board of Public Works shall, unless otherwise determined by the Board of Public Works, be done under written contract, except in case of urgent necessity as hereinafter provided; and except as otherwise specifically provided in this Charter, the following proceedings shall be taken in all cases in the matter of the letting of contracts by said Board. Before the award of any contract for doing any work authorized by this article, the Board shall cause notice to be posted conspicuously in its office for not less than five days, and published for the same time, inviting sealed proposals for the work contemplated; except, however, that when any repairs or improvement, not exceeding an estimated cost of five hundred dollars, shall be deemed of urgent necessity by the Board, such repairs or im-

provement may be made by the Board under written contract or otherwise, without advertising for sealed proposals."

Section 30 reads as follows:

"The Board shall cause to be made all urgent repairs upon the public streets that may from time to time be requisite for the public safety, and for that purpose may employ such laborers as may be necessary, and at such wages as may be from time to time fixed by the Board; but when the expense of the repairs upon any street or portion of a street shall exceed the sum of five hundred dollars, exclusive of materials to be furnished from the Corporation Store Yard, the same shall be done under contract awarded in the manner provided in this article."

Section 14 is general in its character and is not limited to street repair or improvement. Section 30 is limited in its application to *urgent repairs upon the public streets that may from time to time be requisite for the public safety.* In general, there are two classes of street improvement of accepted streets, the entire reconstruction of streets and repairs to streets. Repairs to streets may be divided into two classes, urgent repairs that may from time to time be requisite for the public safety and ordinary repairs not necessary for the public safety but which may be convenient and proper.

Section 30, as pointed out, is limited in its operation to urgent repairs. In the matter of the reconstruction of public streets there is nothing found in the Charter specifically covering the same. When a street, however, has been accepted and improved by property owners the street must thereafter be kept in repair and improved at the expense of the City and County. (Sec. 23, Chap. II, Art. VI.) The City being required to repair and improve accepted streets it follows that the City has the undoubted power to reconstruct the streets.

Reconstruction of streets then comes within the general provisions of Section 14 of Chapter I, Article VI, as public work authorized by the Supervisors to be done under the supervision of the Board of Public Works, and the question whether reconstruction of public streets must be done under written contract or by labor employed by the Board of Public Works, depends upon the proper construction to be given that section. Likewise, ordinary repairs as distinguished from urgent repairs necessary for

the public safety come within the same section, while urgent repairs are governed by the provisions of Section 30.

Section 30 is plain and unequivocal. The Board of Public Works is authorized by the section "to make all urgent repairs on the public streets that may from time to time be requisite for the public safety" and if the expense of such repairs upon any street or portion of a street is less than $500.00, not including the materials to be furnished from the corporation yard, the Board of Public Works may employ such labor as may be necessary to do the work. When, however, the urgent repairs upon any street or portion of a street shall exceed the sum of $500.00 exclusive of the materials to be furnished from the corporation yard, the same must be done under contract in the manner provided in the Charter for the letting of contracts by the Board of Public Works.

There is this distinction in the power of the Board of Public Works as to urgent repairs requisite for the public safety and ordinary repairs or reconstruction of streets. The matter of urgent repairs is entirely confided to the Board of Public Works. The Board of Supervisors has nothing whatever to do with those repairs. The appropriation made by the Board of Supervisors for urgent repairs is entirely within the jurisdiction of the Board of Public Works. The Board of Supervisors neither authorizes nor directs the repairs. The Charter itself places that power entirely within the jurisdiction of the Board of Public Works. The reason for this undoubtedly lies in the fact that if a repair is urgent, time should not be wasted in securing the approval of the Board of Supervisors to do the work, because if delay could be had in making the repair it could not be said to be urgent, and, secondly, because the members of the Board of Public Works are responsible upon their bonds for a dangerous condition in the public streets when that condition has been brought to the attention of the Board of Public Works and there is an appropriation available to cure the dangerous character of the street.

While Section 30 is plain and unequivocal, Section 14 of Chapter I, Article VI, cannot be said to be so. It is possible to forcibly urge several different constructions of that section. It has been urged that the portion of the section which reads "except as otherwise specifically provided in this Charter, the following proceedings shall be taken in all cases in the matter of the letting of con-

tracts by said Board," requires that the work authorized by the Board of Supervisors to be done under the supervision of the Board of Public Works must be done under written contract.

It is also argued that the words "unless otherwise determined by the Board of Public Works" means that the Board of Public Works shall do the work authorized by the Supervisors under written contract unless the Board of Public Works determines that a repair or improvement is of urgent necessity, in which case if the cost of the repair or improvement is less than $500.00 the Board of Public Works may do the work without entering into a written contract. Such construction requires that the words "unless otherwise determined by the Board of Public Works" be read with the exception contained in the latter part of the section, namely, the $500 exception, and limit those words in their application to that part of the section.

On the other hand, it is urged that the words "unless otherwise determined by the Board of Public Works" are not limited to any other part of the section and the Board of Public Works may determine to do the work otherwise than by written contract and that the section simply requires that if the Board of Public Works does do the work under written contract the procedure laid down in Section 14 and the subsequent sections of the same chapter and article must be followed.

While the meaning of Section 14 is by no means plain, it is my opinion that the section should be construed as conferring upon the Board of Public Works the power either to do the work under written contract or by day labor. In this connection it is to be noticed that the Board of Public Works under Sections 31 and 32 of Chapter II, Article VI, has been given the power, when directed to do so by the Board of Supervisors, to purchase materials which may be required for the repair of public streets or of any improvements thereon and to maintain a corporation store yard "wherein shall be kept all supplies, materials, implements and machines belonging to the City and County to be used in repairing or cleaning and sprinkling the streets or for any improvement thereon." These materials are not limited by the section to be used solely in urgent repairs but are such materials as are to be used for any improvement of a public street. Of course, it would be possible in a written contract to provide that the materials to be used should be furnished by the

City and County from its corporation store yard, but I am convinced that the framers of Sections 31 and 32 contemplated that the Board of Public Works might make the improvement by day labor and the power was therefore given the Board to purchase the necessary materials for the improvement. It cannot be said that the words "except as otherwise specifically provided in this Charter the following proceedings shall be taken in the matter of the letting of contracts by the Board" are a limitation upon the power of the Board of Public Works in the performance of public work, preventing the Board of Public Works from doing the work by day labor. Those words are simply a limitation upon the manner of letting a contract. If a written contract is to be entered into, then the Board of Public Works must follow the provisions of Section 14.

The procedure outlined for the letting of contracts by the Board of Public Works is designed to encourage to the fullest extent competitive bidding and to prevent favoritism. And it is not an anomaly to provide that the Board of Public Works may determine whether public work shall be done by written contract or by day labor and at the same time require compliance with very stringent proceedings for the entering into contracts, for the reason that while the Board could be given this very wide discretion, yet, if the Board's discretion led it to do the work by written contract, proceedings must be followed insuring competitive bidding and preventing favoritism. This construction of that part of Section 14 which lays down the proceedings which shall be taken in the matter of the letting of contracts is sustained by the case of Perry vs. City of Los Angeles, 157 Cal. 146. In that case quite similar language requiring a certain procedure to be followed for the letting of contracts, was considered as not requiring the City of Los Angeles to do the work under written contract but as merely requiring that if a written contract was entered into a certain defined procedure must be followed.

I am therefore of the opinion that the words "unless otherwise determined by the Board of Public Works" places it within the power of the Board of Public Works to determine that work done under the supervision of the Board may be done by day labor. In this connection it should be pointed out that that determination rests entirely with the Board of Public Works. The Board of Supervisors merely authorizes the improvement. How the im-

provement shall be done is left entirely to the Board of Public Works.

It is proper in this connection to point out that before work or improvement on streets shall be authorized by the Board of Supervisors the same must be first recommended by the Board of Public Works. Section 2 of Chapter II, Article VI, among other things provides that the Board of Public Works may "recommend any improvements, the expense of which is to be paid by the City and County, though no application may have been made therefor, and must make, with said recommendation to the Supervisors, an estimate of the expense, and in such case the Supervisors may order the same done." And, further, that "*no street work or street improvement of any kind shall be ordered to be done by the Supervisors unless a written recommendation to do the same has been made to them by the Board of Public Works,*" except that when application is made to the Board of Public Works for any work or improvement of which the expense is to be paid by the City and County, and the Board of Public Works shall not approve the said application it shall report to the Supervisors its reason for such disapproval and the Supervisors may then, after having obtained from the Board of Public Works an estimate of the expense of said work or improvement, by ordinance passed by the affirmative vote of not less than fourteen members of the Board of Supervisors, order the doing of said work or the making of said improvement. The Board of Supervisors has not the power of its own initiative to order the improvement of a public street. The duty of determining what street improvements shall be made lies with the Board of Public Works. The Board of Supervisors can merely approve or disapprove what the Board of Public Works recommends except in case where the Board of Public Works disapproves of an application of property owners.

The procedure, therefore, to be followed in the matter of street work or street improvement, other than urgent repairs requisite for the safety of the public, the expense of which is to be paid by the City and County, is for the Board of Public Works to first recommend the same unless application has been made for the work by property owners and the Board of Public Works disapproves of the application, in which case the Board of Supervisors may overrule the action of the Board of Public Works by an affirmative vote of fourteen of its members. When the recommendation has been made to the Board of Supervisors, by

the Board of Public Works, the Board of Supervisors is then empowered and not till then to authorize or disapprove of the work or improvement.

I therefore advise as follows:

1st: Urgent repairs requisite for the public safety may be done by the Board of Public Works, without any authorization therefor, by day labor, if the expense of the urgent repair does not exceed $500.00, exclusive of materials furnished by the City from the corporation store-yard. But if the expense of the improvement exceeds $500, not including the materials furnished from the corporation store-yard, the same must be done under written contract.

2nd: Ordinary repairs for the public convenience and reconstruction of streets shall first be recommended by the Board of Public Works and then authorized by the Board of Supervisors.

3rd: That when the improvements are authorized by the Board of Supervisors the Board of Public Works may do the work either under written contract or by day labor.

4th: That the determination whether such public work shall be done by day labor or by contract is entirely confided to the Board of Public Works.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

What Minors Are Citizens of California.

October 20, 1914.

Sir: I am in receipt of your recent request for my opinion on the two following questions:

1. How may a minor become a citizen of the State of California?

2. If born in the United States, but a state other than California, what residence or intention is necessary to make a minor a citizen of this State?

Opinion.

I.

Amendment XIV of the Constitution of the United States provides, in Section 1 thereof, that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. * * *"

Section 51 of the Political Code of California provides that "the citizens of the United States are:

"1. All persons born in this State and residing in it, except the children of transient aliens and of alien public ministers and consuls."

Therefore the minor children of aliens born in California are citizens thereof.

The minor child of an alien, though born out of the United States, if dwelling within the United States at the time of the naturalization of his parent, becomes a citizen by virtue of such naturalization. (Campbell vs. Gordon, 6 Cranch (U. S.) 176, 3 L. ed. 190; Vint vs. King, 28 Fed. Cas. No. 16,950.)

Section 2158 (U. S. Comp. Stat. 1901, p. 1332) provides that the widow and children of an alien who has made a declaration of intention and who dies before he is actually naturalized, shall be considered as citizens of the United States and shall be entitled to all rights and privileges as such upon taking the oath prescribed by law.

II.

Paragraph 2 of Section 51 of the Political Code of California provides that "the citizens of the State are:

"2. All persons born out of this State who are citizens of the United States and residing within this State."

The rules for determining residence under this section are to be found in Section 52 of the Political Code of California, which reads as follows:

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

"1. It is the place where one remains when not called else-

where for labor or other special or temporary purpose, and to which he returns in seasons of repose;

"2. There can only be one residence;

"3. A residence cannot be lost until another is gained;

"4. The residence of the father during his life, and after his death, the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child;

"5. The residence of the husband is the residence of the wife;

"6. The residence of an unmarried minor who has a parent living cannot be changed by either his own or that of his guardian;

"7. The residence can be changed only by the union of act and intent."

The rules of law stated herein will, I believe, answer your queries.

Respectfully,

PERCY V. LONG,

City Attorney.

Probation Officer.

Board of Education Has Full Discretion in Fixing Amount of Teachers' Salaries.

October 22, 1914.

Sir: I am in receipt of your recent communication requesting my opinion as to the power of the Board of Education to reduce the salaries of teachers for any fiscal year to an amount less than that paid for similar service, during any previous year.

Opinion.

Article VII, Chapter III, Section 2 of the Charter confers on the Board of Education the power—

"To employ such teachers and persons as may be necessary to carry into effect its powers and duties; to fix, *alter* and approve their salaries and compensation."

Article VII, Chapter III, Section 4, provides that—

"The Board shall, between the first and twenty-first days of May of each year, adopt a schedule of salaries for the next ensuing year for teachers and all employees of the School Department."

These sections confer upon the Board of Education full discretion in fixing the salaries to be paid its teachers and employees.

You are therefore advised that if the Board sees fit to reduce teachers' salaries for any ensuing fiscal year it may do so and its decision in the matter is final.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Blasting Permits.

October 23, 1914.

Gentlemen: I am in receipt of your communication as follows:

"Permits granted by the Board of Supervisors for blasting contain a provision 'that the work of blasting shall be performed to the satisfaction and under the supervision of the Board of Public Works.'

"The Fire Committee of the Board of Supervisors respectfully asks that it be informed if said provision renders the City or Board of Public Works liable in the event of damage being done by the blasting. In all cases the permittee is required to furnish a bond fixed by the Board of Public Works and approved by the Mayor."

Opinion.

The only theory upon which the City and County could be held liable in the event of damage being done by the permittee under a permit issued by the Board of Supervisors, for blasting, is that the act authorized is intrinsically dangerous. Blasting can be conducted safely and without hazard or risk to either person or property. It is the manner in which blasting is done that may make it unsafe and dangerous. That being so, it raises no lia-

bility against the City, for the reason that no permit is given to blast in a dangerous manner.

The permit is issued upon certain conditions to be complied with by the person obtaining the same, viz.: that the work of blasting shall be performed to the satisfaction and under the supervision of the Board of Public Works, and that the permittee shall furnish a bond in an amount fixed by the Board of Public Works and approved by the Mayor.

The City and County has no private interest in the matter and exercises no control or authority over those employed by the permittee. The condition imposed that the work shall be done under the supervision of the Board of Public Works makes for the better security of person and property, and the law will not penalize the City and County for exercising a measure of precaution intended to safeguard the interests of its citizens, and especially is this so, when no liability could be imposed upon the City and County for failing to insert such a condition.

The only duty to be performed by the Board of Public Works in this connection is to inspect the work, with no power of direction or of control over the persons performing it.

In the case of Foster vs. Chicago, 96 Ill. App. 4, the Court held that, although the contractor agreed to perform all the work "under the immediate direction and superintendence of the Commissioner of Public Works, and to his entire satisfaction, approval and acceptance," the work he agreed so to perform was that prescribed in the contract, and this direction and superintendence related to results, to the character of the workmanship and not to methods, unless by the use of improper methods the character of the workmanship was rendered unsatisfactory.

Analogous cases have arisen in respect to the issuance of permits by mayors of cities for the discharge of fireworks, and in every case it has been held that the city was not liable for injuries resulting from the negligent manner in which the licensee discharged a bomb; the permit not having authorized a discharge in such manner.

De Agramonte vs. City of Mt. Vernon, 98 N. Y. S. 454;

Landan vs. City of New York, 85 N. Y. S. 606;

Fifield vs. City of Phoenix, 36 Pac. 916;
Lincoln vs. Boston, 20 N. E. 329;
Wheeler vs. Plymouth, 18 N. E. 532;
Crowley vs. Rochester Fireworks Co., 76 N. E. 470.

In the case of Von Langerke vs. City of New York, 134 N. Y. S. 837, the Court held that the City was not liable for giving a permit for the building of a tunnel under one of its streets, or in failing to properly supervise the work.

I am of the opinion that neither the City and County nor the Board of Public Works is liable in the event of damage being done by blasting performed under a permit issued as herein specified.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

All Municipal Pensions Are Exempt from Execution and Are Incapable of Assignment.

October 26, 1914.

Dear Sir: In reply to your communication of recent date I beg to advise you that the recent decision of Judge Murasky (on file in your office) covers all cases of judgments against pensioners of the City and County of San Francisco.

The conclusions reached in that opinion, supported by good and sufficient authority, are to the effect that a pension is a gift or gratuity bestowed by the municipality upon the pensioner or his family. It is not a debt owing from the municipality to the pensioner, nor is it a right arising out of an obligation. (Civil Code, sec. 1458.)

You are therefore advised that all pensions granted by the City and County of San Francisco are exempt and incapable of assignment.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Improvement of Van Ness Avenue Between North Point and Lewis Streets.

October 26, 1914.

Gentlemen: I am in receipt of your communication of the 23rd inst., as follows:

"We enclose herewith a copy of communication received from the Van Ness Improvement Association under date of April 13, 1914, relative to the inauguration of public proceedings to improve Van Ness Avenue from North Point to Lewis Streets.

"In accordance with the attached report thereon from the City Engineer, you are requested to advise this Board what procedure should be followed to declare Van Ness Avenue from Beach Street northerly an open, public street of the City and County."

Opinion.

Van Ness Avenue, so-called, from a point midway on the easterly line thereof between Beach and Jefferson Streets, thence extending in a westerly direction to a point approximately in the center thereof and thence proceeding in a general northwesterly direction to a point on the westerly line of Van Ness Avenue about opposite the center line of Jefferson Street; thence northerly to the southerly line of Lewis Street; thence easterly 125 feet along said southerly line of Lewis Street; thence southerly to the point of commencement, is in private ownership according to the decree in the case of Ellen Dore et al. vs. Mortimer K. Truett et al., which was an action brought for a partition of the tract of land known as the "North Peter Smith Tract."

The history of that litigation is set forth in an opinion rendered by me to the City Engineer on April 4, 1912, a copy of which may be found in the Opinions of the City Attorney, 1910-11-12, pages 636 et seq., to which your attention is hereby called. No public proceedings can be initiated to improve that which is private property and it would be necessary for the City to acquire said property by either of three methods, viz: Donation of the land by the owners thereof to the City and the dedication thereof to public use and purposes as a public street; purchase or condemnation,

before any street work can be done thereon by the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Interpretation of State Hotel and Lodging House Act—In re Building Permit.

October 30, 1914.

Gentlemen: I am in receipt of your communication of August 26, 1914, as follows:

"The Columbia Realty Company filed an application with this Board on August 7, 1913, for permission to construct a lodging house on the westerly line of Taylor Street, 137½ feet north of Sutter Street.

"On August 10, 1913, the Hotel and Lodging House Law of the State became effective and placed certain restrictions upon the erection of lodging houses, these provisions being applicable to lodging houses erected in the City and County of San Francisco.

"The Board approved the application of the Columbia Realty Company on September 24, 1913, and on January 30, 1914, issued a permit to the Columbia Realty Company to construct a lodging house according to the plans originally filed on August 7, 1913.

"In behalf of Jennie G. Mackinley, owner of property adjacent to this building, Mr. A. Pattiani claims that inasmuch as permission was granted the Columbia Realty Company to construct a lodging house on the Westerly line of Taylor Street north of Sutter Street after the State Hotel and Lodging House Law became effective, that this permit expired automatically, in accordance with Section 10 of the State Hotel and Lodging House Law, as follows:

" 'Any permit or approval which may be issued by said department but under which no work has been done above the foundation walls within six months from the issuance of such permit or approval shall expire by limitation.'

"You are requested to advise this Board whether the contention of Mr. Pattiani is correct, whether this Board had the legal authority to grant a permit to the Columbia Realty Company according to plans filed before the State Hotel and Lodging House Law became effective."

Opinion.

The State Hotel and Lodging House Act provides a uniform system of regulations for the building and occupancy of hotels and lodging houses in every incorporated city, town and City and County of the State. Section 10 of the Act provides that:

"Before the construction or alteration of a hotel or lodging house, or the alteration or conversion of a building for use as a hotel or lodging house is commenced, the owner or his agent or architect shall submit to the building department of the incorporated town, incorporated city or city and county in which said hotel or lodging house or building to be constructed, altered, added to or converted, is situated or to be situated, or if there be no building department, then to the health department, of if there be no building department or health department, then to such department as shall be designated for that purpose by municipal ordinance of the municipality in which said work is contemplated, a detailed statement in writing, verified by the affidavit of the person making the same, of the specifications for the construction of such hotel or lodging house or building upon blanks or forms to be furnished by such department and also a complete and full copy of the plans of such work. * * * If such plans and specifiactions conform to the provisions of this Act relative to the building and occupancy of hotels and lodging houses the department with which said plans and specifications are required to be filed shall issue a written certificate to that effect to the person submitting the same. Such certificate shall state the State Hotel and Lodging House Act has been complied with."

and Section 25 of the Act reads:

"All statutes of the State and ordinances of incorporated towns, incorporated cities, and cities and counties, as far as inconsistent with the provisions of this Act, are hereby repealed; provided, that nothing in this Act contained shall be construed as repealing or abrogating any present law or ordinance of any incorporated town, incorporated city or city and county of the State, making further restrictions than are made in this Act."

It is clear from these quotations that it was the purpose of the lawmakers in passing this Act to require anyone desiring to build a hotel or lodging house after the Act went into effect to obtain a permit in conformity with the provisions of the Act. It is equally clear that it was intended to repeal any ordinance or parts of ordinances which were inconsistent with this Act. Unless for some reason, then, this Act must be held not to have the full effect intended for it your Honorable Board was without power to issue the permit here in question after the Act had gone into effect.

Two reasons have been suggested for holding that the State Hotel and Lodging House Act had no application in this case.

First, it is claimed that the Legislature is without power to legislate with regard to building construction in San Francisco, because under the Charter the Board of Public Works and the Board of Supervisors are given exclusive control. This claim is based upon Article VI, Chapter I, Section 9, Subdivision 5 of the Charter which reads:

"The Board of Public Works shall have charge, supervision and control, under such ordinances as may from time to time be adopted by the Supervisors: * * * 5. Of the supervision of any and all building construction in the City and County."

It is argued that under this provision the Board of Supervisors is the only body which may legislate with regard to building construction in the City and County. This argument would have more weight if the provision above quoted was a grant of power to the Supervisors. But it is not. The Board of Supervisors gets its power to pass building laws from the general grant of power, Article II, Chapter II, Section 1, Subdivision 1, of the Charter:

"Subject to the provisions, limitations and restrictions in this Charter contained, the Board of Supervisors shall have power:

"1. To ordain, make and enforce within the limits of the City and County all necessary local, police, sanitary and other laws and regulations."

and this is but a paraphrase of the constitutional grant found in Article XI, Section 11 of the State Constitution:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws."

Inherent in this constitutional grant itself is the limitation that ordinances passed under it must not be in conflict with general laws.

On the other hand, Article VI, Chapter I, Section 9, Subdivision 5 of the Charter, quoted above, is not and does not purport to be a grant of power to the Board of Supervisors. It designates the Board of Public Works as the department of the City and County government which shall have supervision of building construction, but that supervision is not an absolute and uncontrolled one. It is to be exercised "under such ordinances as may from time to time be adopted by the Supervisors." In other words, whenever the Board of Supervisors, acting under the grant of power found in Article XI, Section 11 of the Constitution, choose to legislate with regard to building construction, this provision of the Charter designates the Board of Public Works as the body which shall have supervision and the control under that legislation. This is my opinion in the full effect of this provision. Its purpose is not to give the Board of Supervisors the exclusive power to enact building laws for the City and County. Its purpose is to designate the Board of Public Works as the proper body to have control of building construction under such building legislation as the Supervisors see fit to enact.

It has also been suggested that the State Act did not apply in this case because the application for a permit was filed with your Honorable Board three days before the State Act went into effect. I am unable to agree with this suggestion.

Section 25 of the State Act in express terms repeals all ordinances in conflict with the State Act. On the day when the State Act went into effect the ordinance under which building permits had theretofore been issued by your Honorable Board was repealed in so far as it applied to hotels and lodging houses. It became a nullity, and any attempt thereafter to issue a permit for the construction of a hotel or lodging house under the terms of that ordinance was consequently without legal authority. This is true unless the mere act of filing an application for a permit before the State Act became effective must be held to have given the applicant a vested right to have the permit issued according to the terms of the law in effect at the time it was filed. The clear intention of the State Act itself is that no permits should be issued except in conformity with its provisions. It has frequently

been held that even physical property is held subject to reasonable police regulation. For example in Ex parte Hadacheck, 165 Cal. 416, 420-1, the Court says:

"The right of the Legislature, in the exercise of the police power, to regulate or, in the proper cases, to prohibit the conduct of a given business, is not limited by the fact that the value of investments made in the business prior to any legislative action will be greatly diminished."

In Ex parte Quong Wo, 161 Cal. 220, the Court was passing on the validity of an ordinance of the City of Los Angeles prohibiting laundries within certain districts at page 228, we read:

"Nothing is better settled than the proposition that property is held subject to the lawful exercise of the police power, and the fact that petitioner has an unexpired leasehold interest in the premises upon which he conducts his laundry is, therefore, of no consequence in determining the question of the validity of the ordinance."

In the Quong Wo case it also appeared that petitioner had paid his laundry license to June, 1911. In spite of that fact he was convicted of conducting a laundry on April 13, 1911, while the period for which he had paid a license fee had still several months to run.

In the case of In re Stoltenberg, 165 Cal. 789, the Supreme Court upheld the State Tenement House Act though that act imposed certain requirements of construction even upon tenement houses already in existence. If the owner of property may in a proper case be compelled to discontinue the use of his property for the business for which he has fitted it, if the holder of a license to conduct a business may be compelled to discontinue the business during the life of the license, or if the owner of a tenement house already constructed may be compelled to make certain alterations and improvements, it seems too clear for argument that the mere filing of an application for a permit does not give the applicant such a right to have his permit granted that the requirements applicable to it could not be changed pending the consideration of the application.

For the reasons given above I advise you that your Honorable

Board was without legal authority to grant the permit here in question.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Pay-day Twice a Month for City Employees Illegal.

October 30, 1914.

Gentlemen: I am in receipt of your communication requesting my opinion as to whether or not your Board may establish a pay-day twice a month instead of the regular monthly pay-day now in existence.

Opinion.

Section 1 of Chapter IV, Article III of the Charter provides that:

"Section 1. The salaries and compensations of all officers, including policemen and employees of all classes, and all teachers in the public schools, and all others employed at fixed wages, shall be payable monthly."

The phrase "shall be payable monthly" is mandatory, and to pay otherwise than according with the Charter provision is clearly contrary to the organic law of the municipality. You are therefore advised that your Board has no legal authority to establish a pay roll twice a month.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Legality of Paying Firemen Twice a Month.

October 30, 1914.

Dear Sir: I am in receipt of your communication of October 13, 1914, in which you request an opinion, as follows:

"A represenative of the Fire Commission, with the undersigned, had a conversation the other day with the Civil Service Commission regarding the legality of paying the salaries of the members of the San Francisco Fire Department twice a month.

"Arguments pro and con were discussed, and it was unanimously agreed by all present that it would be a good thing if payments were made as suggested. The question of the legality was discussed, and it was suggested that I ask for your opinion in the matter.

"Do you think under our present Charter provisions we could legally pay the salaries of the firemen twice a month?"

Opinion.

The Charter, Article III, Chapter IV, Section 1 thereof provides:

"The salaries and compensations of all officers including policemen and employees of all classes, and all teachers in the public schools, and others employed at fixed wages, shall be payable monthly."

In an opinion which I rendered for the Fire Commissioners, August 1, 1909, to be found at page 396 of the Opinions of City Attorney for 1908-9, I held that this provision applied to all members of the Fire Department, in the following language:

"The salaries of all members of the Fire Department are fixed by Chapter VIII, Article IX, of the Charter, as an annual salary. Chapter IV of Article III of the Charter provides that these salaries shall be payable monthly, or, in other words, the Charter gives each member of the Department an annual salary and provides, as a matter of convenience both to the City and the employees, that their salaries shall be paid in equal monthly installments."

This Charter provision that "salaries and compensations * * * shall be payable monthly" clearly means that they shall be

payable once a month, and since the provision applies to all members of the Fire Department I advise you that under the Charter you cannot legally pay their salaries twice a month.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Police Officers—Seniority of Service.

October 31, 1914.

Gentlemen: I am in receipt of your communication of August 26, 1914, as follows:

"Ex-City Attorney Franklin K. Lane and yourself have rendered opinions to the effect that when a policeman has severed his connection with the Police Department he loses whatever rights he may have had therein and that when he goes into the service again he goes as a new man.

"Frank J. Teutenberg was appointed as a policeman on November 30, 1900, and resigned on February 27, 1907. He took a new examination on September 19, 1908, and was re-appointed as a policeman on December 30, 1908, and is still in the Department but now ranks as a corporal.

"On March 7, 1914, this Commission held an examination for promotion in the Police Department from the rank of corporal to the rank of sergeant and one of the subjects considered in the examination was 'Seniority of Service.' In rating this subject the senior applicant was allowed the maximum credits, 100. The other applicants were rated proportionately. Will you kindly advise us at your earliest convenience as to whether Mr. Teutenberg should be allowed credit for time he served in the Police Department under both his appointments, or whether he is entitled only to consideration for the service he has had since the date of his re-appointment to the Department? We enclose herewith a copy of the circular issued by the Commission to the applicants in the examination above named."

Opinion.

The Charter provision with regard to promotions in the Police Department (Art. VIII, Chap. VII, Sec. 1) provides that "all promotions in the Department shall be from the next lowest rank, seniority of service and meritorious public service being considered."

Ex-City Attorney Franklin K. Lane advising the Board of Police Commissioners on January 28, 1902, as to the status of a police Officer who had once resigned and was later reappointed, used the following language:

"By voluntarily severing his connection with the department whatever rights he may have had within the department were lost, and he came into the service again as a new man and upon no better footing than any other officer." (Opinions of the City Attorney of San Francisco, 1899-1902, p. 603.)

In the *Opinion of the Justices to the Governor and Council,* 126 Mass. 603, the Supreme Court of Massachusetts was called upon to determine the meaning of "seniority of service," I quote from that opinion:

"The Justices of the Supreme Judicial Court, having considered the question upon which their opinion has been required by His Excellency the Governor and the Honorable Council, respectfully submit it as their opinion that the Legislature, in enacting that, 'whenever a vacancy occurs in the office of sheriff in any county, the senior deputy sheriff shall perform all the duties required by law to be performed by the sheriff, until the office of sheriff is filled in the manner required by law, giving bond as now required by law of sheriffs,' has not, by the words 'the senior deputy sheriff in service,' designated the deputy sheriff in office when the vacancy occurs, who is oldest in years only, nor the one whose original appointment was of the earliest date, but who has not since remained continuously in office; nor yet the one who has served for the greatest number of years, but not continuously; but has designated, as the officer to perform the duties of sheriff during the vacancy, the deputy sheriff 'senior in service' when the vacancy occurs, that is to say, the one who has then been longest in office continuously."

I am satisfied of the correctness of these opinions, and so I advise you that Corporal Teutenberg is entitled only to credit

for the service he has had since his reappointment, in determining his standing with regard to seniority of service.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Control Over Poles for Lighting Vested in Board of Public Works.

November 2, 1914.

Gentlemen: I am in receipt of your recent communication requesting my opinion on the legality of the following ordinance:

"Section 1. The Board of Public Works shall not issue any permit for the installation or erection of any posts, poles or standards, used for street lighting purposes to any person, firm, corporation or association unless the type or kind of such post, pole or standard be first approved by the Lighting and Rates Committee of the Board of Supervisors.

"Section 2. This ordinance shall take effect immediately."

Opinion.

Paragraph 13 of Article II, Chapter II of the Charter confers upon the Board of Supervisors the power "*except as otherwise provided in this Charter,* to regulate and control the location and quality of all appliances necessary to the furnishing of water, light, heat, power, telephonic and telegraphic service to the City and County."

By Paragraph 1, Section 9, Chapter I, Article VI, the Charter places under the "charge, superintendence and control," of the Board of Public Works, "under such ordinances as may from time to time be adopted by the Supervisors," "* * * the erection of telegraph and telephone poles, and poles for electric lighting. * * * "

By the provisions of these Charter sections the Board of Supervisors may adopt any ordinance it deems necessary with relation to poles for lighting purposes, but any control or superintendence over such poles under such ordinance is to be exercised by the Board of Public Works.

The ordinance as submitted places this control in the hands of a committee of the Board of Supervisors, a power expressly vested in another board by the Charter.

You are therefore advised that the ordinance in its present form is not legal, being in conflict with Charter provisions.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Effect of Stipulation in Car Contract on Patented Articles.

November 11, 1914.

Sir: I am in receipt of your communication of September 30th which reads as follows:

"I enclose herewith a copy of a letter addressed to the City Treasurer on May 12th, requesting him to withhold payment to car builder of $100 per car to cover the royalty on account of the use of patents owned by Ross & McDonald.

"A copy of this letter was forwarded to the Jewett Car Company on August 27th, calling their attention to the following clause in the specifications which are a part of the contract under which they are constructing the cars.

"'All fees or claims for any patented invention, article or arrangement that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof, shall be included in the price bid for doing the work herein proposed and the contractor and his sureties shall protect and hold any and all departments of the City, together with all of its officers and employees harmless against any and all demands made for such fees or claims and against any and all suits and claims brought or made by the holder of any invention or patent or growing out of any alleged infringement of any invention or patent, and before final payment is made on account of the contract the contractor shall furnish acceptable proof to the Board of Public Works of a proper release of all such fees or claims.'

"Our letter to the Jewett Car Company further contained the following paragraph which was included on the advice of your Mr. Lull:

"'It will be necessary that you either furnish acceptable proof to the Board of Public Works that this controversy with the Prepayment Sales Car Company has been settled or that the Board of Public Works withhold an amount sufficient to cover the royalty which may be recovered from the City in case of suit, before making a final settlement with you for these cars. Will you kindly give this matter your immediate attention and inform us of your intentions in the matter?'

"Under date of September 19, 1914, the Jewett Car Company addressed a letter to the City Engineer, containing the following paragraphs:

"'We hereby acknowledge the receipt of your letter of August 27th, enclosing copy of letter from Samuel E. Darby in behalf of the Prepayment Car Sales Company, requesting you to withhold a certain amount of money per car to cover royalty on an alleged patent on prepayment features of the cars being constructed for you. We beg to differ with the statement of Mr. Darby in his letter to the effect that the patent referred to by him has been sustained by any court. This is not true and the validity of this patent has never been sustained in any court thus far. Furthermore, the cars being furnished you by us do not in any manner infringe the above mentioned patent even if the same is declared valid later, and the claim being made we regard as an absolute piece of blackmail, designed simply to hamper us in the delivery of our car bodies to you.

"'We do not see that the City can consistently recognize this claim in any manner, inasmuch as there are hundreds of cars now operated in the City of San Francisco built by us and by other builders having exactly the same features as our cars and there has never been a royalty paid or claimed by anybody on any of these cars.

"'Furthermore, we have executed an ample bond with the City, protecting it against any claims such as are made by the Prepayment Sales Car Company.

"'Therefore we do not recognize that the City has any right to make any deductions from our payments on any such account.'

"Cars from the Jewett Car Company are arriving in San Francisco every week and under the terms of the contract we have up to this time been paying the full contract price for these cars. About half of the cars, or 62, have already been delivered and paid for. Will you kindly give this matter your attention and inform us at your earliest convenience on the following facts:

"Does the bond executed by the Jewett Car Company for the faithful performance of their contract protect the City against suits which may be brought now or after the final completion of the entire contract on account of infringement of patent rights?

"Would the rights of the City be more fully protected if we were to withhold $100 per car to cover the royalty for which the City might be liable in the event of this patent proving valid and it being proved that our cars infringe said patent, than they are under the bond given by the Jewett Car Company?

"Should Mr. Samuel E. Darby be informed by this office that the Jewett Car Company deny any liability for royalty under the patents controlled by his clients?

"What answer should be made to the Jewett Car Company's letter of September 19th?"

Opinion.

The stipulation in the contract referred to provides that before the final payment is made on account of the contract the contractor shall furnish acceptable proof to the Board of Public Works of a proper release of all fees or claims for patent rights. It is necessary that the City require this proof in order to protect itself as against the bond furnished by the surety company, for the reason that if this proof is not required the surety would probably be released in case there were patent rights upon which the holders of the patents could recover from the City. It is questionable whether the surety bond would remain in full force and effect after the contract had been finally completed and the cars delivered to and accepted by the City.

For the foregoing reasons I am of the opinion that the City, in order to protect itself, must require of the contractor acceptable proof of a release of fees and claims for patented articles and until such proof has been furnished the City is justified in retain-

ing at least a part of the sums due the contractor and if this is not done there is danger that the surety would be released upon the surety bond in case the City should become liable for patented rights. I am convinced that the City would be fully protected if the City were to withhold $100 per car to cover patent royalties. I further believe that it is advisable to inform Mr. Samuel E. Darby of this determination by the City.

I think that a reply should be made to the letter of Jewett Car Company of September 19th, informing the company that the City must require acceptable proof of a proper release of all fees and claims made upon the City for patented articles, or show to the City that there is no merit in such claims. The contractor's surety should also be advised of the claim of Mr. Darby and the City's attitude in regard thereto.

Respectfully,

PERCY V. LONG,

City Attorney.

City Engineer.

Election Officers' Compensation Fixed by State Law at $10.

November 12, 1914.

Gentlemen: I am in receipt of your communication of the 10th inst. in which you enclose a petition of election officers and clerks who served at the recent election of November 3, 1914, in this City and County, and who are petitioning for additional compensation for their services rendered at said election. You request advice as to what power the Board of Supervisors has, if any, to grant the request of these petitioners.

Opinion.

It appears that the amount of compensation allowed to each of the election officers and clerks by the Board of Election Commissioners of this City and County is ten dollars. This sum was determined upon as provided in Section 1072 of the Political Code of this State, which provides that—

"Each member upon a board of election in any county, or city and county, in the State, and each clerk thereof, shall receive

as compensation for his services upon such board a sum not to exceed ten dollars, which sum shall be paid out of the treasury of the county, or city and county, in which such persons act."

The Charter of this City and County, Article XI, Chapter I, Section 5 thereof, provides that—

"All provisions of the General Laws of this State, including penal laws, respecting elections, not inconsistent with the provisions of Chapter II hereof, shall be applicable to all elections held in the City and County of San Francisco. * * * "

There is nothing in the above referred to Chapter II which is inconsistent with said Section 1072 of the Political Code. Section 1127 of the Political Code provides that—

"The Board of Supervisors, or other board having charge and control of elections in each of the counties, and cities and counties, of the State, shall, as soon before a general election as is convenient, proceed to divide such county, or city and county, into election precincts, of which there shall be as many as shall be sufficient to make the number of votes polled at any one election precinct to be not more than two hundred, *as nearly as can be ascertained.*"

It appears from the report filed by the Registrar of Voters with the Board of Election Commissioners of this City and County, dated November 9, 1914, that in a formal protest filed by certain citizens and taxpayers with the Board of Election Commissioners after the election of 1913, attention was called to the discretion vested in the Election Commissioners by the aforesaid Section No. 1127 of the Political Code and demand was made that the number of precincts be reduced to 350 or 400 at the most. Thereupon the Registrar recommended to the Board of Election Commissioners that a trial be made for the elections of 1914, of this maximum recommendation of 400 precincts. This recommendation was approved by the Board of Election Commissioners and the precincts fixed at 403 for the 1914 election. Subsequently, upon the recommendation of the Registrar of Voters, and in view of his expectation of an increased vote for the 1914 election, the number of precincts was increased, first to 475, then to 500 and then to 525. All of these recommendations were approved by the Board of Election Commissioners and the number finally fixed at 525 precincts, which would be an average of 200 votes to be polled at an election of 105,000 votes. The

Registrar based this estimate on the ground that at the last presidential election in San Francisco there were in round numbers 105,000 votes cast and it has rarely happened that the votes cast at the State election have exceeded votes cast at the last preceding presidential election.

The Registrar also calls attention to the fact that when the annual estimates for the cost of elections were sent to the Board of Supervisors in April, 1914, the principal item of compensation for election officers for the year was based upon election officers for 403 precincts which had previously been established, and the appropriation by the Supervisors for the year 1914 was made for that number of election officers only. Therefore, in increasing the number of precincts to 525 this basis, upon which the appropriation had been made, was correspondingly increased. Also that the contract for the erection and maintenance of the election booths was made, as usual, early in the summer, and for 403 precincts as then established. To save expense the booths were to be maintained where located for the general election as well as for the primary election. That thereafter, at a later date and after the primary election, precincts were increased by 125. The Registrar was obliged to locate these 125 additional booths in such manner as to leave the preceding 403 booths where they were located for the primary election, under the contract for both elections. It was found that this presented difficulties and ultimately resulted in some precincts containing considerably more votes than others, since, under the provisions of the State law, no precinct can cross any assembly or senatorial or other district line.

The petition which you enclose calls attention:

1. To the above Section 1127 of the Political Code, and asks that the election officers be compensated at the rate of ten dollars per two hundred votes registered and ten dollars for additional fractions thereof.

As to this, it is of course apparent, from the report of the Registrar, that the Election Commissioners did everything within their power, under the unusual circumstances, to divide the City and County into election precincts, of which there should be as many as would be sufficient to make the number of votes at any election precinct to be not more than 200 "as nearly as can be ascertained."

2. Attention is called to Article II, Chapter II, Section 1, Subdivision 24 of the Charter, which provides that the Board of Supervisors shall have power:

"To fix hours of labor or service required of all laborers in the service of the City and County, and to fix their compensation; provided that eight hours shall be the maximum hours of labor in any calendar day, and that the minimum wages of laborers shall be three dollars a day."

With reference to the above it is to be noted: first, that the Board of Supervisors is not authorized under the law to fix the compensation of officers of election; and, second, that such a provision clearly refers only to "laborers."

With reference to the powers of the Board of Supervisors in this matter the Charter clearly provides that all power is vested in the Board of Election Commissioners. Article XI, Chapter I, Section 1 of the Charter provides that:

"The conduct, management and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in the City and County, shall be vested exclusively in and exercised by a Board of Election Commissioners, consisting of five members, who shall be appointed by the Mayor, and shall hold office for four years."

The introductory language of Article II, Chapter II, Section 1 of the Charter, which contains Subdivision 24 above referred to, with reference to fixing the wages of laborers, states that "*subject to the provisions, limitations and restrictions in this charter contained,* the Board of Supervisors shall have power" etc.

Section 1216 of the Political Code provides that:

"In all counties, and cities and counties, in this State, having a Registrar of Voters and a Board of Election Commissioners, the powers conferred and the duties imposed by this code upon the county clerks and other officers, in relation to matters of election and polling places, shall be exercised and performed by such Registrar of Voters and Board of Election Commissioners. * * * "

Complete jurisdiction over elections is therefore vested by law in the Board of Election Commissioners.

Finally the petition describes what was very apparent to all voters at the last election, that is, that the conditions under

which the officers and clerks worked were most unusual; that the hours were very long and the duties most onerous.

It is indeed well stated in this petition submitted by your Board, so far as a common sense consideration of the question is concerned, that "the laws covering elections were originally formulated some thirty or more years ago, and cannot strictly apply to this day and date."

It is most unfortunate that the law is at present in such a condition as to render it impossible to meet such an unusual situation. However, in view of the clear mandate of the law which fixes the compensation, and also in view of the equally clear provisions of law vesting all control in the Board of Election Commissioners, I am compelled to advise that it is not within the power of the Board of Supervisors to grant any relief in the premises. I shall be pleased to co-operate with your Board, should you so desire, in the framing of necessary legislation to be submitted at the coming session of the Legislature, to render such a situation impossible in the future.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Improvement of Randall Street.

November 12, 1914.

Gentlemen: I am in receipt of your communication as follows: "I am directed by William H. McCarthy, Chairman of the Committee on Streets and Sewers, to refer the accompanying communication to you, relative to the improvement of Randall Street between the Southern Pacific Crossing and Mission Street, for report."

Opinion.

I assume that the report that you desire in this matter is a report on the title to the property described as follows, to-wit:

"Commencing at a point on the southerly line of Randall Street, as shown on map prepared by Marsden Manson in

August, 1909, entitled Map showing Randall, Mission and Charles Streets, distant thereon 1 foot 7¾ inches westerly from the northwesterly line of Mission Street, running thence westerly along said line of Randall Street 111.43 feet to a fence, thence at a right angle northerly and along a line of fence 16.34 feet, thence easterly along a line of fence 75 feet, thence at a right angle southerly 5¾ inches, thence at a right angle easterly 38 feet, thence Southeasterly 8.20 feet to a line drawn northeasterly and parallel with the northwesterly line of Mission Street through the point of commencement and distant thereon 13.60 feet northeasterly from the southerly line of Randall Street, thence southwesterly along said last described line 13.60 feet to the southerly line of Randall Street and point of commencement."

The matter of the examination of the title of this property was referred by me to the Title Insurance and Guaranty Company, which said Company reports that the title thereto is in Alice Kennedy, a widow, and said Company further reports as follows:

"The land in question formed portion of a tract owned by Samuel Brannan and Wm. T. C. Huen which tract was surveyed for Samuel Brannan by Geo. C. Potter on June 8, 1865. As shown by this survey the Brannan Tract, so called, was bounded on the west by the right of way of the San Jose Railroad, on the east by the San Jose Road, on the south by monuments and on the north by the property known as the Four Mile House.

"According to said survey Randall Street did not at that time cross San Jose Railroad right of way. You are referred to the letter of Franklin K. Lane to the Board of Supervisors under date of February 9, 1899, (see Opinions of the City Attorney, 1899-02, p. 17), for a history of this street as far as is indicated by the various official maps.

"We find no conveyance of record to the City of this strip. The deed from Brannan et al. to John F. Kennedy was recorded January 28, 1869 (476 Deeds, p. 210). We have not in our possession the language of the description of this particular deed, but we have a plat of same indicating that it covered 95 feet on San Jose Road. The fuller description which we have at hand of other deeds from Brannan and Huen conveying other portions of the tract are very general, and use the Four Mile House as a base, to-wit:

"'Commencing ..... feet south of the Four Mile House.'

"A copy of the Assessor's block book of the year 1870 shows that 95 feet was assessed to Kennedy and a strip to the north of this land, viz: between it and the Four Mile House of approximately 76.9 feet was assessed to unknown owners."

I find that Honorable Franklin K. Lane, then City Attorney, rendered an opinion to the Board of Supervisors on February 9, 1899, in which he discussed the question of whether or not Randall Street is a public street of the City and County of San Francisco. In that opinion he directed the attention of the Board of Supervisors to the fact that on the south side of Randall Street between Mission Street and San Jose Avenue, a portion of the roadway was enclosed and occupied by one John F. Kennedy, and had been so enclosed and occupied for a number of years but that the land was never assessed to said Kennedy. His examination of the maps did not convince him that the street had been dedicated to the City and that the solution of the question would resolve itself into a matter of actual fact, as to whether the strip had been used as a public highway by the public to such an extent as to amount to a public dedication thereof by user.

In view of the report of the Title Insurance Guaranty Company on the title to this piece of land it seems to me that the City could acquire title thereto by any one of three methods. viz: 1st, the purchase of the land by the City; 2nd, a dedication of the same by the owner thereof to the public as a public street; 3rd, by declaring the same to be a public street of this City and County by reason of the fact that it had been used by the public as a street for five years or more openly and notoriously. This last method would, of course, require an investigation by your Honorable Board as to whether or not the public had used the land as a public street for the period mentioned.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Advising Treasurer That He May Pay Salary Demands of Sealer of Weights and Measures Without Special Appropriation by Board of Supervisors Therefor, Under Certain Circumstances.

November 13, 1914.

Sir: I am in receipt of your communication of the 7th inst. requesting my opinion as to whether or not you can legally pay the demands of the Sealer of Weights and Measures and his deputies for salaries for the months of April, May, June, July, August, September, October, November and December, 1912. In your communication you outlined various reasons why you have refused payment of these demands, the first one being that the Mayor did not sign the ordinance requiring the City Attorney not to appeal the decision in favor of the Sealer. My attention has not been called to any ordinance so passed by the Board of Supervisors requiring the Mayor's signature, and after diligent inquiry on my part I have failed to discover any such ordinance.

Your second objection is that you think the time for appeal to the Supreme Court has not elapsed. In answer to this objection I desire to say that no appeal can be taken from the decision of the District Court of Appeal. In the case of McEvers vs. Boyle the decision of the District Court of Appeal granting a peremptory writ of mandate to compel the Auditor to audit the demands referred to, could only be reviewed by the Supreme Court upon a petition to said Court for a hearing of the case therein. The time for filing such a petition with the Supreme Court has elapsed. It follows therefore that no review of any kind whatever can be had of the decision of the District Court of Appeal.

The decision of the District Court of Appeal is in effect a command to the Auditor to audit and approve the demands specified in your communication. This the Auditor has done in obedience to the mandate of the Appellate Court and the judgment therefor has been in all respects complied with. The demands as presented to you are therefore in no different category than would be any other demand received by you in the ordinary course of business, and, unless they on their face show that they are not authorized by law or the Charter, or that they are not expressly made payable out of the funds to be charged therewith, or that they otherwise do not measure up to the re-

quirements of Section 5, Chapter II, Article IV of the Charter, they should be paid without any specific instructions to you so to do. This answers your fourth objection.

In your third inquiry you state that the Finance Committee of the Board of Supervisors has not made arrangements to appropriate the money to pay the judgment awarded by the Court and in your fifth inquiry you ask out of what fund this money is to be taken. In reply to these questions I desire to say that the demands on their face should show out of what fund they are to be taken. The Board of Supervisors by Resolution No. 9014 (New Series), approved December 11, 1911, appropriated and authorized to be expended out of the General Fund for the fiscal year 1912, the sum of $2,000, toward purchasing the supplies and for meeting the expenses of maintenance of the Bureau of Weights and Measures. By Resolution No. 9010 (New Series) the Board of Supervisors set aside, appropriated and authorized to be expended out of the General Fund for the fiscal year 1911-12, the sum of $6,050, for the purpose of paying the salaries of the Sealer of Weights and Measures and the employees of the bureau. Prior to the passage of the above resolutions and the creation of said bureau the whole matter was plunged into litigation. On the 18th day of November, there was filed in the Superior Court of the City and County of San Francisco, State of California, the case of Donnelly vs. City and County of San Francisco, et al., in which case the question of the legality of the ordinance creating the Bureau of Weights and Measures was brought up. The Board of Supervisors, Treasurer and Auditor were made parties thereto. On February 5, 1912, the Superior Court of the City and County of San Francisco made and entered its decree adjudging that the Weights and Measures Ordinance was null and void and further enjoined the Sealer of Weights and Measures from doing any further act as such Sealer and commanded the Board of Supervisors to desist from paying any demands or incurring any expense against the City and County of San Francisco under the provisions of said ordinance; and commanded the Auditor not to audit and the Treasurer not to pay any demand for cost or expenses incurred in connection with the provisions of said ordinance. An appeal was taken from the judgment and decree so rendered. Pending the determination of said appeal a petition was filed by M. P. Scott, one of the Deputy Sealers of Weights and Measures in the Supreme Court of the State of California asking for a writ of

mandate running to the Auditor of the City and County of San Francisco and compelling him to pay the salary demands of Scott. Upon the hearing of said petition a peremptory writ of mandate was issued by the Supreme Court and the Auditor of the City and County of San Francisco in obedience to said writ audited all of the demands of Scott up to the first day of April, 1912, and you as Treasurer paid them. At the same time the Auditor of the City and County of San Francisco audited and you as Treasurer paid the salary demands of the Sealer and his deputies up to the first day of April, 1912. Thereafter Scott filed his petition in the Superior Court of the City and County of San Francisco for a writ of mandate to compel the Auditor to pay the remainder of his salary demands commencing the first day of April, 1912, and ending the 31st day of December, 1912. At the hearing of this petition Judge Seawell granted this writ. An appeal was duly taken from the decision of Judge Seawell pending which J. W. McEvers, Deputy Sealer of Weights and Measures, filed his appeal in the Superior Court on behalf of himself and his associates for a writ of mandate to compel the Auditor to audit the demands of himself and associates for the months of April up to and including December, 1912. After full hearing in the District Court of Appeal the writ of mandate was issued as prayed for. This last case being the one referred to in your communication.

Section 3, Chapter II, Article III of the Charter states:

"The Surplus Fund shall consist of the moneys remaining at the end of any fiscal year in any other funds (except the Common School Fund and the other funds by this Charter otherwise expressly provided for) after all valid demands, indebtedness and liabilities against said funds incurred within such fiscal year have been paid and discharged; *provided*, that all disputed or contested claims payable out of such funds have been finally adjudicated.

"The Surplus Fund shall be used for the purposes and in the order following:

"1. In payment of any final judgment against the City and County. * * * "

Inasmuch as the payment of the salaries of the Sealer of Weights and Measures has been a contested matter from its very inception we must assume that the Auditor has performed his duty as outlined in the foregoing Charter provisions and that

before merging any appropriation made for said Department into the Surplus Fund he awaited the final adjudication of the contested salary claims herein referred to and has held intact all moneys appropriated for the maintenance of said bureau and the payment of the salaries thereof until the present time. Furthermore, inasmuch as the judgment for the issuance of the writ of mandate runs against the Auditor of the City and County of San Francisco in his official capacity the same is in the nature of a final judgment against the City and County. If there be not sufficient funds left in the appropriation made by the Supervisors and herein assumed to have been kept intact by the Auditor until this time, then said demands should be paid in their order out of any balance that may exist in the surplus of the General Fund, and it is not necessary for the Finance Committee of the Board of Supervisors to make any specific appropriation to meet the demands in question unless there be no funds available for the purpose as above outlined.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Title to Lot on Northeast Corner of Army Street and San Bruno Avenue Vested in Mrs. Ann Cronin.

November 13, 1914.

Gentlemen: I am in receipt of your communication of the 8th ult., as follows:

"On March 4, 1914, this Board adopted a resolution of expediency for the improvement of Army Street from San Bruno Avenue to the easterly line of Kansas Street, including the intersection of Army Street with Vermont Street and Kansas Street, and on the same date approved specifications for this work.

"A resolution of intention to perform this work was passed by the Board of Public Works on March 25, 1914, and on June 22, 1914, action was taken on this resolution of intention.

"By Ordinance No. 2839 (New Series), adopted July 15, 1914, the Board of Supervisors ordered this work.

"At its meeting held August 31, 1914, the Board of Public Works by Resolution No. 32,632 (Second Series), awarded this contract to The Fay Improvement Company. On August 26, 1914, Mrs. Ann Cronin protested the award of this contract for the alleged reason that the performance of the work covered by the same would interfere with her title to certain property located at the northeasterly corner of Army Street and San Bruno Avenue. In reporting on this protest the City Engineer informed the Board of Public Works as follows:

"'There is a protest of Ann Cronin against awarding this contract, stating that she has owned property which encroaches on the line of Army Street, for forty years. It is the opinion of this office that this property does not encroach on Army Street; no deeds or survey having been filed to show that it does.'

"Will you kindly inform this Board whether, under the contract awarded to The Fay Improvement Company, a valid assessment can be made against the owners of property affected for the improvement of Army Street between San Bruno Avenue and Kansas Street?

"Copies of the proceedings had and taken by this Board and the Board of Supervisors in this matter are herewith enclosed."

Upon receipt of your communication I took the subject matter of your communication up with the Title Insurance and Guaranty Company and am in receipt of a report on the title to that certain lot of land described as follows:

"Commencing at a point on the northeasterly line of San Bruno Avenue, distant thereon about 148 feet northeasterly and northwesterly along said line of San Bruno Avenue from the Northwest corner of the Flume House 50 Vara Lot No. 350 and which said point of beginning is also the point of intersection of the southeasterly line of lot No. 34 (as said lot is laid down and designated on that certain map entitled 'Plat of 5, 50 Vara Lots, Nos. 242, 243, 244, 245 and 351, part of Precita Valley Lands, subdivided into building lots by V. Wackenreuder, filed August 12, 1869, in the office of the Recorder of the City and County of San Francisco, California, and recorded in Liber 2 "A" and "B" of Maps, at page 215) and the said Northeasterly line of San Bruno Avenue; thence northwesterly along said line of San Bruno Avenue 50 feet; thence at a right angle northeasterly

70 feet; thence at a right angle southeasterly 50 feet; thence at a right angle southwesterly 70 feet to the northeasterly line of San Bruno Avenue and point of beginning. Being lots Nos. 34 and 35 as per map entitled "Plat of 5, 50 Vara Lots, Nos. 242, 243, 244, 245 and 351, Part of Precita Valley Lands subdivided into building lots by V. Wackenreuder, filed August 12, 1869 in the office of the Recorder of the City and County of San Francisco, California, and recorded in Liber 2 "A" & "B" of maps, page 215."

Said company reported that it found the title vested in Ann Cronin, wife of John Cronin, as her separate property. I wrote a letter to Mrs. Cronin to call at my office, which she did on the 12th inst., and request was made of her that she deed the land to the City for the purpose of straightening out the northerly line of Army Street at the corner of San Bruno Avenue. She refused to do so but said she was willing to sell the same to the City for a reasonable sum.

I inquired at the Assessor's office and was informed by Mr. Zimmerman, a deputy in said office, that this property had been assessed to Mrs. Cronin for a great many years and is now assessed to her. Mr. Schimer of the Board of Public Works investigated the physical condition pertaining to the property and reported to me that this land was enclosed with a fence. Mrs. Cronin has a decree establishing title under the McEnerney Act.

From all that I can ascertain in regard to this matter I am convinced that Mrs. Ann Cronin is the owner of said property and the same is not a part of Army Street. It will be necessary for the City to acquire said property by purchase from Mrs. Cronin or by condemnation proceedings in court if it is desired to straighten out the northerly line of Army Street at this point.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

City Is Not Liable for Damages Sustained by Houses on Seventeenth Street Car Barn Site, Purchased by Mrs. Minna Maier.

November 14, 1914.

Gentlemen: I am in receipt of your communication of the 4th inst., requesting me to advise your Honorable Board whether or not, from the state of facts contained in your communication, the City is liable for the damage alleged to have been sustained by Mrs. Minna Maier in connection with the removal of buildings purchased by her from the City and County of San Francisco from the site of the Seventeenth street municipal railway car barn. Briefly stated the facts are these:

On Friday, July 24, 1914, his Honor, the Mayor, sold at public auction to Minna Maier a three-story frame building designated as No. 2543 Seventeenth Street, standing at the corner of York and Seventeenth Streets on property purchased for the Seventeenth street municipal railway car barn site. Under the terms of the sale it was provided as follows:

"It is further provided that the sale of the said buildings is to be in compliance with the specifications prepared by the Bureau of Architecture of the Board of Public Works and that a surety bond be conditioned and exacted in the sum of $1,000.00 for the faithful performance of the said specifications and agreements by the successful bidder."

The specifications which the buyer agreed to are as follows:

"All improvements to be entirely removed to the level of the street grade.

"All improvements shall be removed within a period of not to exceed fifteen (15) days from date of sale."

The Daniel O'Day Company was awarded the contract for excavating the site of the Seventeenth street car barn and about July 23rd proceeded to lay out its track connections and assemble its equipment, and on August 1st had its steam shovel set up and ready to commence operations on the lot and afterwards proceeded to clear the way for a trench for its track alongside of the large building purchased by Mrs. Maier and had taken down and thrown to one side a portion of a fence and had shifted to one side the lattice frame for an arbor. Mrs. Maier,

for her convenience, moved the building purchased by her diagonally across the lot owned by the City situated between Seventeenth, Mariposa, York and Hampshire Streets and in the prosecution of said work she was compelled to bridge over the trench dug by the Daniel O'Day Company in the prosecution of its contract in grading the site.

The gist of her claim is that, on account of the extra expense incurred by her in doing said work and delay occasioned by the operations of the Daniel O'Day Company and also by reason of the fact, as alleged by her, that a steam shovel belonging to the O'Day Company had damaged one side of a small cottage purchased by her from the City, she was damaged in the sum of $1400. A claim was filed by her signed by Mr. James W. Cochrane as her attorney.

Upon receipt of your communication I fixed Monday, November 9, 1914, at my office as the time and place of hearing the statements of the various parties interested in this matter. There appeared at said hearing Mr. Timothy Reardon, President of the Board of Public Works, Mr. and Mrs. Maier, represented by Attorney McCleod appearing for Mr. James W. Cochrane, the representatives of the Daniel O'Day Company and Mr. Moore, the house mover, employed by Mr. and Mrs. Maier.

The only contention advanced by the attorney for Mr. and Mrs. Maier to sustain their claim for damages was that certain officials of this City and County had promised them that they would be reimbursed for any expense occasioned by delay in moving the building or by reason of the fact that they were compelled to expend more money than they had contemplated doing in the moving of the large building across the property owned by the City, owing to the bridging of the trench made by the O'Day Company.

Acknowledgment was made by the attorney of Mr. and Mrs. Maier that no written contract to that effect had been made and entered into between the City and without such contract made pursuant to the provisions of the Charter, it is my opinion that no liability is imposed upon the City and County of San Francisco or upon your Honorable Board to respond in damages to Mr. and Mrs. Maier in this matter. The law is well settled that a municipal corporation cannot be held liable for any acts of any board or official not acting within the scope of their power

and authority and in order for the City to be held liable in this case it would have to be shown that a contract, made in pursuance of the Charter provisions, had been entered into between the City and Mr. and Mrs. Maier.

It is unnecessary to further dilate upon this point as the courts have held on numerous occasions in accordance with the above opinion.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

City Not Liable for Damage Done to Property on Bemiss and Laidley Streets.

November 27, 1914.

Gentlemen: I am in receipt of your communication requesting my opinion as to whether or not the City and County of San Francisco is liable for any portion of the damage sustained by the owners of property on Bemiss and Laidley Streets on account of the landslide caused by the rains during the past winter.

Opinion.

The claims filed here are by those who own property on Laidley and Bemiss Streets in the block bounded by Mateo, Roanoke, Laidley and Bemiss Streets and grow out of damages sustained by their property occasioned by slides due to the unusually heavy rains during last winter.

It appears that Laidley Street, between Mateo and Roanoke Streets was graded and bituminized under a private contract with the owners of the property on both sides of said street. To grade the street to the official grade, as established by the City and County it was necessary to excavate to a depth of ..... feet, thus leaving the property on the north side of the street elevated.

The rain falling on Bemiss Street, which is unimproved and on the land above it, as well as the lots south thereof, caused the earth to crack and slide toward Laidley Street, forcing some of the houses built thereon off their foundations and raising the soil beneath the sidewalks and the pavement on the north side

of said street. Bemiss Street at Mateo Street is forty feet higher than Laidley Street, and at said point the grade is twenty per cent. At Roanoke Street Bemiss Street is forty-seven feet higher than Laidley Street or a grade of twenty-three and one-half per cent. These figures were computed by the City Engineer's office.

It does not appear that any claim is made that the municipality, or any of its officials, were negligent, or that by reason of negligence on its part or their part, the damage suffered by the claimants was due. On the other hand it can be shown that the rains which caused the damage were unprecedented and could not be foreseen.

It is a fact, as shown above, that the property damage lies below the level of Bemiss Street and it is well settled law that a municipality will not be held liable under the circumstances of this case.

Dillon, in his work on Municipal Corporations (5th Ed.), Section 1736 (Old Sec. 1042), states the proposition as follows:

"We agree to the doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street."

The Supreme Court of this State, in the case of Stanford vs. San Francisco, 111 Cal., p. 202, quoted the text above with approval.

I fail to find a case in which a municipality was held liable for damages under like conditions. On the contrary, the Supreme Court held, in the case of Armstrong vs. Luco, 102 Cal. 272, that the owner of the higher lot was liable to the owner of an adjoining lower lot for damage done by defective drainage pipes used in carrying away water from the roof of his building where he has knowledge, or the fair means of knowledge of such defects. The damage alleged in the case cited was that the foundations of plaintiff's building were weakened and destroyed.

At common law no natural easement or servitude existed as between coterminous owners of land in favor of the owner of the superior or higher land and against the owner of the lower tenement for the flow of more surface water or such as falls or accumulates by rains.

Under the civil law the owner of the upper or dominant tenement had a natural easement or servitude in the lower or servient estate to discharge all surface waters falling or accumulating on

his higher land upon or over the lower lands of the servient owner as they were accustomed to flow in a state of nature, and such natural flow could not be interrupted or prevented by the lower proprietor to the detriment or injury of the estate of the dominant proprietor.

In many states, California included, the doctrine of the civil law has been adopted with the modification that it has no application to lots held in cities or towns where changes or alterations in the surface are essential to the enjoyment of such lots.

Ogburn vs. Connor, 46 Cal. 347;
Cochran vs. Benicia, 96 Cal. 1;
Los Angeles C. Assn. vs. Los Angeles, 103 Cal. 461.

An exception having been made in the law as to servitudes concerning city lots, the owner of the lower lot may, at his option, lawfully obstruct or hinder the flow of surface water thereon, and in so doing may turn it back or off of his own land and onto and over the lands of the proprietor of the higher land without liability, by reason of such obstruction or diversion.

Dillon, 5th Ed. Sec. 1731, says it is important to distinguish between natural streams flowing in channels between defined and actual banks and surface water caused by rain or melting snow, for the law relating to them is essentially different and the powers of the municipality much greater with respect to the latter than the former. He says further, in Section 1732, that the law largely regards surface water as a common enemy which every proprietor may fight or get rid of as best he may.

The same author also says, in Section 1733, that "authority to establish grades for streets and to grade them involves the right to make changes in the surface of the ground which may injuriously affect the adjacent property owners; but where the power is not exceeded there is no liability unless created by special constitutional provision."

The Constitution of California, Section 14, Article 1, provides that "private property shall not be taken or damaged for public use without just compensation having been first made or paid into Court for the owner."

The first case in which this provision was discussed by the Supreme Court is the case of Reardon vs. San Francisco, 66 Cal.,

page 492. Therein the Court said: "We do not intend to say, nor do we think it extends to such damage as the owner of the property injured sustains in common with the other abutters on the street or the general public, but only to that special injury which he receives over and above such common injury."

It must be borne in mind that the damages here are not alleged to have been the consequences flowing from the grading of the street. The owners could not very well make that claim against the City and County for the reason that the actual grading was done by them under a private contract. The mere establishment of a grade on paper by the Supervisors did not give the owners a cause of action against the City and County for damages. Until compensation is made an establishment or change of grade by a municipality is invalid as against an owner who has not been compensated.

Nor is a claim made that by reason of the lowering of the grade of the street the subjacent support of the lots was taken away. A similar answer could be made to that claim, viz., that such damage was caused by the act of the owner himself in grading the street under a private contract.

The damage alleged to have been caused to the land in question here is not such damage as is covered by the constitutional provision. It is not a consequential damage as defined by the courts and it has been held in Armstrong vs. Luco, supra, decided after the Constitution was adopted in 1879, that any damage of the character here complained of may be recovered, not against the City and County, but against the owner of the adjoining property from whence the surface waters flow.

It is my opinion, therefore, that the City and County is not liable for the damage done to the property on Laidley and Bemiss Streets.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Demands of the Playground Commission Must Be Approved by the Board of Supervisors.

December 4, 1914.

Sir: I am in receipt of your recent communication requesting my opinion as to whether a claim approved by the members of the Playground Commission must be further approved by the Board of Supervisors.

Opinion.

I am enclosing herewith a copy of an opinion rendered July 8, 1914, to the Plaground Commission. You will find therein cited Section 10 of Article XIV-a of the Charter, which provides that the Playground Commissioners shall have exclusive management and disbursement of funds annually appropriated to them.

The question as to whether the words "exclusive management and disbursement of funds annually appropriated to them" obviates the necessity of approval by the Board of Supervisors was discussed by my predecessor, Franklin K. Lane (Lane's Opinions, p. 180, 182).

It was there held that the approval by the Supervisors of demands of those departments having "exclusive management and disbursement," of their funds was necessary. This duty, however, is purely of a ministerial nature.

This opinion was also set forth in an earlier opinion of Mr. Lane on February 13, 1900 (Lane's Opinions, p. 175), and on March 10, 1900 (Lane's Opinions, p. 200). In the former case Mr. Lane used the following language in informing the Supervisors as to the necessity of their approving such demands.

"So far, however, as such demands are lawful, your duty is merely ministerial, and you are required to approve them without question on your power as to the advisability of the expenditure. The discretion in that matter is vested in the Health Department. If, however, such demands should exceed the appropriation provided in the budget or be in other respects actually unlawful, then you are justified in withholding your approval."

In an opinion rendered to the Board of Supervisors on February 17, 1900, Mr. Lane said:

"The Board of Supervisors at the beginning of each fiscal year must set aside appropriations for the departments named and at such time may, by the appropriation so made, limit and control the expenditure of such departments for such fiscal year. But after such appropriation has been made responsibility for its expenditure rests entirely upon the department to which it is allotted. The legislative department provides the funds; the administrative department expends them. Each is to be held responsible within its own province. The legislative must see that funds sufficient for needs, but not permitting of extravagance, are provided. The administrative departments are made responsible for the manner in which the moneys so appropriated are used.

"The duty imposed upon the Board of Supervisors of approving all demands upon the funds set aside for such departments is of a purely ministerial character, except in so far as it acts as a check upon such department against the expenditure of more than its appropriation permits or protects the City and County against expenditures of an unlawful character."

In view of the foregoing opinions, in which I concur, I beg to advise that claims approved by the Playground Commission must be further approved by the Board of Supervisors before they become valid claims which can be legally audited by you, but that this approval by the Supervisors is merely a ministerial act which the Charter requires the Supervisors to perform, unless the demand be actually unlawful or in excess of the budget appropriation as above indicated.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Interpreting Section 20, Workmen's Compensation Act—Claim of John Cahill.

December 6, 1914.

Gentlemen: I am in receipt of your communication of December 3rd, asking to be advised as follows:

"I have been instructed to obtain an opinion as to the legal liability of the Board of Park Commissioners in regard to the following case, which comes under the 'Workmen's Compensation Insurance and Safety Act.'

"September 2, 1914, John Cahill, a derrick man, while temporarily employed on the Ocean Beach by the Park Commissioners, injured the thumb of his right hand. He continued to work until the work he was engaged upon was completed, reporting at the office of the secretary for his pay September 25, 1914. He did not report the accident at that or any other time and this office learned of the injury from the office of the Industrial Accident Commission.

"It is a fact that the thumb was fractured and seems not to have been properly set, which necessitates the breaking and resetting of the bones."

Opinion.

In regard to this matter I call your attention to Section 20 of the Workmen's Compensation Act which reads:

"No claim to recover compensation under this act shall be maintained unless within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and the address of the person injured, the time and the place where the accident occurred, and the nature of the injury, and signed by the person injured or someone in his behalf, or in case of his death, by a dependent or someone in his behalf, shall be served upon the employer; provided, however, that actual knowledge of such accident and injury on the part of such employer or his managing agent or superintendent in charge of the work, upon which the injured employee was engaged at the time of the injury, shall be equivalent to such service; and provided, further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery under this act if it is found as a fact

in the proceedings for the collection of the claim that there was no intention to mislead or prejudice the employer, and that he was not in fact misled or prejudiced thereby."

It appears that your Honorable Board had no notice or knowledge of the accident within thirty days as herein provided. Whether the superintendent or whoever had actual charge of the work had knowledge of the injury, does not appear. In the absence of such notice or knowledge your Honorable Board is, in my opinion, under no liability for the reason that the injury complained of has arisen from the fact that the thumb was not properly set. This could have been avoided had opportunity been given to furnish competent treatment and so I am satisfied that your Board has, in the language of the Act, been "prejudiced" by the failure to give the required notice.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Park Commissioners.

Necessity of Supervisors Ordering Ordinances and Resolutions to Be Published.

December 14, 1914.

Gentlemen: I am in receipt of your request that I advise you whether or not it is necessary for the Board of Supervisors to specifically direct in each individual case that an ordinance or resolution required to be published shall be published.

Opinion.

Section 2 of Chapter III of Article II of the Charter provides as follows:

"All contracts for official advertising shall be let annually in like manner by the Supervisors to the lowest responsible bidder publishing a daily newspaper in the City and County which has a bona fide daily circulation of at least eight thousand copies, and has been in existence at the time of letting such contract for at least two years. In inviting proposals therefor, such advertising shall not be classified and no proposal shall be acted upon

which offers to do such advertising at different rates for different portions thereof.

"Such advertising shall be construed to mean the advertising and publication of all official reports, orders, ordinances, messages, resolutions, notices inviting proposals and all notices of every nature relating to city work. No part or kind of such advertising shall be charged or contracted for at a higher rate than any other part or kind of the same is charged or contracted for, except in the case of the delinquent tax list.

"The newspaper to which the award of such advertising is made shall be known and designated as the 'official newspaper.'

"The advertising of the delinquent tax list shall be let to the lowest responsible bidder on a separate bidding from all other official advertising.

"No board, department or officer shall make any publication which is not expressly authorized by this Charter or by the Supervisors."

Section 25 of Article XVI provides as follows:

"All publications provided for in this Charter must be made in the official newspaper only."

These two sections of the Charter require that all publications shall be published in but one newspaper, namely, the official newspaper of the City and County. There is no discretion in the Board of Supervisors as to what newspaper the publication of an ordinance or resolution shall be made in.

Section 13 of Chapter I of Article II of the Charter provides as follows:

"Every bill or resolution providing for any specific improvement, or the granting of any franchise or privilege or involving the lease, appropriation or disposition of public property, or the expenditure of public money, except sums less than two hundred dollars, or levying any tax or assessment, and every ordinance providing for the imposition of a new duty or penalty, shall after its introduction, be published in the official newspaper with the ayes and noes, for at least five successive days (Sundays and legal holidays excepted) before final action upon the same. If such bill be amended, the bill as amended shall be advertised for a like period before final action thereon. But in cases of

great necessity the officers and heads of departments may, with the consent of the Mayor, expend such sums of money, not to exceed two hundred dollars, as shall be necessary to meet the requirements of such necessity."

Reading the three sections cited above together it appears that the Charter has specifically directed the manner in which publication of ordinances shall be made, the necessary time of the publication and the newspaper in which those publications shall be made. The direction comes from the Charter and for the Supervisors to order that the publication be made would simply be ordering what has already been ordered by the Charter. The language is that the ordinance "shall be published in the official newspaper with the ayes and noes for at least five successive days in the official newspaper."

The question has arisen in several cases decided by our Supreme Court, whether a publication should be ordered by the Supervisors where a publication is necessary. The Court in each case construed the law or statute requiring the publication. The leading case was Donnelly vs. Tillman, 47 Cal., p. 40. In that case the law simply required that the publication should be made in a newspaper but did not, as in the case of our present Charter, direct the paper in which the publication should be made. Therefore, it was necessary in the Donnelly case for the Supervisors to designate the paper in which the publication was to be made and without that designation the publication was not legally made.

The Court in the case of City of Napa vs. Easterby, 61 Cal., page 509, considered the provisions of the Napa charter requiring publications and held that inasmuch as it was not ordered that the resolution be published the resolution failed. The language of the Napa city charter was that "the Board of Trustees shall cause to be published in some newspaper in the city all ordinances." The distinction between the Napa charter and our Charter is that the Napa charter did not designate the paper in which the publication was to be made and did not say that ordinances should be published, but that "the Trustees *shall cause to be published* all ordinances."

It is unnecessary to cite the other cases which have considered this question for they all hinge upon the proper construction of the particular act or law requiring publication and the same

distinction lies in all the cases, namely, that it was necessary for the Board of Supervisors to designate the newspaper since the law itself did not.

In my opinion it is not necessary for the Board of Supervisors to direct in each specific instance that the resolution or ordinance be published in the official newspaper. The Charter requires that to be done and leaves no discretion in the Board of Supervisors and when the publication has been made in the manner directed by the Charter all that is required to be done has been done.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Whether Removal of Thomas R. Murphy, Chief Engineer of the Fire Department, Is Legal.

December 19, 1914.

Gentlemen: I am in receipt of your communication of December 19, 1914, which reads as follows:

"At a special meeting of the Board of Fire Commissioners, held December 18, 1914, I was directed to respectfully request your opinion upon the question contained in the following resolution:

"'Resolved, That the Secretary of the Fire Commission be instructed to request the City Attorney to render the Fire Commissioners an Opinion as to the legality of a resolution passed by this Board on December 16, 1914, to the effect that the office of Chief Engineer be declared vacant, and particularly as to whether this Board had the right to declare such office vacant without filing charges against the former incumbent and a subsequent trial thereof.'

"Your attention is directed to Section 16 of Article XX of the Constitution of the State of California."

The resolution referred to in your communication is as follows:

"Resolved, That the position of Chief Engineer of this Depart-

ment now being held by Thomas R. Murphy be and the same is hereby declared vacant."

The Chief Engineer of the Fire Department is appointed under the provision of Section 1, Chapter III, Article IX of the Charter which provides:

"The Board of Fire Commissioners shall appoint a Chief Engineer, who shall be in charge of the special duty of superintending the extinguishment of fires."

The Charter does not provide either the tenure of office of the Chief Engineer nor his necessary qualifications. He is also exempted from the Civil Service provisions of the Charter (Section 11 of Article XIII).

Section 7 of Chapter I of Article IX provides:

"No officer, member or employee of the Department shall be appointed, transferred or removed because of his political opinions, nor shall he be transferred or dismissed except for cause, nor until after a trial before the Commissioners."

The same provision is carried over into Section 2 of Chapter II of Article IX, which reads as follows:

"No officer, member or employee of the Department shall be dismissed or transferred except for cause nor until after a trial. The accused shall be furnished with a written copy of the charges against him at least three days previous to the day of trial. He shall have the right to appear in person and by counsel and examine witnesses in his behalf. All witnesses shall be examined under oath and all trials shall be public."

The language of both sections is broad enough to include the Chief Engineer of the Department. The Chief Engineer is its chief executive officer and, since no officer is exempted from the provisions of the two sections, it must be held that it was intended to include the office of Chief Engineer within their provisions.

Prior to November 6, 1906, Section 16 of Article XX of the present Constitution provided:

"When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer

or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years."

On November 6, 1906, this section of the Constitution was amended to read as follows:

"When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years; provided, however, that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control."

Again, on October 10, 1911, Section 16 was amended and that section now reads:

"When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years; provided, however, that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control; and provided, further, that the term of office of any person heretofore or hereafter appointed to hold office or employment during good behavior under Civil Service laws of the State or of any political division thereof shall not be limited by this section."

Section 7 of Article XI of the Constitution of 1849 provided: "When the duration of any office is not provided for by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office not fixed by this Constitution, ever exceed four years."

The language of Section 7 of Article XI of the old Constitution and that of Section 16 of Article XX of the new, before the amendment of 1906, were substantially alike and both sections would require the same construction and be given the same legal effect.

In the case of People vs. Hill, 7 Cal, p. 97, decided in 1857, the Supreme Court of this State construed Section 7 of Article XI of the Constitution of 1849. The Court, on page 102, said:

"Two propositions are involved in this case: First, the authority of the appointing power to remove an officer, when the term of the office is not fixed by law; and, second, the constitutionality of the Act consolidating city and county governments of San Francisco.

"The Constitution of this State, Section 7, Article XI, provides: 'When the duration of any office is not provided for by this Constitution, it may be declared by law, and if not so declared, it shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office, not fixed by this Constitution, ever exceed four years.'

"By a reference to lexicographers, it will be found that the word 'duration' signifies 'extent,' 'limit,' or 'time.' When, therefore, the time of holding is not fixed, the tenure of the office is at the pleasure of the appointing power. This power of removal cannot be divested or taken away, except by limiting the term.

"A law which provides that an officer may be removed in a certain way, or for a certain cause, does not restrain or limit the power of removal to the cause or manner so indicated. The power to remove is an incident to the power to appoint, as a general proposition, and is made so expressly by the Constitution.

"The only way in which the power of removal can be limited is by first fixing the duration or term of office, and then providing the mode, if deemed necessary, by which the officer may be removed during the term. A law which simply provides that a party shall not be removed, except in a given case, where the duration of the office is not declared, would, in our opinion, be unconstitutional."

People vs. Hill was affirmed in People vs. Farrell, 1 Cal. App., page 5, decided in 1905. Under the authority of these cases the

provisions of Section 7, Chapter I, Article IX, and of Section 2, Chapter II, Article IX of the Charter were, at the time of their adoption, unconstitutional in so far as they governed the removal or dismissal of the Chief Engineer of the Fire Department, because, as pointed out above, the term of his office is not declared by law and, therefore, he would hold his office at the pleasure of the authority making the appointment.

As already pointed out, since the adoption of the Charter, there have been two amendments to Section 16 of Article XX so that in the case of any officer or employee of any municipality governed under a legally adopted charter the provisions of such charter, with reference to the tenure of office or dismissal from office of any such officer or employee, shall control. This amendment, however, did not breathe life into Section 7 of Chapter I of Article IX and Section 2 of Chapter II of Article IX. This point was directly decided in the case of Banaz vs. Smith, 133 Cal. 102.

Prior to November 3, 1896, the Constitution provided, among other things, that cities and towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of the Constitution should be subject to and controlled by general laws. On November 3, 1896, this section was amended so that it now provides that cities and towns heretofore or hereafter organized and all charters therefor framed or adopted by authority of the Constitution, *except in municipal affairs*, shall be subject to and controlled by general laws.

The charter of Los Angeles, adopted prior to November 3, 1896, contained a complete law for improvement of streets and levying of assessments on private property for the cost of the improvement. However, the Vrooman Act was in force and effect at the time of the adoption of the charter and the Vrooman Act and the charter provisions were in conflict. Under the provisions of Section 6 of Article XI of the Constitution, the charter provisions were void. Upon the adoption of the amendment of November 3, 1896, it became competent for a city to provide its own method for the improvement of streets and the levying of assessments to pay the cost thereof. The Court, in Banaz vs. Smith, held that the adoption of this amendment did not make valid the provisions of the Los Angeles charter. The Court, on page 104, said:

"In Yarnell vs. Los Angeles, 87 Cal. 603, it was said: 'The amendment to Section 8 of Article XI, under which the Los Angeles charter was framed, provides that certain cities may frame charters for their own governments, consistent with and subject to the Constitution and laws of the State. If, therefore, the provisions above stated of section 44 of the charter in question are inconsistent, either with the Constitution, or any law which is 'general' in the sense in which it is used in the clauses above quoted, then they are invalid and void.'

"If void from the beginning, the amendment to Section 6 of Article XI of the Constitution in 1896 did not give life to such provisions. That would give the amendment the effect of enacting laws, instead of merely authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people, in adopting the amendment, could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it, unless it is expressly so provided."

On October 10, 1911, Section 8½ of Article XI of the Constitution was amended so that the portion thereof pertaining to the question under discussion now reads as follows:

"Where a city and county government has been merged and consolidated into one municipal government, it shall also be competent, in any charter framed under said Section 8 of said Article XI, or by amendment thereto, to provide for the manner in which, the times at which and the terms for which the several county and municipal officers and employees whose compensation is paid by such city and county, excepting judges of the Superior Court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. All provisions of any charter of any such consolidated city and county heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid."

The important addition to the amendment is the last sentence above quoted. This amendment and the amendment of 1911 to Section 16 of Article XX, which section is hereinabove quoted,

were adopted concurrently by the people of the State. Section 16 has reference to municipalities in general, while the application of Section 8½ is to consolidated cities and counties only. Any reference in the laws or the Constitution of this State to a consolidated city and county has special reference to the City and County of San Francisco and it can apply only to the City and County of San Francisco at the present time since the City and County of San Francisco is and has been the only city and county government in the State of California.

Section 8½ applying to only one kind of a municipal corporation and Section 16 of Article XX being general, the special provisions of the Constitution, namely, the provisions of Section 8½ of Article XI would control over the general provisions of Section 16 of Article XX so far as a consolidated city and county is concerned. Under Section 8½ as it now stands, the provisions of Section 7 of Chapter I of Article IX, quoted above, are now confirmed and made valid by express provision of the Constitution. In other words, although prior to October 10, 1911, the Chief Engineer of the Fire Department could be removed at the pleasure of the Board of Fire Commissioners, since October 10, 1911, he cannot be dismissed except for cause, nor until after a trial before the Commissioners in the manner prescribed in Section 2, Chapter II, Article IX.

I have gone at length into the history of the Constitution and of the Charter so as to endeavor to make it plain why, prior to October 10, 1911, the Chief Engineer did not come within the provisions of Section 7 of Chapter I of Article IX and Section 2 of Chapter II of Article IX of the Charter, and why, since October 10, 1911, the office comes within those provisions.

The power conferred upon the Commissioners in the removal of the Chief Engineer, as the law now stands, is the power to remove "for cause" only after a trial upon written charges, at which he shall have the right to appear in person and by counsel and examine witnesses in his behalf. As the law stood prior to October 10, 1911, it was within the power of the Commissioners to remove the Chief Engineer at their pleasure. In other words, the Commissioners could remove the Chief Engineer without trial or notice for any reason or cause which prompted them to do so and they were not required to assign any reason for their action. However, as the law now is, the Chief Engineer cannot be removed except for cause. It is dif-

ficult to define precisely what "cause" means. It must be legal cause, "some delinquency, general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character or fitness for office." (People vs. Fire Commissioners of New York, 72 New York, 445-9.)

The power to remove at pleasure requires no hearing or trial at all. The power to remove for cause requires a hearing and trial, a judicial determination of the fitness of the accused, or the truth of accusations made against him concerning some act which in law, if true, would justify his removal.

My attention is directed in your communication to Section 16 of Article XX of the Constitution. That section has already been quoted in this opinion and the history of the section given.

The point that you desire to be advised upon is: In view of the provisions of that section of the Constitution, is the term of the Chief Engineer of the Fire Department, not to exceed in any event four years in duration? In other words, would the position of a Chief Engineer cease upon the expiration of four years of service from the date of the appointment if a new appointment was not made at the end of the four years? I am informed by you that Thomas R. Murphy was appointed Chief Engineer on March 16, 1910.

Assuming, for the sake of argument, that the limitation in the section "but in no case shall such term exceed four years" applies to a position held at the pleasure of the authority making the appointment and does not limit solely the term of office which is declared by law, I am of the opinion that Section 16 of Article XX, since October 10, 1911, has no application to the question here involved.

I pointed out to you above that Section 8½ of Article XI controls in the matter of a consolidated city and county government and that Section 16 does not affect the City and County of San Francisco. Section 8½ of Article XI of the Constitution permits a charter framed under that section to make the term of office of the Chief Engineer of the Fire Department an indefinite one, and having made it indefinite, the provisions of Section 16 of Article XX do not control. The Chief Engineer, therefore, holds until he is removed, voluntarily retires, dies, or becomes incapacitated.

Thomas R. Murphy had not served four years prior to the adoption of the amendment to Section 8½ in 1911. He was not appointed for four years, but was appointed for an indefinite term. Section 16 of Article XX, no longer operating upon the position of the Chief Engineer, could not cut off his position at the end of four years from the date of his appointment.

The only other point involved in the question is whether dismissal as Chief Engineer without dismissal from the Department is such a dismissal as is referred to in Section 7 of Chapter I of Article IX and Section 2 of Chapter II of Article IX.

The qualifications for a Chief Engineer are not stated in the Charter. He may be a member of the Department or not. The Commissioners are at liberty to choose any citizen of the City who they think is qualified to occupy the position. In my opinion, so far as dismissal is concerned, it makes no difference whether he comes from the Department or outside of the Department. It is a dismissal such as is contemplated in Section 7 of Chapter I of Article IX and Section 2 of Chapter II of Article IX. The language of the Charter is not that he shall be dismissed from the Department, it is that no officer shall be transferred or dismissed without cause and not until after trial. Removal and dismissal are synonymous terms. If, by action of the Commission, he can no longer occupy the position of Chief Engineer, he is removed and dismissed from that position and the fact that he automatically returns to some lower rank does not alter the legal effect of the action of the Commission. He has been dismissed from his position as Chief Engineer and the Charter does not distinguish between a dismissal from a position in the Department where the dismissal is accompanied by an entire removal from the Department, or a dismissal where the dismissed officer returns to a lower rank.

Dillon, in his works on Municipal Corporations, at page 804, Vol. 11 (5th Ed.), states the rule as follows:

"But with these, and possibly a few exceptions of a similar nature, it may be laid down as a general rule that any *dismissal* from office or employment, or *change* in position which results in reducing the grade and decreasing the compensation of the officer, *is a removal* within the provisions of statutes requiring the removal to be for cause and after notice and a hearing. Thus, under these statutes, it has been held that the transfer of an

officer or employee to a lower grade or position in the same department with decreased pay is a removal from office which can only be effected by complying with the statutory requirements."

See also

Housten vs. Jersey City, 71 Atl. 1116;
Hansen vs. Van Winkle, 69 Atl. 1011;
State vs. Kennedy, 37 Atl. 503.

I therefore advise you as follows:

1. The Chief Engineer of the Department cannot be removed except for cause and after trial in the manner prescribed in the Charter sections quoted above.

2. The resolution referred to in your request is without force or effect.

3. Thomas R. Murphy remains Chief of the Fire Department and is legally entitled to the office.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Legality of Paying Golden Gate Park Employees Twice a Month.

December 19, 1914.

Dear Sir: I am in receipt of your communication of the 19th instant, in which you ask whether the rule expressed in my opinion to you of October 30, 1914, with reference to the legality of paying firemen twice a month, applies to all departments of the City government, including Golden Gate Park.

You state that the Park Commission has sent to your office salary demands for half a month from December 1st to December 15th, including all park employees.

You are advised that the aforesaid opinion of October 30, 1914,

does, because of the effect of Article III, Chapter IV, Section 1 of the Charter, apply to the said Park employees.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Per Diem Men May Be Paid Oftener Than Once a Month.

December 21, 1914.

Sir: I am in receipt of your communication of the 21st inst., in which you inquire as to the effect of my opinion rendered to the Auditor on the 19th inst., in the matter of the legality of paying Golden Gate Park employees twice a month.

You inquire whether this opinion applies to the case of per diem employees of the City who are employed at a compensation which is fixed on a basis of a certain amount for each day's work actually performed.

I am therefore writing to advise that the question which you raise was not before me at the time the said opinion was rendered and that the rule stated in that opinion was applicable only to City employees employed at a regular stated and fixed monthly compensation. In my opinion the rule of the Charter requiring monthly payment of salaries does not apply to per diem employees.

I am forwarding a copy of this opinion to the Auditor.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Legality of Boxing Law.

December 22, 1914.

Gentlemen: I am in receipt of your communication of the 19th inst., as follows:

"The Police Committee of the Board of Supervisors desires your opinion as to the status of boxing and sparring exhibitions in view of the recent initiative amendment to Sections 412, 413 and 413½ and adding 414a to the Penal Code.

"Has the Board of Supervisors any jurisdiction over boxing exhibitions, and is it advisable to repeal Ordinance No. 1791 (New Series), copy enclosed."

Opinion.

Ordinance No. 1791 (New Series) was adopted under the power given by Section 412 of the Penal Code, as the same read before the adoption by the people of an initiative amendment to said section. I find that Section 412, as amended by the people, gives no power to Boards of Supervisors, to issue permits for amateur boxing exhibitions, the only kind allowed in this State under said section. The law, as it stands, allows amateur boxing exhibitions, and provides the conditions under which the same may be held, leaving nothing to be supplied by ordinance, except that amateur boxing exhibitions may be prohibited by ordinance.

As the law has been changed, and the power vested in Boards of Supervisors to permit boxing exhibitions for any limited number of rounds has been taken away, Ordinance No. 1791 has become a dead letter in all its features.

Your Honorable Board may, however, impose a license fee on all amateur boxing exhibitions held under the provisions of the existing law, and also prescribe such conditions, under the police power, as may be necessary, providing for the safety, comfort and convenience of those attending such amateur boxing exhibitions.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Supervisors Must Fix Public Utility Rates Until Legislature Makes Recent Constitutional Amendment Effective.

December 24, 1914.

Gentlemen: I am in receipt of your request for an opinion as to the present powers of the Board of Supervisors in the matter of fixing rates in the City and County of San Francisco for water, gas, electricity, heat and telephones for the year 1915, and whether or not your Board should follow its former and regular procedure in such matters until the Legislature shall have made operative the constitutional amendment recently adopted by the people of the State, by which Section 23 of Article XII of the Constitution of the State was amended. The amendment authorizes the Legislature to vest power in the State Railroad Commission to fix rates to be charged by the public utility corporations of this State.

Opinion.

Prior to the recent amendment above referred to, Article XII, Section 23 of the Constitution declared certain utilities to be public utilities,

"subject to such control and regulation by the Railroad Commission as may be *provided by the Legislature.* * * * The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities *as shall be conferred upon it by the Legislature.* * * * From and after the *passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities,* all powers respecting such public utilities vested in boards of supervisors or municipal councils, or the governing bodies of the several counties, cities and counties, cities and towns in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission."

There was, however, included the following proviso in this section of the Constitution:

"Provided, however, that this section shall not affect such powers of control over any public utility vested in any city and

county or incorporated city or town as, at an election to be held *pursuant to laws to be passed hereafter by the Legislature*, a majority of the qualified electors voting thereon of such city and county, or incorporated city and town, shall vote to retain, *and until such election such powers shall continue unimpaired.*"

This amendment was adopted by the people of the State on October 10, 1911. At the special session of the Legislature of 1911 there was passed the Act known as the "Public Utilities Act," which was approved on December 23, 1911 (Extra Session 1911, page 18). This Act was adopted to make effective the constitutional authorization thus given to the Legislature to vest such powers in the Railroad Commission. The constitutional amendment was not self-executing. The Legislature recognized the inhibition against vesting control in the Commission with reference to utilities over which control had already been given to any city and county or incorporated city or town, unless an election was held in accordance with laws to be thereafter passed by the Legislature, at which election the people of any such city and county or incorporated city or town might determine either to retain such powers or to transfer them to the Railroad Commission. This recognition is seen in Section 82 of the Public Utilities Act, which repeats the exact language of the above proviso of the constitutional amendment with reference to this local self-control. This section has never been amended or repealed by the Legislature.

At a later date in the same extra session of the Legislature, there was approved, on January 2, 1912 (Extra Session 1911, page 168), an Act prescribing the procedure by which the proposition of giving up such local control might be submitted to the voters of any such city and county or incorporated city or town. This Act, after prescribing the procedure by which either the local legislative body, or the voters by petition, might cause such a question to be submitted at an election, provided for the submission at any such election, of ten definite propositions, to-wit, whether the municipal corporation should retain its control over

1. Railroad Corporations;
2. Street Railroad Corporations;
3. Common Carriers, other than Railroad and Street Railroad Corporations;

4. Gas Corporations;
5. Electrical Corporations;
6. Telephone Corporations;
7. Telegraph Corporations;
8. Water Corporations;
9. Wharfingers;
10. Warehousemen.

The Act then provides that with reference to such of the above ten public utilities as the people should determine to retain control, that control would be so retained, while in the case of any of these utilities where a majority of the electors determine to relinquish control, that upon a proper certification of the vote being made to the Railroad Commission the Commission would be empowered to act.

There was never submitted to the people of this City and County any proposition to relinquish the authority of the municipality, as so authorized by the State Constitution and Acts of the Legislature. Clearly then, up to the time of the recent amendment to Section 23 of Article XII of the Constitution all control continued in the Board of Supervisors of this City and County. The only question then is whether the recent amendment to Section 23 of Article XII of the Constitution has changed the situation, and I am clearly of the opinion that until the State Legislature makes effective this constitutional amendment, no rate-making powers are vested in the State Railroad Commission so far as San Francisco is concerned.

The amendment continues the language above quoted and italicized, including the statement that these public utilities are "subject to such control and regulation by the Railroad Commission as *may be provided by the Legislature.*" And also the language to the effect that the Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities and to fix the rates to be charged for commodities furnished or services rendered by public utilities "*as shall be conferred upon it by the Legislature.*" Also there is repeated the language that "*from and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities,* all powers respecting such public utilities vested in boards of supervisors," etc., shall cease to be exercised by the local legislative bodies.

With reference to the above described proviso which secures local control on this subject by cities and counties and incorporated cities and towns until the same is voluntarily relinquished, the amendment consists in depriving such local communities of the opportunity to so vote upon this question except with reference to local police regulations and powers. This police power is continued until voluntarily relinquished by vote of the people. The proviso now reads as follows:

"Provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county or incorporated city or town, voting thereon shall vote to retain, and until such election such powers shall continue unimpaired. But if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the Railroad Commission as provided by law."

The above portion of the amendment is the only portion in point for the purposes of this opinion. It will be seen that the only change is to strip cities and counties and incorporated cities and towns of their power of election heretofore given by the Constitution and to authorize the Legislature, so far as the fixing of rates is concerned, to pass such legislation as they may desire without first calling upon the voters of the local communities for an expression of their views on the subject. There remains, however, the old language which clearly states that any such regulation by the Railroad Commission must be authorized expressly by the Legislature. There also remains Section 19 of Article XI of the Constitution which authorizes municipal corporations "to regulate the charges" of persons or corporations which supply the inhabitants of such municipalities with "light, water, power, heat, transportation, telephone service or other means of communication." Inasmuch as the Legislature has not yet given any authorization under the amended section of Section 23 of Article XII, and since the people of our City and County have never consented to the relinquishment of such control under the old law, you are advised that your Board should follow its former and regular procedure in the matters

referred to in your communication until the Legislature shall have made operative the constitutional amendment.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Supplying Electric Current for Board of Public Works, Sixteenth and Harrison Streets.

January 4, 1915.

Gentlemen: I am in receipt of your communication of December 23, 1914, as follows:

"As shown by the enclosed resolutions the City and County of San Francisco entered into a contract with the City Electric Company to supply electric current for light and power purposes, for the year 1914-15, at 'Board of Public Works, Sixteenth and Harrison Streets,' and other places, and with the Pacific Gas and Electric Company for the same period of time to supply electric current for light and power purposes at all places in the City and County of San Francisco, except those designated in the contract with the City Electric Company. At the time this contract was entered into with the City Electric Company there was under construction at Alameda and Florida Streets a new asphalt plant requiring electric current for its operation. Some time after the City Electric Company began supplying electric power under its contract to Board of Public Works at Sixteenth and Harrison streets this asphalt plant was finished and required power. A controversy arose between the two companies as to which company was entitled to supply electric power for this plant. The contention of the City Electric Company being that this new asphalt plant was included within the general Corporation Yard of the City, the entrance to which is located at Sixteenth and Harrison Streets, all being under the control of the Board of Public Works. The Pacific Gas and Electric Company maintained that inasmuch as the asphalt plant was three or four blocks away from Sixteenth and Harrison Streets and was not in a position to require electric power at the time the City entered into the contract with the City Gas and Electric Com-

pany, that under the general provision in their contract the Pacific Gas and Electric Company were entitled to supply power for this asphalt plant. This is the view taken by the Lighting and Rates Committee of the Board of Supervisors.

"The City Electric Company appealed from this decision to the Board of Supervisors and the Board referred the matter to you for your opinion as to the construction of the contract of the City Electric Company. The Board wishes to know whether under the resolution authorizing the City Electric Company to supply electric current to the Board of Public Works, Sixteenth and Harrison Streets, is included the right to furnish power to the new asphalt plant located at Florida and Alameda Streets recently completed."

Opinion.

The resolutions referred to in the foregoing communication were those awarding the contracts for the supply of electric current for municipal lighting and power purposes to the Pacific Gas and Electric Company and City Electric Company.

The contracts, signed in pursuance with said resolutions, provide that the City Electric Company shall "supply current for lighting and all power purposes for use in the Corporation Yard, 313 Francisco Street, Board of Public Works, Sixteenth and Harrison Streets * * * in strict accordance with the specifications and advertisements," etc.; that the Pacific Gas and Electric Company shall "supply electric current for lighting and all power purposes to public buildings, offices, yards and public places (except the Corporation Yard, 313 Francisco Street, Board of Public Works, Sixteenth and Harrison Streets. * * *)"

The question presented by your Board then is as to the construction to be placed upon the designation "Board of Public Works, Sixteenth and Harrison Streets," as presented in said contract. If, on the face of the contract, this designation can be construed as including all lighting and power requirements for the Corporation Yard, and if, as you state in your request, the new asphalt plant is included within the general Corporation Yard limits, then evidently the award should be made to the City Electric Company. If, on the other hand, it is necessary to go back of the contract to find the explanation of said designation, "Board of Public Works, Sixteenth and Harrison

Streets," then it may be necessary to examine the proceedings leading up to the award of the contract.

As the determination of this matter required some examination as to what was really meant by the above designation, I requested the City Engineer to define for me the official limits of the Corporation Yard. He states that "the Corporation Yard, as used by the Board of Public Works for its various departments, comprises all the City lands between Eleventh and Sixteenth Streets located in blocks 3523, 3925, 3926 and 3527. These block numbers are the new official block numbers. The new asphalt plant is located upon a portion of this land between Alameda, Eleventh and Division Streets and is a portion of the Corporation Yard. I am also informed by him that the official address of said Corporation Yard is not Sixteenth and Harrison Streets, but is Eleventh and Bryant Streets. It would therefore seem that the designation "Board of Public Works, Sixteenth and Harrison Streets," would not, on its face, refer to the Corporation Yard.

I accordingly made further inquiries as to what this address could refer to and the City Engineer informs me that the only buildings located at that point are the old asphalt plant and the sewer cleaning department.

On the face of the contract then, and without going into the negotiations leading up to the award of the same, I am of the opinion that the above designation can refer properly only to the old asphalt plant and the sewer cleaning department, unless, and this seems to me a rather strained construction, the new asphalt plant located four blocks away, replacing the old plant, can be taken as the plant referred to.

To check this construction of the contract, however, I have examined the proceedings leading up to the award of the same and I find that on the 4th day of May, 1914, the City Electric Company wrote a letter to the Board of Supervisors asking for the privilege of submitting separate bids for the furnishing of electric current at various points for municipal use, among them being "municipal asphalt plant, Sixteenth and Harrison Streets" and "Corporation Yard, Eleventh and Bryant Streets."

From the above request it would seem that the City Electric Company had in mind, in requesting the privilege of bidding, a

separation of the old asphalt plant and the general corporation yard. When the bids were advertised for, however, the only separate specifications submitted affecting this matter were for the furnishing of electric current to the "Board of Public Works, Sixteenth and Harrison Streets." It would therefore seem that the Board of Supervisors, in specifying that address and eliminating the other one, had in mind the separation of the two points.

If it were true that the official address of the Corporation Yard was Sixteenth and Harrison Streets, I might be inclined to the view that the designation of this address included the entire yard, but as I am credibly informed by the City Engineer that the official address of the Corporation Yard is and has been Eleventh and Bryant Streets, I do not see how that construction can be reasonably put upon the designation.

I am therefore of the opinion that the City Electric Company's contract calls only for the supplying of current to those buildings actually situated at Sixteenth and Harrison Streets and that the Pacific Gas and Electric Company is entitled to furnish light and power to the new asphalt plant under the residuary clause in its contract.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Restoration of Hoseman to Fire Department—Lapse of Time a Bar.

January 7, 1915.

Gentlemen: I have your communication of January 4, 1915, as follows:

"Please be advised that this Board is in receipt of the following application from one C. F. Leuterdt, under date of December 12, 1914, reading as follows:

"C. F. Leuterdt respectfully shows to your Honorable Board the following facts:

"He was duly and regularly appointed a hoseman in the year 1903, and continued to hold said rank of hoseman in said Fire

Department down to June 8, 1906, upon which latter date he was dismissed from said Fire Department without having been previously furnished with a written copy of charges against him and without a trial.

"He further shows that said order or judgment of dismissal of June 8, 1906, made against him is void, because the same is beyond and in excess of the jurisdiction of said Honorable Board and contrary to the provisions of Section 2 of Chapter II of Article IX of the Charter of the City and County of San Francisco, State of California, which provides:

"'No officer, member or employee of the Department shall be dismissed or transferred except for cause nor until after a trial. The accused shall be furnished with a written copy of the charges against him at least three days previous to the day of trial. He shall have the right to appear in person and by counsel and examine witnesses in his behalf. All witnesses shall be examined under oath, and all trials shall be public.'

"Wherefore, said C. F. Leuterdt prays that he be restored to his former position of hoseman in said San Francisco Fire Department or that if there are pending against him any charges, the same be served upon him and he be brought to hearing thereupon, all in accordance with law.

"I have been directed by this Board to respectfully request an opinion from you as to the jurisdiction of this body in entertaining the above application."

Opinion.

It appears that the applicant was dismissed from the Department on June 8, 1906, or over eight years ago. This long delay is sufficient in itself to bar the applicant's claim.

It was held in Jones vs. Board of Police Commissioners, 141 Cal. 96, that a delay of seven years in seeking to be restored to the Police Department was a bar under the Statute of Limitations. The Court said in that case:

"It was more than seven years after petitioner was dismissed and discharged before he filed his petition * * *. The period that elapsed after petitioner's alleged rights accrued is longer than the time given for the commencing of an action by an

individual under any provision of the code. Not only this, but it is barred by laches. Courts will not allow parties to sleep upon their rights for many years and then invoke the aid of this prerogative writ."

Upon the authority of this case and of Farrell vs. Board of Police Commissioners, 1 Cal. App. 5, and Dodge vs. Board of Police Commissioners, 1 Cal. App. 608, which cite and follow it, I advise you that the applicant is barred by lapse of time from seeking to be restored to the Department. This makes it unnecessary to consider whether applicant, if he had pursued his remedy in time, would have been entitled to any redress.

Respectfully yours,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Captain Casserly's Reduction in Rank, Fire Department, Not Under Duress.

January 20, 1915.

Gentlemen: I am in receipt of your communication in which you request an opinion on the following facts:

"On November 23, 1910, Captain John Casserly of this Department was charged with being under the influence of intoxicating liquor while on duty. The records of the Department show that he pleaded guilty of the above charges and was deprived of one month's pay. The plea of guilty as above mentioned, was made on December 15, 1910, and on the same date he made application to be reduced from the rank of Captain to that of hoseman in the Department. His application was granted and he was accordingly reduced. He is now making an application to be restored to his former rank of captain, claiming that the act on his part which resulted in his reduction in rank was performed under duress. The facts are as follows:

"The President of the Board of Fire Commissioners in December, 1910, informed Captain Casserly that in all probability he would be dismissed from the Department. That he did not wish to deprive him entirely of his means of livelihood, and if he made application for reduction in rank, as he did not believe

the Commissioners had power to disrate, the Commissioners would feel that he had been sufficiently punished. Captain Casserly, thinking there was no other course open to him, and upon the request of the then President of the Board of Fire Commissioners, which he now terms to be duress, acted upon the request and made the application which disrated him."

You ask whether it is within the power of the Board of Fire Commissioners to rescind the order granting Captain Casserly's application for reduction in rank made in 1910. In my opinion the facts as stated in your communication do not show such duress as would in law make the action of Captain Casserly in applying for such reduction an involuntary act. In the event that an unreasonable request is made by any official municipal board upon any City employee under the jurisdiction of such board, such employee is of course not required to comply with any such request. It would seem from the facts as stated in your communication that Captain Casserly voluntarily made such application for reduction in rank, in anticipation that by so doing there would not be filed and heard charges for his complete dismissal from the Department. If there were no grounds for any such charges being filed and Captain Casserly considered that he would have a good defense to any such charges, it was both his privilege and his obligation under the law to refuse to make the application which he did make.

Furthermore it will be noted that more than four years have elapsed since this action taken by the Board of Fire Commissioners, and the Statute of Limitations has therefore run in favor of the City so far as any legal rights of Captain Casserly are concerned.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

All Acknowledged Instruments Must Be Recorded if Accompanied by Legal Fees.

February 3, 1915.

Sir: I am in receipt of your recent communication, as follows:

"I herewith submit for your inspection a certificate of ordination, which authorizes the party ordained to solemnize marriages, etc.

"You will note that the party ordained is unable to write her name.

"Will you please advise me if the County Recorder is compelled to accept for record instruments similar to this."

Opinion.

The State law regarding what instruments must be recorded by the Recorder upon payment of the proper fee is contained in Section 4131 of the Political Code, in Chapter IV, of Title IV, Part IV of Division 2 of the Civil Code, and in legislative Acts pertaining to particular proceedings.

Article IV, Chapter VII of the Charter provides that "The Recorder shall take into his custody and safely keep all books, records, maps and papers deposited in his office."

A careful examination of these code sections and Acts has failed to discover any exclusive list of documents which may or must be recorded. The only limitation is found in Section 1161 of the Civil Code, which provides that before an instrument can be recorded (with certain exceptions), its execution must be acknowledged before the proper person executing the same.

In view of the foregoing you are advised that your office must record any instrument when properly acknowledged, if accompanied by the necessary fee. The act of recording is a purely ministerial one, and the character of the instrument presented for recordation cannot be questioned by your office.

Respectfully,

PERCY V. LONG,

City Attorney.

Recorder.

Legality of Proposed Quarantine Ordinance.

February 9, 1915.

Gentlemen: I am in receipt of your communication of January 29th, as follows:

"I have been directed by the Public Health Committee to submit to you the accompanying copy of a proposed ordinance designed to prevent the spread of contagious diseases, with the request that you pass on the legality of same."

Opinion.

It has always been recognized that the isolation of persons suffering from infectious and contagious diseases is a valid exercise of the police power for the protection of the public health.

Haverty vs. Bass, 66 Me. 71;

Hengehold vs. Covington, 56 S. W. 495;

Kirk vs. Wyman, 65 S. E. 387;

Allison vs. Cash, 137 S. W. 245;

Hawthorne vs. Comrs., 99 P. 598.

Upon this point the Court in Hengehold vs. Covington, supra, said:

"Under its general powers to guard against epidemic diseases, a board of health may control and isolate persons affected with the disease. * * * It is certainly a reasonable regulation which provides for the removal of such cases to a pesthouse in good sanitary condition, provided with nurses and physicians for the treatment of patients suffering with the disease."

I therefore advise you that this proposed ordinance providing for the removal of persons suffering from the epidemic diseases enumerated therein to hospitals within the City and County whenever in the judgment of the Board of Health this is necessary for the public safety is a valid ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Gas and Water Inspector and Assistant, Employees of Supervisors, with Civil Service Status.

February 10, 1913.

Gentlemen: I am in receipt of your communication requesting advice with reference to the status of the positions held by Mr. Robert W. Hampton and Edward Ellison, they being, respectively, the Gas and Water Inspector, and the Assistant Gas and Water Inspector, for this City and County. Your inquiry involves the question whether these two positions are protected by Section 11, Subdivision A, Article XIII of the Charter as amended March 28, 1913, which reads as follows:

"Any person who has served in any position in the office of the Assessor, the Coroner, Recorder, the County Clerk, the Sheriff, the office of the Justices' Clerk, *the Board of Supervisors* or the Treasurer for a period of one year continuously prior to the approval of this amendment and who shall be actually employed in any of said offices at said time is hereby declared to be appointed within the provisions of Article XIII of this Charter to the position to which he may be assigned, and shall be entitled to the benefits of said article thereafter."

It appears that Messrs. Hampton and Ellison have been formally appointed by both the Board of Supervisors and the Board of Public Works. You are asking whether they are to be considered as employees of the Board of Public Works or of the Board of Supervisors. You state that the Board of Public Works has for several years past been making requests monthly upon the Civil Service Commission for the certification of eligibles for appointment to the positions above mentioned, but owing to the fact that examinations for these positions have not been held and eligibles were therefore not available, the Board of Public Works was authorized to make temporary appointments until regular appointments could be made. In accordance with the authorization issued temporary appointments to said positions were made monthly by the Board of Public Works, and the name of the person so appointed appeared each month on the pay roll of the Board of Public Works.

An examination of the records of the Board of Supervisors shows that by Journal Resolution No. 94, adopted February 26, 1912, the Board of Supervisors did appoint Messrs. Hampton

and Ellison as the Gas and Water Inspector and the Assistant Gas and Water Inspector, in place of their predecessors in said positions, said appointment to take effect March 1, 1912; that the said Hampton and Ellison assumed the duties of said offices on March 1, 1912, and have served in said positions ever since; that on June 30, 1913, there was adopted Resolution No. 10,266 (New Series), by the Board of Supervisors, which was approved on July 2, 1913, under the terms of which Resolution it was formally recited by the Board of Supervisors that the positions of Gas and Water Inspector and Assistant Gas and Water Inspector had been duly filled by said Hampton and Ellison ever since March 1, 1912, and that they had served in said positions for a period of one year continuously prior to the 27th day of March, 1913, and were actually employed in said office at said time. And further the action by the Board of Supervisors of February 6, 1912, in appointing said Hampton and Ellison to the said positions was approved and confirmed. A copy of the said resolution is as follows:

"Whereas, By an Act of the Legislature, approved March 4, 1878, Section 2, the Mayor of the City and County of San Francisco was authorized to appoint a gas inspector, such appointment to be confirmed by the Board of Supervisors of said City and County, said Board to also fix the salary of said gas inspector; and

"Whereas, After the position had been filled by several appointees, on the 16th day of January, 1899, O. M. Tupper was appointed by the Mayor and his appointment confirmed by the Board of Supervisors, as Gas Inspector and ex-officio Water Inspector; and

"Whereas, Subsequent to the taking effect of the Charter of the City and County of San Francisco, and prior to the earthquake of April 18, 1906, Frank O'Leary was appointed by the Board of Supervisors, Assistant Gas and Water Inspector; and

"Whereas, On the 28th day of May, 1906, by Resolution No. 58 (New Series), Stephen A. Byrne was appointed Gas and Water Inspector in place of O. M. Tupper, such appointment to take effect July 1, 1906; and

"Whereas, The Board of Supervisors, February 26, 1912, appointed Robert W. Hampton Gas and Water Inspector in the place of the said Stephen A. Byrne, and Edward Ellison Assist-

ant Gas and Water Inspector, in the place of the said Frank O'Leary (Journal Resolution No. 94), said appointees to take office March 1, 1912; and

"Whereas, The said Robert W. Hampton and Edward Ellison assumed the duties of said officers as required by law on said March 1, 1912, and have served in said positions for the period of one year continuously, prior to the 27th day of March, 1913, and were actually employed in said offices at such time; now, therefore, be it

"Resolved, That it is hereby declared that the position of Gas and Water Inspector has existed since the taking effect of the Charter as a continuation of the office created by said Act of the Legislature approved March 4, 1878, and that the position of Assistant Gas and Water Inspector has likewise existed since on or about January 1, 1906, the records of the creation of said office having been destroyed; and it is further

"Resolved, That the action of the Board of Supervisors of February 26, 1912, in appointing said Robert W. Hampton to the position of Gas and Water Inspector, and Edward Ellison to the position of Assistant Gas and Water Inspector, is hereby approved and confirmed.

"Adopted—Board of Supervisors, San Francisco, June 30, 1913."

As explained in the above resolution of the Board of Supervisors the early Act of the Legislature of March 4, 1878, made it the duty of the Mayor of every city having a population of one hundred thousand or more to appoint, subject to the approval of the Board of Supervisors thereof, a Gas Inspector for such city, who was to hold his office for a term of two years or until his successor shall be appointed and qualified, subject, however, to his removal from such office by the Mayor with the concurrence of a majority of the Board of Supervisors for certain enumerated causes. The Act provided that the salary was to be fixed by the Board of Supervisors and to be paid out of the General Fund of the City. He was made responsible directly to the Mayor and the Board of Supervisors. It appears that acting under this law several different persons were so appointed by the Mayor and the Board of Supervisors of San Francisco, and that after the adoption of the Charter the Board of Supervisors did regularly appoint different Gas and Water Inspec-

tors and Assistant Gas and Water Inspectors, the latter position being created subsequent to the adoption of the Charter amendment, and prior to the fire of April 18, 1906. The Board of Supervisors did regularly adopt an ordinance defining specifically the duties of these offices, which ordinance, however, cannot now be located, and which was intended to take the place of the State law above cited. There can be no doubt then that said Messrs. Hampton and Ellison were regularly appointed by the Board of Supervisors as of March 1, 1912, to said positions, and served continuously thereafter for a period of more than one year prior to the Charter amendment of March 28, 1913, and have ever since been so serving in said positions.

The Board of Public Works, also subsequent to said Journal Resolution No. 94 adopted by the Board of Supervisors on February 26, 1912, passed a resolution, the intention of which was to comply with the terms of said resolution of the Board of Supervisors. That is, the Board of Public Works also formally adopted a resolution appointing said Hampton and Ellison to said positions.

My understanding of the occasion for the adoption of this resolution is that much of the work performed by the Gas and Water Inspector and his assistant is of such a nature as to bring these offices in close touch with the Board of Public Works.

Under the Charter and the ordinances of our City, these officials have duties to perform both for the Supervisors and for the Board of Public Works. They, in some instances, report directly to the Board of Public Works, and in others, to the Supervisors. In order to remove any question of doubt as to the validity of the appointments, and as a precautionary measure, it was thought best by the Board of Supervisors and the Board of Public Works that each of said Boards make said appointments. This precautionary act cannot of course deprive the occupants of those positions of the rights given them by the aforesaid Charter amendment, which stated that any person who has served in any position in the office of the Board of Supervisors for a period of one year continuously prior to the approval of said amendment and who shall be actually employed in such position at the time of the approval thereof was declared to be appointed within the provisions of the Civil Service article of the Charter, and to be entitled to the benefits of said article.

The Gas and Water Inspector and his assistant are at all times subject to the call of the Board of Supervisors and a great portion of their time is taken up in attendance upon different committees of the Board of Supervisors having charge of the gas and water supply of the City, and in complying with the directions of said committees in attending to complaints made before these committees by different citizens and property owners with reference to the character of light and water being served, or the question of the proper registering of gas and water meters, etc.

You are therefore advised that Messrs. Hampton and Ellison are, under the terms of the aforesaid Charter amendment, entitled to be considered as duly appointed to their said positions and as enjoying all of the benefits of Article XIII of the Charter.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Limitation Upon Taxes for Park Purposes.

February 23, 1915.

Gentlemen: I am in receipt of your communication of February 10, 1915, as follows:

"The Finance Committee is about to begin preparation of the budget estimates for the next fiscal year, and in this connection desires an official opinion from you regarding the power of the Board of Supervisors to exceed the 7-cent limit for parks as prescribed in Article XIV, Section 11 of the Charter.

"The Committee has been advised by a member of the Park Commission that any appropriations or allowances for park purposes in excess of 7 cents is illegal."

Opinion.

Section 11 of Article XIV of the Charter reads:

"The Supervisors shall provide all necessary money for the maintenance, preservation and improvement of said parks, squares, avenues and grounds, and to that end shall annually

levy a tax on all property in the City and County not exempt from taxation, which shall not be less than five cents nor more than seven cents upon each one hundred dollars assessed valuation of said property."

In addition to this it is provided in Article III, Chapter II, Section 2 of the Charter:

"The Park Fund shall consist of the moneys annually apportioned to said fund by virtue of the tax provided for in this Charter for the maintenance, preservation and improvement of the parks, squares, avenues and public grounds of the City and County; of all moneys accruing from rents of buildings under the jurisdiction of the Park Commissioners; and of all moneys coming into the hands of said Commissioners whether from donations or otherwise. Out of said fund shall be paid all the expenses of every kind for the preservation, maintenance and improvement of the parks, squares, avenues and public grounds of the City and County."

These sections place a limitation upon the amount of taxes that may be levied and the amount of money that may be appropriated for park purposes by your Honorable Board. Section 11 of Article XIV is mandatory and prohibitory. Under it your Honorable Board must annually levy a tax to provide all necessary money for park purposes. This tax must not be less than five cents on the hundred; it cannot exceed seven cents.

By Article III, Chapter II, Section 2 the Park Fund is made to consist of the amount raised by this tax, together with certain money from other sources. That section then provides that "out of said fund shall be paid all the expenses of every kind" for park purposes. The effect of this is clearly to limit your Honorable Board in the appropriation of funds for park purposes to the amount realized by the tax levy for park purposes.

I therefore advise: 1. That your Honorable Board cannot legally levy a tax of more than seven cents on the one hundred dollars for park purposes; 2. That in no case can money be appropriated for park purposes in excess of the amount realized by the tax for park purposes.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Official Advertising Contract—Supervisors Cannot Reserve Power to Cancel Same.

March 8, 1915.

Gentlemen: I am in receipt of your request for an opinion, as follows:

"The Board of Supervisors on next Monday, March 8, 1915, will receive bids for the printing of the official advertising as prescribed by the Charter and the laws of the State.

"The specifications contain a paragraph reading as follows:

"'The Board of Supervisors reserves the right to cancel any contract entered into upon thirty days' notice of such cancellation in the event that the City and County shall be authorized by amendment to the Charter to publish the official advertising in the Municipal Record.'

"Supervisor Hayden, Chairman of the Publicity Committee, asks that you furnish said Committee with an opinion before next Monday as to whether or not the clause above quoted would have the effect of invalidating any contract that the City might enter into for official advertising."

Opinion.

The Charter sections governing the letting of contracts for official advertising are Sections 1 and 2 of Chapter III of Article II. Section 1 refers more particularly to the annual contracts for goods, merchandise, stores, supplies, etc., and provides for an annual contract for the supplying of the City for the period of one year after a published call for competitive bidding. All proposals must be accompanied with a certificate of deposit or certified check of ten per cent of the amount of the bid. Unless the successful bidder enters into and executes a contract, and furnishes the bond required within five days after the award is made, the check is forfeited to the City.

Section 2 then provides that "all contracts for official advertising shall be *let annually in like manner* by the Supervisors to the lowest responsible bidder publishing a daily newspaper in the City and County, etc."

There is to be submitted to the electors of this City, at the Charter Amendment election of March 16, 1915, a proposal to

permit of official advertising being done in the "Municipal Record." The contract for which bids have been called is for the year commencing April 1, 1915.

We therefore see that the Charter contains a clear direction to the Board of Supervisors to award the advertising contract annually, for a year's printing. That Charter section will be in force and effect when the bids are received on March 8th. If the award were made on that day, then, within five days thereafter and before the Charter Amendment election referred to, the successful bidder would be required to either execute a contract or forfeit his certified check. However, irrespective of the date of award, he certainly has every right to look to the organic law of the City as defining his rights in the premises, as well as the power of the Board of Supervisors to impose any conditions upon him. I am of the opinion that he might lawfully disregard the above described condition included in the specifications, as an act which is beyond the powers of the Board of Supervisors, and therefore void. He could, in my opinion, successfully prosecute an action to compel the Supervisors to so award him the contract for the year's printing, and would be justified in disregarding any notice of cancellation of contract given him by the Supervisors.

The voters themselves would have no constitutional power by Charter amendment to so affect a contract theretofore made, and surely then, the Supervisors cannot, by indirection, assume a power to give notice to successful bidders that they will reserve the privilege to, on a certain contingency, cancel a contract theretofore entered into in accordance with Charter provisions.

If, by the mere giving of prior notice of such a reservation of power, the Supervisors could impose such a condition upon bidders, there would be little value to the Charter sections. It is obvious, for instance, that bids received under such conditions might be considerably higher in amount than they would be without such a condition. Then the Charter amendment may fail of passage, and the City would suffer a waste of public funds as a result of such speculating on a Charter election. Again, there may very easily arise some serious question on the publication of certain notices, etc., required by law, in the proper newspaper. It would certainly be, in my opinion, at least a most dangerous chance to take.

I therefore respectfully advise that the condition above described be ignored by your Board, and further, that your Board formally so express itself prior to the final receiving of bids.

Respectfully,

PERCY V. LONG,

City Attorney.

Publicity Committee,
Board of Supervisors.

Power of City to Acquire Part of Existing Utility and Pay for Same from Bond Funds.

March 8, 1915.

Gentlemen: I am in receipt of a request for an opinion as follows, to-wit:

"Resolved, That the City Attorney is requested to advise this Committee as to the power of the City to purchase an integral part of an existing utility—separated from all other property of said utility. Also, advice is requested on authority or ability of the Board of Supervisors to initiate condemnation proceedings for such integral part of a given utility.

"2nd. Advice is requested on the power of the Board to declare that such integral part of a utility (purchased by sale or condemnation proceedings) is a nucleus of the Hetch Hetchy or municipally-owned water system and to pay for same out of bond issue (known as Hetch Hetchy Bond Fund).

"The City Attorney is requested to furnish this advice by Monday, March 1st or Monday, March 8, 1915.

Opinion.

In reply I would state:

The City has the power to purchase an integral part of an existing utility separated from all other property of the utility. The City may exercise this power through condemnation proceedings initiated by the Board of Supervisors having in mind however the fact that the City can be compelled to pay all damages to the remaining properties of the utility which are not taken and which may be damaged to any extent and in

any manner by reason of the segregation. (See Constitution of California, Art. 1, Sec. 14, Reardon vs. San Francisco, 66 Cal. 492.)

The Board of Supervisors has the right to declare that the integral part of the utility is a nucleus of the Hetch Hetchy or municipally-owned water system and to pay for same out of bond issue known as Hetch Hetchy Bond Fund, provided that the part of the utility thus acquired may reasonably be said to be a part of such system. Article XII, Section 10 of the Charter provides that the proceeds from the sale of bonds "shall be placed in the treasury to the credit of the proper fund and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue." The question as to whether or not the purchase of an integral part of an existing utility is "one of the purposes and objects mentioned by the ordinance authorizing" the issue of the bonds is one that lies within the power of the Supervisors to determine but their conclusion as to this will not be final but if unreasonable may be overthrown in a court of law. (See San Christina etc. Co. vs. San Francisco, 167 Cal. 762 et 769.)

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Panama-Pacific Exposition Should Insure Against Injuries to Firemen.

March 8, 1915.

Gentlemen: You have requested my opinion with reference to the possible liability of the City for injuries received by firemen who are employed for fire duty in accordance with an arrangement which has been made between the Board of Fire Commissioners and the Board of Directors of the Panama-Pacific Exposition Company.

Opinion.

The details of this arrangement are found in Ordinance No. 2261 (New Series). It is therein provided:

"Section 12. The Exposition Company shall provide adequate fire protection for the safety of persons and property within the said site and shall establish such fire companies as the Exposition Company and the Board of Fire Commissioners shall deem necessary for the purposes hereof, which said fire companies shall be maintained wholly at the cost of the Exposition Company. The Exposition Company shall submit to the Board of Fire Commissioners the names of men selected by it for said fire companies. The Board of Fire Commissioners for good cause may reject the name or require the discharge of any man who may be so selected, notifying the Exposition Company of the cause of such rejection or requirement of discharge. Under such regulations or orders as may be made by the Board of Fire Commissioners, the said fire companies shall at all times be under the discipline and control of the Chief of the Fire Department of the City and County of San Francisco. In case of fire the Chief of the Fire Department may order such portions of the regular Fire Department as he deems necessary to attend any fire within the Exposition site. The Board of Fire Commissioners may enter into an agreement with the Exposition Company whereby for the greater security of lives and property the discipline and instruction of the men of the Exposition fire companies shall be assured without cost to the City and County of San Francisco, and for the purposes hereof any man or men of the regular Fire Department may be temporarily detailed to service with the Exposition fire companies, and men from those companies temporarily attached to regular fire companies. No man employed by the Exposition Company under the provisions hereof shall be deemed to be a member of the regular Fire Department, or to acquire any rights as such under any provisions of the Charter or ordinances of the City and County of San Francisco or any existing rule or regulation of the Board of Fire Commissioners. The Auxiliary High Pressure Water Supply System for fire protection and all connections with and extensions and use of the same shall at all times be under the control of the Board of Fire Commissioners, and the Exposition Company shall not cause or permit the same to be disturbed or used except by and with the approval of the Board of Fire Commissioners."

The ordinance further provides that the City shall not be liable for any such injuries, as suggested in your request for an

opinion, and the Exposition Company has, in correspondence with your Commission on this matter, admitted that they and not the City shall be held responsible for any such injuries received.

The only question then is as to any possible liability upon the City in the event of the Exposition Company not being able to meet such obligations. You inquire whether the City should require the Exposition Company to take out liability insurance to cover any such possible claims under the Workmen's Compensation Act.

You will note from the above quotation from the ordinance under which these arrangements are made, that the Board of Fire Commissioners for good cause may reject any name suggested by the Exposition Company and, further, may require the discharge of any men so selected by said Exposition Company. Further, that the men so selected shall be subject to the discipline and control of the regular Fire Department of this City and subject to the orders of the Chief thereof. It is then provided, that in order to increase the efficiency of these men so selected, they may be detailed to regular fire duties in the City and outside the Exposition grounds, and regular members of the San Francisco Fire Department temporarily substituted in their place.

My understanding is that at present there are eighty-nine men in all who have been so selected. That forty-nine of them are performing duties at the Exposition and the remaining forty have been detailed for duties outside the Exposition. That the Fire Department has provided these forty places by detailing forty regular members of the Fire Department for temporary service in the Exposition grounds. The Exposition Company pays the salaries of these eighty-nine men so selected by agreement between the Exposition Company and the City.

It will therefore be seen that there is every element of regular employment between the City and these eighty-nine men with the exception of the payment of compensation. It is rather an unusual arrangement which has been made and it is difficult to advise with any positiveness as to just what the courts would hold with reference to this relationship between the City and the men performing fire duties, in the event of their

being injured in such service and being unable to collect compensation from the Exposition Company.

I am of the opinion, however, that inasmuch as the employment and the dismissal of the men is subject absolutely to the control of the City, and since, further, they are subject to the discipline and orders of the Chief of the City's Fire Department, that the City might very well be held as being in the position of an employer, the Exposition Company being a joint employer along with the City.

I therefore believe that if you desire to have the City absolutely secure against any possible claims for injuries received in such service, under the terms of the Workmen's Compensation Act, that you should require the Exposition Company to insure against any such liability.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Emmet Place.

March 11, 1915.

Gentlemen: I am in receipt of your communication, as follows:

"I am directed by Wm. H. McCarthy, Chairman on Streets and Sewers, to request you to advise the Committee as to whether or not Emmet Place, west side of Stockton Street between California and Sacramento Streets, is an open, public street."

Opinion.

On December 31, 1910, one Edouard Mandonnet filed an action against all persons to re-establish title to certain property described in the complaint in said action and included therein all of Emmet Place.

On October 24, 1912, the City and County of San Francisco filed an answer in said action, alleging that Emmet Place described in said answer was and had been for more than forty years prior to the filing of said answer a public street or alley of the City and County of San Francisco. Answers were also filed by certain property owners abutting on said Emmet Place.

On November 15, 1913, judgment in said action was rendered by Honorable George H. Buck in favor of the City and County of San Francisco, holding that the land described in the answer of the City and County was and is a public street or alley of this City and County, and that the plaintiff Edouard Mandonnet, in said action had no right, title or interest therein, except that as an abutting property owner he had a right-of-way for ingress and egress to his property over said Emmet Place.

The plaintiff in said action made a motion for a new trial therein, which was denied, and on December 30, 1913, he filed his notice of appeal from that part of the judgment in favor of the City and County of San Francisco.

The Bill of Exceptions on said appeal is now awaiting the signature of the judge on final settlement.

You are therefore advised in answer to your inquiry that Emmet Place is in my opinion a public street, but that it is the subject of litigation which is now on appeal to the Supreme Court of this State.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Requirement of State Lodging House Act as to Yard Space.

March 13, 1915.

Gentlemen: I am in receipt of your communication as follows: "Upon the suggestion of the Chief Building Inspector of this Board, you are respectfully requested to render an opinion concerning the apparent inconsistency of the provisions of Sections 4, 5 and 6 of the State Hotel and Lodging House Law, in so far as these sections of said law affect property in the 100 vara subdivisions of the City and County of San Francisco.

"Communication from the Chief Building Inspector of the Board of Public Works, dated November 5, 1913, in relation to this matter is herewith enclosed as of possible interest in this connection."

Opinion.

The particular point of the request as I understand it is whether a lodging house on a lot 160 feet in depth, running from

street to street requires a yard space. In other words, notwithstanding that both the front and the rear of the house abut upon streets nevertheless does the Lodging House Act require that a yard space of at least twelve feet in depth shall be left in the rear of the lodging house?

The Act is designed to afford light and air and all of its provisions are framed to secure these things. It would be competent for the Legislature to restrict the size of lodging houses and hotels and require a full amount of light and air but it would seem to be to no purpose to require that where a lodging house runs from street to street and its size is not prohibited by law that it could not be built to the property lines although both streets were ample in width to afford an abundance of light and air. An examination of the provisions of the Act shows that the Act itself is uncertain as to whether or not the Legislature did attempt to require that although a building ran from street to street nevertheless a yard space was required to be left. It is unnecessary to review these provisions.

In view of that uncertainty I am of the opinion that the proper construction to be placed upon the Act is such a construction as would lead to a reasonable result since no apparent purpose can be seen why the building should not run from property line to property line. The proper construction in view of the uncertainty of the terms of the Act would seem to me to be that it can be so constructed.

I therefore advise you that those lots south of Market Street 160 feet in depth and running from street to street may be used to construct a lodging house thereon without leaving a yard space provided that the lodging house in all respects conforms to the Act and the building laws and affords the requisite amount of light and air.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Lease, Chestnut Street Lot.

March 15, 1915.

Gentlemen: I am in receipt of your communication as follows:

"By direction of the Board of Supervisors I am sending to you letter of H. K. Eells, Attorney for Mary Farley, et al., in the matter of the lot on Chestnut Street which was advertised for lease. The Board of Supervisors request you to investigate the City's title to this property and report. Pending your investigation and report, the matter of leasing is held in abeyance.

"I am sending you the original papers, which please return when you are finished with them."

On January 10, 1908, I sent a letter to Honorable Washington Dodge, then Assessor of the City and County of San Francisco, a copy of which is as follows:

"I beg leave to call your attention to lot on the northerly line of Chestnut Street 177 feet 3 inches westerly from the westerly line of Polk Street; thence westerly 30 feet by 137 feet 6 inches deep.

"This property has never been assessed and I believe stands on your books in the name of the City. By decree establishing title made December 30, 1907, by Honorable Judge Troutt it was decided that the claimant, Mary Farley, was entitled to the possession and complete title to these premises. Under such decision said property should be assessed to Mary Farley."

The decree mentioned in said letter was obtained under the McEnerney Act and was founded upon a deed from the City and County of San Francisco by Thomas H. Selby, Mayor, to Thomas Farley, dated March 13, 1871, recorded March 1872, in Liber 681 of Deeds at page 138, which deed conveyed all of fifty vara lot No. 41 of the Western Addition which included the lot mentioned in your communication.

There has never been any deed from Thomas Farley or his successors in interest to the City and County of San Francisco.

You are therefore advised that the City and County of San

Francisco has no right, title or interest in or to said lot or any portion thereof.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim for Compensation of Benjamin Barnett.

March 22, 1915.

Gentlemen: I am in receipt of your communication of March 4, 1915, as follows:

"Benjamin Barnett, who owns a team and drives it for the Board of Public Works in the Street Cleaning Department, was injured some months ago and has made demand on the Board of Public Works for compensation under the State law. Barnett's injuries are very serious and probably permanent.

"Will you please give an opinion at your earliest convenience as to whether Mr. Barnett is to be considered an employee of the City and County and entitled under the provisions of the State law to compensation.

"The suggestion has been made that compensation be based upon $3.00 a day allowance for driver of a team. Mr. Barnett received $6.50 a day for the use of his team which he drove himself, and after his injury he employed a driver so that the team could be continued in the service of the Board of Public Works."

Opinion.

The Industrial Accident Commission has very recently decided a case which involved almost the same question here presented—Harry H. Stevens vs. H. S. Tittle and Western Indemnity Co., Claim No. 563. In that case the applicant, who was the owner of a number of teams, proposed to the defendant, a contractor performing work for the City and County on the Van Ness Avenue line, to furnish teams and drivers to defendant at the rate of $6.00 per day for each team and driver. Under this arrangement the applicant himself went to work for defendant driving one of his own teams. About a week later the applicant

furnished another team with a driver hired by himself at the same rate of $6.00 for driver and team. In this situation the applicant was injured and put in a claim against the defendant. The Commission held that while the applicant might be an independent contractor with regard to the second team and driver nevertheless he himself was an employee and entitled to compensation on the basis of $3.00 per day, the usual wage for drivers in that business.

On the authority of this case I advise you that Benjamin Barnett is entitled to compensation based on the usual wage for drivers in the business in which he was employed at the time of the injury.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Issuance of Permit for Supply Stations.

March 25, 1915.

Gentlemen: I am in receipt of your communication of March 12th, which reads as follows:

"At the request of the Fire Committee I enclose you copy of Ordinance No. 2659 (New Series) for an opinion as to the legal right or power of the Board of Supervisors to deny an application for a permit made under this law provided the location is not within the boundaries of 200 feet of a school, church, theatre or hospital as provided in Section 2 thereof.

"Another paragraph in said Section 2 provides that 'The Board of Supervisors shall grant and issue said permit provided the applicant agrees to abide by and comply with all the rules, regulations, requirements and provisions of this ordinance.'

"At a recent meeting of the Committee the point was raised that the Supervisors had no legal right or power to deny an application for a permit, notwithstanding the fact that one member of said Committee was of the opinion that the location of a station at the particular point sought would menace life.

"The Committee is also of the opinion that not more than

one of these supply stations should be permitted within any one block, but if the point raised in the case above cited is good law, the Committee and the Board are powerless to exercise the right of denying the permit although the public good and welfare demand such course.

"Should you find that the Board's power to deny applications is restricted to locations within 200 feet of a church, etc., the Committee respectfully requests, that you draft the necessary amendments to the ordinance to meet with the views of the Committee, as above given."

Opinion.

The ordinance as it now stands does not permit of the Board of Supervisors refusing to grant to any applicant a permit to conduct a supply station who agrees to abide by and comply with all the rules, regulations and requirements and provisions of the ordinance. The language of the ordinance is quoted in your communication and is mandatory. There is no question as to the interpretation of the ordinance and the only question of any doubt contained in your communication is whether or not the Board of Supervisors may adopt an ordinance requiring a permit to be obtained for the business of conducting an automobile supply station but retain a power of discretion in the Board as to whether or not the permit shall be granted. The business of selling gasoline and automobile supplies is a necessary, lawful and legitimate business. The storage of gasoline, however, is hazardous and for that reason the business of storing gasoline is subject to police regulation. Ordinance No. 2659 contains a large number of regulations and rules governing the storage of gasoline.

It may be questioned, however, whether a full compliance with these regulations entirely removes the hazard of the storage of gasoline. That is a scientific question which the Board of Supervisors must determine for itself. If it be considered that a full compliance with the rules and regulations contained in Ordinance No. 2659 removes all hazard from the storage of gasoline and lubricating oil, then it would be unconstitutional for the Board of Supervisors to refuse to grant to A a permit to conduct a supply station and refuse the same permit to B if both A and B fully complied with the regulations laid down.

The rule as to the power of a municipality to vest in the Board of Supervisors a discretion as to the issuance of permits to conduct a lawful and useful business which is subject, however, to police regulations, is stated in Dillon on Municipal Corporations, 5th Ed. Vol. 2, Sec. 698, p. 937, as folliows:

"Many cases are to be found sustaining ordinances prohibiting acts or even the following of trades and occupations without procuring permits which may be issued at the discretion of the council, mayor, or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permit shall be given or the dispensing power exercised."

If it is possible for the Board of Supervisors to define the exact conditions under which the business of storage of gasoline will be allowed the Board of Supervisors cannot retain a discretion as to the granting of a permit to conduct the business. It might be urged, however, that the storage of gasoline under the most favorable conditions in a large city is attended with great hazard. Being a necessary hazard it must be permitted, subject to proper police regulations. No matter what regulations may be prescribed the hazard is still present varying as to location of the storage. Therefore, it could be urged that the storage of gasoline in a thickly settled part of the City creates a greater hazard than the storage of gasoline in an unsettled part. Also the absence of buildings near the storage tank would make the storage less hazardous.

If the Board of Supervisors deems that the above are facts surrounding the storage of gasoline I am of the opinion that the Board has the power to retain a discretion as to the location of a gasoline storage tank for the reason that it would be impossible to determine in advance the exact conditions under which the storage of gasoline would be allowed. In my opinion, if the Board of Supervisors should amend Ordinance No. 2659 so as to retain in the Board of Supervisors the power to refuse to grant a permit when in the judgment of the Board the particular location of the supply station would create a particularly large hazard the ordinance would be valid. In line with your communication I therefore suggest that a proviso be added to Section 2 as follows: "Provided, however, the Board of Super-

visors shall refuse the permit if in the judgment of the Board of Supervisors the location of the temporary supply station is particularly hazardous to the public safety."

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim, A. J. Lichtig, Damages to Automobile.

March 29, 1915.

Gentlemen: I am in receipt of your communication of March 4, 1915, respecting the claim of A. J. Lichtig for $15.30 damages caused to his automobile by running into an unguarded hole at the corner of Post and Buchanan Streets on December 11, 1914.

I beg to advise your Honorable Board that the City and County is not liable for this accident and in this behalf I call attention to the opinion which I gave your Honorable Board on October 10, 1914, with regard to the claim of S. H. Susskind for a somewhat similar accident.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Disposition of Moneys Received from Scavengers for Use of Islais Creek Garbage Incinerator.

March 30, 1915.

Gentlemen: I am in receipt of your communication of March 27th, which reads as follows:

"In connection with the opinion herein requested, the Board of Public Works transmits—

"Communication from its Cashier, dated March 26, 1915, concerning the disposition of receipts from scavengers in connection with the use of the Islais Creek Garbage Incinerator;

"An itemized statement of these receipts for the period from September 3, 1913, to October 13, 1914.

"The Board of Public Works respectfully requests that you advise it whether these moneys should be deposited with the City and County Treasurer, and if so, to the credit of what fund they should be deposited.

"In this connection we desire to call your attention to our communications of November 16, 1914; December 3, 1914; January 7, 1915 (3), and of February 9, 1915, concerning the rejection by this Board of the incinerating plant at Islais Creek, contract of the Destructor Co."

Opinion.

As I understand it the moneys referred to above are moneys paid by scavengers to the City in consideration of the City taking certain refuse from them. These moneys in reality have nothing to do with the Incinerator Fund, but may be properly considered moneys received for garbage.

It is my opinion that these moneys should be paid over to the General Fund.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Moving Picture Shows in Panama-Pacific International Exposition Not Under Jurisdiction of Moving Picture Censor Board.

March 31, 1915.

Gentlemen: I am in receipt of your recent request for an opinion as to the rights and privileges of your Board "as far as exhibits of motion pictures on the grounds of the Panama-Pacific Exposition Company are concerned."

Opinion.

In 1913 a new section was added to Section 1 of Chapter II of Article II of the Charter, empowering the Board of Supervisors to pass such ordinances as it may deem fit and proper governing that portion of the City selected as the site for the Panama-Pacific International Exposition. It further provides that any such ordinance, when adopted by the Board of Supervisors, "shall supersede all conflicting provisions of this Charter, and all conflicting provisions of any ordinance heretofore passed, so far as the same apply to the site" above referred to, until January 1, 1917.

Acting under the power thus granted, the Board of Supervisors, by Ordinance No. 2261 (New Series), adopted April 28, 1913, the Exposition Company was granted power, among others, to "erect, maintain and operate such places of amusement, *including moving picture shows*, as it shall determine to be necessary, proper or expedient for the welfare and convenience of the public within the said site." (Section 10.)

This grant of power is exclusive, by the terms of the Charter amendment under which it was adopted, and Ordinance No. 761 (New Series), regulating moving picture exhibitions, is superseded by Ordinance No. 2261 (New Series) above referred to.

You are therefore advised that you are not only not entitled to free access and admission into the various motion picture houses on the grounds, but your Board has no right of censorship over such moving picture houses.

Respectfully,

PERCY V. LONG,

City Attorney.

Moving Picture Censor Board.

Geary Street Not Under the Jurisdiction of the Park Commissioners.

April 13, 1915.

Gentlemen: I am in receipt of your communication of the 9th inst., as follows:

"Will you kindly advise this Board whether it has authority, under the Charter of this City and County, to assess property fronting on Geary Street (formerly Point Lobos Avenue), for the cost of street work done under the provisions of the Street Improvement Ordinance?

"The City Engineer has been informed that Point Lobos Avenue, which is now Geary Street, has been declared a boulevard and placed under the jurisdiction of the Park Commission, also that the Board of Supervisors has no power to order street work done on account of this transfer of jurisdiction."

Opinion.

On investigation I find that there has been no ordinance passed by the Board of Supervisors placing Geary Street or any portion thereof under the jurisdiction or control of the Park Commission of this City and County.

On April 1, 1878, Point Lobos Avenue as then laid out, was, by statute, placed under the jurisdiction and control of the Board of Park Commissioners of this City and County. By the adoption of the Charter in 1900, Point Lobos Avenue was taken from the jurisdiction of the said Commission.

You are therefore advised that your Honorable Board has authority, under the Charter of this City and County, to assess property fronting on Geary Street, formerly Point Lobos Avenue, for the cost of street work done under the provisions of the Street Improvement Ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Bid of United Engineering Company for Repair of Fire Boats.

April 27, 1915.

Gentlemen: I am in receipt of your communication of April 22, 1915, requesting me to advise you as to the validity of certain bids received by your Honorable Board for dry-docking, repainting of hulls, etc., of the fire boats "Dennis T. Sullivan" and "David Scannell."

It appears from the bids submitted that the United Engineering Works offered to do the work for $1,258.00 but in submitting their bid they did not bid on items 48 and 49 in accordance with the specifications but attached to their bid a rider by which they offered to furnish the materials for specified sums but not within the time provided in the specifications for furnishing the same. Section 4, Chapter II, Article IX of the Charter provides that "The provisions of Article II, Chapter III, in regard to the advertising for proposals, the affidavit and security accompanying the same, the presentation and opening of proposals, the awarding of contracts and the security for the performance thereof, shall, so far as the same can be made applicable, apply to all proposals and contracts made, awarded or entered into for furnishing supplies to the Fire Department. Any contract made in violation of the provisions of this chapter shall be void."

Section 1, Chapter III, Article II, among other things provides that "all bids with alterations or erasures therein shall be rejected." Of course this provision is applicable to bids received by the Fire Department and therefore under Section 4, Chapter III of Article IX controls the presentation of bids to the Fire Department. The same provision is found in the Charter relating to bids received by the Board of Public Works and I have heretofore advised the Board of Public Works that an alteration such as appears in the bid of the United Engineering Works is not a valid bid and violates the provisions of the Charter.

In view of the plain language of the Charter I must advise you that the United Engineering Works' bid cannot be received.

It further appears that Moore & Scott Iron Works submitted a bid for the same work for $1,299.00. After examining that bid I am of the opinion that the bid conforms with the provisions of the Charter.

The Board of Fire Commissioners have the power to do either one of two things under the circumstances. They may reject all bids offered and advertise anew or they may reject the bid of the United Engineering Works upon the ground that it is not a bid that can be received by the Board and award the contract to Moore & Scott Iron Works, that company's bid being the lowest bid offered that can be received by the Board.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Fire Commissioners.

Licensing Firms Who Have Their Own Electricians.

April 30, 1915.

Gentlemen: I am in receipt of your communication of April 21st, in which you ask to be advised on the following points:

"(1) Has the City any legal right to exact a license fee from a person, firm or corporation maintaining an electrical department engaged in installing wires, apparatus, etc., solely on the premises of said person, firm or corporation?

"(2) Has the City the right to collect inspection fees from such persons, firms or corporations?"

Opinion.

A license tax may be imposed for either of two purposes; as a means of regulation or solely for revenue. It is clear that the installation of electrical wires, apparatus, etc., is subject to reasonable regulation under the police powers of the City and County. The Supervisors may enact an ordinance requiring the inspection of every job where an electrical appliance is installed and impose a reasonable fee to cover the cost of such inspection. So long as the fee charged is simply to cover the necessary cost of inspection it is an exercise of the power of regulation and may be imposed on all alike.

In answer to your second question, therefore, I advise you that inspection fees may be imposed on persons, firms and corporations of the class you mention.

Your first question presents greater difficulty. An annual

license fee of a fixed amount imposed upon all alike, irrespective of the amount of inspection which each might require during the course of the year would seem to bear no relation to the cost of regulation. It must then be imposed at least partly for revenue. The Charter, Article II, Chapter II, Section 1, Subdivision 15, empowers the Supervisors "to impose license taxes and to provide for the collection thereof." But this does not entitle them to tax the exercise of any right or privilege they choose. A license tax for revenue is an occupation tax.

As is said in Levi vs. Louisville, 30 S. W. 973, "the license tax is one imposed on the privilege of exercising certain callings, professions or avocations." As the persons and firms who keep an electrical force solely to work on their own premises cannot be said to be engaged in that business or occupation, a license tax for revenue cannot be imposed upon them.

I therefore advise you (1) That an inspection fee in such cases is proper, and (2) that an annual fixed license fee may not be imposed upon such persons and firms.

Respectfully,

PERCY V. LONG,

City Attorney.

Department of Electricity.

Insuring Drivers of Teams.

May 3, 1915.

Gentlemen: I am in receipt of your communication of April 21st, requesting to be advised as to whether your Board can legally require the owners of teams, who hire them to your department with a driver, to insure the drivers against injury under the Workmen's Compensation Act. I advise you that your Board in hiring teams can impose such reasonable conditions as may seem desirable. It follows that it will be perfectly legal to protect the City and County from liability by requiring such owners of teams to insure their drivers.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Charter Limitations as to Taxes Refer to All Purposes.

May 4, 1915.

Dear Sir: Replying to your communications of March 5, 1915, asking for an opinion as follows:

"Do not Sections 1755, 1756 and 1757 of the Political Code, relating to high school taxes and funds, apply to the high school district of San Francisco regardless of any Charter limitations on taxation?"

Opinion.

I have to say that in the case of Josselyn vs. San Francisco (168 Cal. 436), decided by the Supreme Court of California on October 2, 1914, the Court held that the Charter limitations as to taxes applied to all purposes.

In response to your inquiries of February 25, 1915, with reference to Sections 1818, 1839 and 1840 of the Political Code, and their application to San Francisco, I beg to refer you likewise to the Josselyn case, above cited.

Respectfully,

PERCY V. LONG,
City Attorney.

Superintendent of Schools.

Expense of Operating Islais Creek Bridge to Be Borne by City.

May 7, 1915.

Gentlemen: I am in receipt of your communication, asking my advice in the following matter:

A trunnion bascule bridge is being constructed by the Atchison, Topeka and Santa Fe Railway Company and the Southern Pacific Company across the Islais Creek Channel at Kentucky Street.

You desire to know upon whom the responsibility devolves for operating this bridge, and by whom these employees should be paid.

Opinion.

By Ordinance No. 270, approved April 12, 1901, a grant to operate within the limits of the City and County was made to the San Francisco and San Joaquin Valley Railway Company.

This grant was made subject to the following condition, among others:

"That said railway company will, at any time when required by resolution of the Board of Supervisors of the City and County of San Francisco, construct a drawbridge across the waterway known upon the official map of the City and County of San Francisco as Islais Creek Channel, sufficient to accommodate the travel upon said street, or any other drawbridge that may be required by said Board of Supervisors over any other channel which exists now or may hereafter exist. The same to be built under the supervision and to the satisfaction of the Board of Public Works; provided that the permission to cross Islais Creek by drawbridge or otherwise as contained in this franchise shall not become available until the San Francisco and San Joaquin Railway Company, its successors or assigns, shall have filed an abandonment of all rights to a crossing of said Islais Creek on the line of Illinois Street."

Subsequently, on November 18, 1912, the following Journal Resolution was adopted by the Board of Supervisors:

"Santa Fe Railway Company to Construct Drawbridge at Kentucky Street, Across Islais Creek.

"Whereas, The Atchison, Topeka and Santa Fe Railway Company, as successor in interest of the San Francisco and San Joaquin Valley Railway Company, crosses the Islais Creek channel diagonally through Kentucky Street, under a franchise granted by Ordinance No. 260, approved April 4, 1901, providing that said San Francisco and San Joaquin Valley Railway Company will, at any time when required by resolution of the Board of Supervisors of the City and County of San Francisco, construct a drawbridge across the waterway known upon the official map of the City and County of San Francisco, as Islais Creek Channel, sufficient to accommodate travel upon said street, or any drawbridges that may be required by said Board of Supervisors, over any other channel which exists now or may hereafter exist; the same to be built under the supervision and to the satisfaction of the Board of Public Works; therefore

"Resolved, That the Atchison, Topeka and Santa Fe Railway Company (a corporation), as the successor in interest of the San

Francisco and San Joaquin Valley Railway Company (a corporation), is hereby directed to construct a drawbridge at Kentucky Street, across the waterway known upon the official map of the City and County of San Francisco as Islais Creek Channel, sufficient to accommodate the travel upon said street; the said drawbridge to be built under the supervision and to the satisfaction of the Board of Public Works.

"Adopted, November 18, 1912."

In conformance with the terms of this resolution, the Santa Fe Railway Company was duly requested to furnish plans for the bridge. These were submitted and finally approved, and, upon receipt of the necessary moneys, work was commenced on the bridge.

There appears nowhere in the above franchise any provision imposing the burden of maintaining the bridge upon the Santa Fe Railway.

The Legislature, in 1883 (Stat. Cal. 1883, p. 295, Chap. LXX), passed the following act, "to authorize cities to erect and maintain drawbridges across navigable streams that flow through or penetrate the boundaries of such cities."

"Section 1. It shall be lawful for municipal corporations, and they are hereby authorized by their respective legislative body or bodies, to erect and maintain drawbridges across navigable streams that flow through or penetrate the boundaries of such cities, when the public necessities require it. Such bridges shall in all respects be constructed in accordance with the provisions of section two thousand eight hundred and seventy-five of the Political Code."

In view of the above, you are advised that the responsibility for operating the bridge across Islais Creek devolves upon the municipality and that the employees necessary for such operation should be paid from the City treasury.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Probationers in the Fire Department Have No Vested Rights to Places Held by Them During Probation.

May 12, 1915.

Gentlemen: I am in receipt of your recent communication requesting my opinion on the following question:

Does a probationary member automatically become, without any action of your Board, "not only a member of the Fire Department, but also a member of the Company in which he happens to be on the completion of his probationary period?"

Opinion.

Article IX, Chapter I, Section 8 of the Charter provides that your Board "shall make such rules and regulations as may be necessary to secure discipline and efficiency in the department."

By a rule adopted November 7, 1913, under this Charter section, your Board provided that "The assignment of a probationary member of the Fire Department to any given company, whether such member be a superior officer or a fireman without other rank, shall be subject to re-assignment during the period of his probation or immediately on the expiration thereof."

That such assignment is only temporary, is further established by a rule adopted by your Board October 28, 1914, as follows:

"Probationary member shall be assigned to companies by the Chief Engineer, subject to the approval of this Board. Unless good cause is shown to the Board the assignment of a probationary member shall not be changed, except at his own request, until the expiration of the fifth month from the time of his appointment. The position then occupied by him shall be posted as a vacancy, and unless a member having seniority over him shall apply for and be granted a transfer to such vacancy, the probationary member shall be confirmed in that position as soon as the period of his probation expires."

This rule is to be construed in connection with your rule adopted February 18, 1914, which provides that:

"Whenever a vacancy shall occur in the Department a notice of the existence of such vacancy shall be immediately posted on the bulletin board of each company, together with a notifica-

tion that any member of the Department who desires to fill the vacancy shall make written application therefor to the Board of Fire Commissioners through the Chief of the Fire Department, within 48 hours after such posting."

Unless a properly qualified member having seniority over the probationer fails to file his application for the position within the time prescribed by the rule, no right to such position accrues to the probationer.

You are therefore advised that if proper application under the rules of your Board is filed by a duly qualified person to be transferred to a position held by a probationer, the said probationer has only a right to such a place in the Department as may be left vacant by transfers of his seniors in service, in accordance with Section 6 of Rule 3, embracing the powers and duties of the Chief Engineer.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Interpretation of Article XIII, Section 11, Subdivision A of the Charter Amendments 1913.

May 18, 1915.

Gentlemen: I am in receipt of your request for an opinion, dated April 28, 1915, as follows:

"The County Clerk has notified this Commission that on January 8, 1912, he appointed John J. Whelan as a copyist in his office and that Mr. Whelan served in that position until September 10, 1912, when he was granted a leave of absence which ever since has been and still is in effect. Kindly advise us at your earliest convenience as to whether or not Mr. Whelan is entitled to the benefits of Article XIII of the Charter as a copyist in the County Clerk's office under the provisions of Charter Amendment No. 3, which was ratified by the Legislature on March 28, 1913."

Opinion.

Section 11, Subdivision A of Article XIII of the Charter as amended in 1913 contains the following provision:

"Any person who has served in any position in the office of the Assessor, the Coroner, the Recorder, the County Clerk, the Sheriff, the office of the Justices' Clerk, the Board of Supervisors or the Treasurer for a period of one year continuously prior to the approval of this amendment and who shall be actually employed in any of said offices at such time is hereby declared to be appointed within the provisions of Article XIII of this Charter to the position to which he may be assigned and shall be entitled to all the benefits of said article thereafter."

Among other definitions of the verb "to serve" given in Webster's Unabridged Dictionary are the following: "To be in service; to do duty; to discharge the requirements of an office or employment." This is the common idea of the word when used as in the provision above quoted. A man might be an officer in the army, for example, but we would not say that he was serving as an officer unless he was at the time actively engaged in performing the duties of the office. I think this is the proper interpretation to be given to the language of the Charter Amendment. It requires an actual performance of the duties of a position for one year continuously prior to the approval of the amendment and an actual employment in such duties at that time. I must advise you therefore that this case does not fall within the benefits of the provision quoted.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Permit for Blasting to Gray Bros.

May 28, 1915.

Gentlemen: In response to your communication asking this office to ascertain if a permit was ever granted by the Board of Supervisors to Gray Bros. for operating a rock crusher and for blasting in Block 14, Fairmount Tract, bounded by Castro, Diamond, Thirtieth and Beacon Streets, and in Block 13, Fairmount Tract, bounded by Castro, Diamond, Beacon and Thirty-first Streets, my understanding is, from officers of the Twenty-ninth and Castro Street District Improvement Club, that this permit if granted at all was granted during the year 1904, and not

later than April of that year. Inasmuch as the municipal records for that year were destroyed in the fire of 1906, I have had a search made by the State Librarian at Sacramento, California, of the file of the Evening Post, which was the official newspaper of the City during that year. He writes as follows:

"We have found nothing official relating to blasting. * * * Our file of that portion of the Post devoted to City advertising does not seem to be complete."

The State Librarian also sent to this office cameragraphs of certain items taken from the Evening Post under date of February 20, April 2 and April 5, 1904, and the San Francisco Call, under date of February 27, 1904. These items seem to show that a series of ordinances were adopted by the Board of Supervisors requiring a permit before blasting operations could be conducted, and requiring the furnishing of a bond, and also extending the limits within which it was prohibited to carry on blasting and rock crushing operations, the said proposed extension being designed to prevent operations in the neighborhood of Thirtieth Street between Castro and Diamond Streets. It appears that Mayor Schmitz vetoed these ordinances and that subsequently, in April, 1904, the Board again adopted identical ordinances, after having failed to pass the same over the Mayor's veto.

This information is very incomplete, but the State Librarian has had considerable difficulty in getting anything more tangible for us. It is very difficult to locate in unindexed volumes of daily newspapers, over a considerable period of time, such information as is being sought in this case.

I am of the opinion, however, that in the event of any such permit having been granted, the same can be revoked by your Honorable Board upon good cause being shown for such revocation.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim of J. E. Russell—Injured by Steam Roller.

June 2, 1915.

Gentlemen: I am in receipt of your communication of March 5th, relative to the claim of J. E. Russell for injury to his foot by a steam roller on August 24, 1914.

Opinion.

I refer you to Section 8 of Chapter II of Article II of the Charter, which reads as follows:

"All claims for damages against the City and County must be presented to the Board of Supervisors and filed with the Clerk within six months after the occurrence from which the damages are claimed to have arisen; otherwise there shall be no recovery on any such claim."

It appears that more than six months had elapsed since the accident to Mr. Russell before his claim was referred to this office. If no claim was filed with the Board of Supervisors within six months then Mr. Russell's rights are barred under this section of the Charter, and unless such claim was filed it will be useless to investigate the merits of the claim.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Teamster's Separate Saturday Pay Roll.

June 3, 1915.

Dear Sir: I am in receipt of your request for an opinion as follows:

"During the month of April, as a result of the controversy between the Finance Committee of the Board of Supervisors and the other members of the Board, I received two pay rolls for the teamsters employed by the Board of Public Works. Both demands are identical as far as the names of the teamsters are concerned, but the demands have been segregated, one to show the days that these men have worked other than Satur-

days, the other is for Saturdays only. I know nothing about the controversy or what the claims of either side are other than that both demands have been passed by the Board of Supervisors in open session, but in order to have knowledge regarding the facts in the case I sent a letter to the Board of Public Works, copy of which I enclose and also submit a copy of their answer. In addition to this I had the heads of the Street Cleaning Department, the General Street Repair Department and the General Sewer Repair Department call at my office to discuss the matter. I learned from Mr. Owens, representing the Street Cleaning Department, that the teams working under his direction never finished on any Saturday until two or three o'clock—many of them worked a full day, and all do so on demand. The amount of moneys represented in the demand in question, which is known as 565-A, that Mr. Owens has O. K'd is $1,671.

"Mr. McCoy, head of the Street Repair Work, says the teams working under his direction worked full time on Saturdays. The amount which Mr. McCoy has O. K'd on Pay Roll 565-A is $1,651.80.

"Mr. Linehan, head of the Sewer Repair Work, says that teams under his direction never finish until two or three o'clock—that two or three of them worked all day on Saturday and that all worked full time on demand. Mr. Linehan has O. K'd the amount of $446.90.

"Now I cannot see any good reason for segregating these demands as it necessitates the same men coming to the office twice a month for their pay, which is usually at the City's expense; and it further necessitates our office entering the 170 names four times where two would suffice if on one pay roll. I have my doubts as to the legality of issuing two pay rolls a month for the same men.

"I will thank you to advise me if you consider the Board of Public Works has a right to pay a full day's pay for their teams and teamsters on Saturdays when they work into the afternoon as noted above; in other words, upon the facts presented, is not this demand No. 565-A, known as the 'Teamsters' Saturday Pay Roll for April,' a valid demand and should I not approve same?"

Opinion.

There appears to be nothing in the Charter which forbids the passing of these demands separately if the Board of Supervisors chooses to do so. These men being per diem men, my opinion of December 21st to the Treasurer applies to them, and the payment of their wages is not limited to once a month.

Section 3 of Chapter I of Article VI provides that the Board of Public Works may employ such workmen as shall be necessary, "but no compensation to any of said persons shall be greater than is paid in the case of similar employments." This is the only limitation upon the amount of compensation. Giving a full day's pay on Saturday when teamsters work into the afternoon does not seem unreasonable or contrary to this provision of the Charter. I therefore advise you that this demand is valid and should be approved.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Compulsory Removal in Contagious Diseases.

June 4, 1915.

Gentlemen: I am in receipt of your communication of May 18, 1915, submitting Ordinance No. 3141 (New Series) which authorizes your Honorable Board whenever in your judgment necessary to remove or cause to be removed to a hospital any person suffering from certain enumerated diseases. You ask to be advised as to what procedure to adopt should resistance be offered.

Opinion.

There is no method of procedure provided in the ordinance. It provides simply that "the Board of Health of the City and County of San Francisco is hereby authorized and empowered * * * to remove or cause to be removed any person or persons, etc." However, it expressly vests in your Honorable Board the fullest power and discretion to remove such persons or cause them to be removed. It is well settled that in cases of this sort

where the public health may be greatly endangered by delay public bodies and officers entrusted with its safeguarding are justified in proceeding in a summary manner. To this effect are the cases cited in my opinion of February 9, 1915, to the Board of Supervisors upon the legality of this ordinance.

In case of resistance therefore your Honorable Board would be justified in ordering designated employees in your department to forcibly remove the resisting patient. Of course, it is unnecessary to point out the fact that no more force should be used than is under the circumstances necessary and that every precaution should be taken to prevent any ill effects to the patient himself. However, bearing these points in mind, your Honorable Board is by this ordinance authorized and empowered to cause the removal, by force if necessary, of such persons as fall within the purview of the ordinance. In this behalf I will call to your attention Section 3 of Chapter VIII of Article VIII of the Charter which provides:

"Police officers shall be health officers by virtue of their office."

Under this section your Honorable Board is entitled, if necessary, to invoke the aid of the police.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Petition for Reinstatement in Fire Department Cannot Be Considered After Eleven Years.

June 25, 1915.

Gentlemen: I am in receipt of your recent request for an opinion on the following matter:

One Henry A. Smith, an engineer in your Department, resigned his position on April 16, 1904. On June 16, 1915, he filed a petition, seeking reinstatement in his position, and claiming that he was forced to resign because of the "annoying and harassing" acts of the Acting Chief in 1904. In his own words: "I got disgusted and put in my resignation."

You now desire my opinion as to whether or not your Board can consider such a petition at the present time.

Opinion.

This matter of reinstatement has been discussed by me in previous opinions rendered your Board (Long—Opinions, 1910-12, pp. 372-374). In the cases referred to I advised that whatever the circumstances surrounding the tendering of such resignation, an acquiescence for a period of more than three years constitutes a waiver of any claim to right to have circumstances surrounding resignation enquired into. "Where a member of the classified service tenders his resignation voluntarily, and such resignation is accepted, there is no power in the officer or department to set aside the order accepting such resignation, or to give leave for the withdrawal thereof." (See Lane, Opinion, p. 566.) I am supported in this opinion by the case of Harby vs. Board of Education, decided in 1905 (2 Cal. App. 418). There the Court said:

"We are also of the opinion that plaintiff's right of action is barred by laches. She did not bring this action for more than three and one-half years after she was removed from the position she claims. During one year of this time, as appears by her complaint, someone else filled the position, and during none of the time has the public received the benefit of her services for which, if reinstated, she expects the public to pay. In New York State a similar law exists as to the removal of certain public officers, and in that State it has uniformly been held that a person claiming to have been unlawfully removed is guilty of laches, unless he brings his action for a writ of mandate promptly. In Murphy vs. Keller, 61 App. Div. 145 (70 N. Y. Supp. 405), it is said: 'In all proceedings of the character, where a person removed from office is entitled to receive from the public compensation for the services he performs, if he intends to insist that this removal was illegal, or that the law entitled him to be reinstated, his application for reinstatement should be promptly made so as to protect the city from the necessity of paying two persons for the same services.' (Citing cases.) 'A delay of three and one-half years, we think, evinces such laches and acquiescence in the action of the board as precluded plaintiff from now asking to be reinstated by writ of mandate'."

See also Wittman vs. Board of Police Commissioners, 19 Cal. App. 229, decided in 1912. The Court there held "that where a right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claimant can at

any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running. (Cases cited.) Otherwise, as is pointed out in the cases above cited, he might indefinitely prolong his right by neglecting to make the demand until it suited his convenience so to do."

In the case at issue, Smith has been out of the Fire Department eleven years.

You are therefore advised that your Board has no power to consider the petition of Henry A. Smith at the present time.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

School Department May Use Moneys Appropriated for the Construction, etc., of School Buildings for the Purchase of School Lots.

June 26, 1915.

Dear Sir: I am in receipt of your communication under date of June 24th, in which you ask me as to the authority of the Board of Supervisors to allow demands for the purchase of lands to be paid out of Budget Item No. 61 which was appropriated for the construction, reconstruction, fire escapes, repairs to and equipment of school buildings.

I am of the opinion that this item is part of the general fund and for the purposes of convenience and bookkeeping only, was designated as it is found in the printed budget, but having been appropriated to the uses of the School Department, it can be used for any purpose for that Department, which, in the judgment of the Board of Supervisors, seems proper.

You are therefore advised that the demands mentioned in your communication are proper and valid demands against Budget Item No. 61.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Police Patrol Salaries and Maintenance Payable Out of General Fund.

July 6, 1915.

Sir: I am in receipt of your communication under date of June 29, 1915, asking my opinion as to the right of the Police Commission to maintain the Police Boat Patrol and pay maintenance charges out of Maintenance of Police Patrol and Mounted Police items of the budget for 1915-16; also to pay salaries to the engineers out of Salaries for Patrolmen item. It appears from your communication that the Board of Supervisors failed to make any mention of the Police Boat Patrol in their itemization of the appropriation for the Police Department for 1915-16.

Opinion.

The Charter specifically designates the following funds: Park Fund, Library Fund, Common School Fund, Firemen's Relief and Pension Fund, Police Relief and Pension Fund, Public Building Fund, General Fund, Special Deposit Fund, Unapportioned Fee Fund, Interest and Sinking Fund and Surplus Fund. With the exception of the General Fund, all the funds above mentioned must be replenished by tax levy, or special deposit for the special purposes for which they were created.

"The General Fund shall consist of moneys received into the treasury and not specially appropriated to any other fund." (Article III, Chapter II, Section 2.)

"Appropriations made, by annual budget, for the use of the various departments which have no specially designated charter fund, are 'parts of the general fund'." (Opinions of Franklin K. Lane, 1899-1902, p. 175.)

Provision in the budget is made in aid of the departments for two purposes—salaries and maintenance. Specific itemization in the budget does not limit the departments to the employees mentioned, nor does the purpose designated, except that the disbursements are limited, generally, to either salaries or maintenance.

"The Charter provisions, however, very clearly aim at creating appropriations which shall be sacred to the separate departments of the government for which they are made." (Opinions of Franklin K. Lane, p. 176.)

It is therefore true that the appropriation for maintaining the Police Department is provided out of the General Fund and can be used by no other department.

The Charter provides for the composition of the Police Force of the City and County of San Francisco which shall not exceed a certain number based upon the population. If the Police Department requires employees in addition to those mentioned in the Charter provisions governing that department, the appointment of such employees can be made only under authority of ordinance of the Board of Supervisors adopted in accordance with Section 35 of Article XVI of the Charter. This procedure was followed, in March, 1912, by the Board of Supervisors when Ordinance No. 1809 (New Series) was adopted. The Police Commission was authorized to appoint certain employees among whom were "Three engineers for the Police Patrol Boat" at a yearly salary of $1,500.00 each. This, and similar ordinances standing unrepealed, are held to be of equal dignity with Charter provisions and mandamus will lie to compel the Auditor to draw a warrant for the salary payable out of the General Fund, as fixed in the ordinance. Harrison vs. Horton, 5 Cal. App. 415.

"It has been held that the Controller cannot refuse to draw a warrant for a salary fixed by law merely because the Legislature has failed to make a specific appropriation. That the fixing of the salary payable monthly out of the moneys not otherwise appropriated was sufficient. (Humbert vs. Dunn, 84 Cal. 57.)"

Harrison vs. Horton, 5 Cal. App. 420.

In my opinion the salaries of these engineers regularly appointed in accordance with an ordinance of the Board of Supervisors, may properly be paid out of the fund provided in the Salaries for Patrolmen item of the Budget, and the maintenance of the Police Patrol Boat, from the maintenance of Police Patrol and Mounted Police item.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Appointment of Probationer in Fire Department to Vacancy Without Posting Notice, Not Regular.

July 12, 1915.

Gentlemen: I am in receipt of your request for an opinion, as follows:

"By direction of the Board of Fire Commissioners I respectfully request an opinion from you on the following:

"In accordance with Article IX, Chapter I, Section 8 of the Charter, which provides that this Board 'shall make such rules and regulations as may be necessary to secure discipline and efficiency in the Department,' the following Rules were adopted:

" '*October* 28, 1914:

" 'Probationary members shall be assigned to companies by the Chief Engineer, subject to the approval of this Board. Unless good cause is shown to the Board the assignment of a probationary member shall not be changed, except at his own request, until the expiration of the fifth month from the time of his appointment. The position then occupied by him shall be posted as a vacancy and, unless a member having seniority over him shall apply for and be granted a transfer to such vacancy, the probationary member shall be confirmed in that position as soon as the period of his probation expires.

" '*February* 18, 1914:

" 'Whenever a vacancy shall occur in the Department a notice of the existence of such vacancy shall be immediately posted on the bulletin board of each company, together with a notification that any member of the Department who desires to fill the vacancy shall make written application therefor to the Board of Fire Commissioners through the Chief of the Fire Department, within 48 hours after such posting.'

"Does a probationary member who may be assigned to a vacancy, notice of which has not been posted in accordance with the Rules adopted February 18, 1914, acquire a right to hold such position in the Company in which he is assigned, immediately upon the expiration of his probationary period?

"The case in point was brought about by the Board having transferred for cause (charges preferred) Harry Hock, from

Driver of Chemical Co. 6 to Hoseman of Engine Co. 17, which left a vacancy in Chemical Co. 6, which vacancy was filled by James W. Byrne (notice of posting of vacancy being omitted as per Rule adopted) a probationer whose probationary period expired twenty-four hours after he was assigned to Chemical Co. 6.

"The Board, at the meeting of April 7, 1915, approved of the action in the transfer of Harry Hock from Driver of Chemical Co. 6 to Hoseman of Engine Co. 17, and also approved of the assignment of James W. Byrne to Chemical Co. 6, without rescinding the Rule adopted February 18, 1914.

"In view of the above facts, does a vacancy on account of not being posted according to the Rule still exist and should be posted, or is James W. Byrne entitled to hold the place to which he was assigned in Chemical Co. 6?"

Opinion.

Under the above quoted rules adopted by your Honorable Board it is the right of any member of the department to make a written application for any vacancy which may occur in the department within forty-eight hours of the posting of the notice of such vacancy as in said rules provided. Members of the Department cannot be deprived of this right granted them under said rules by a failure to post the required notice.

I therefore advise you that the appointment here made was irregular and a vacancy still exists which can only be regularly filled by posting notices and proceeding thereafter as the rules adopted require.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Status of Former Detective Sergeant Macphee and Former Police Officer Taylor.

July 19, 1915.

Gentlemen: I am in receipt of your request for an opinion under date of April 20, 1915, as follows:

"We respectfully request an opinion from you upon the following matter:

"On May 1, 1913, properly verified charges of 'Conduct Unbecoming an Officer' and 'Neglect of Duty' were filed against Detective Sergeant Arthur F. Macphee and Police Officer Charles H. Taylor. The said charges were set for hearing on May 8, 1913, and on the said date the defendants, said Arthur F. Macphee and Charles H. Taylor, appeared before the Board and entered a plea of 'not guilty' to the said charges, and thereafter evidence was introduced in behalf of the prosecution. That after hearing the evidence for the prosecution, the cases were continued from time to time, and on July 7, 1913, a certified copy of the verdict of a jury in Department No. 11 of the Superior Court of the State of California, in and for the City and County of San Francisco, was filed with the Board, finding the said Arthur F. Macphee and Charles H. Taylor guilty of the charge of Misdemeanor, to-wit: Conspiracy, and thereafter the Board adopted the resolution, a copy of which is enclosed herewith.

"The points we would like to be advised upon are whether or not the Board was justified in adopting the said resolution; was the action of the Board legal, and would the Board be legally justified at this late date in considering an application to reopen the cases with a view of reinstating these men as members of the Police Department of the City and County of San Francisco?"

Accompanying that request is the following excerpt from the minutes of the proceedings of your Honorable Board:

"In the Board of Police Commissioners of the City and County of San Francisco, State of California.

Minute Book No. 17 **July 7, 1913** **Page 440**

Detective Sergeant Arthur F. Macphee and Police Officer Charles H. Taylor. Dismissed.

"President Roche presented to the Board a copy of the indictments filed by the Grand Jury of the City and County of San

Francisco, in the Superior Court of the State of California, in and for the City and County of San Francisco, on May 16, 1913, accusing Detective Sergeant Arthur F. Macphee and Police Officer Charles H. Taylor with the crime of Misdemeanor, to-wit: Violating the provisions of Section 182 of the Penal Code of the State of California. We also presented certified copies of the verdict of the Jury in Department No. 11 of the said Superior Court, finding the said Detective Sergeant Arthur F. Macphee and Police Officer Charles H. Taylor guilty as charged in the indictment. President Roche then read the following section of the Charter of the City and County of San Francisco:

"Article XVI, Section 10. An office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of felony, or of an offense involving a violation of his official duties, or is removed from office, or ceases to be a resident of the City and County, or neglects to qualify within the time prescribed by law, or within twenty days after his election or appointment, or shall have been absent from the State without leave for more than sixty consecutive days.

"The following resolution was then adopted by the Board:

"Resolved, That Detective Sergeant Arthur F. Macphee and Police Officer Charles H. Taylor be and they are hereby dismissed from the Police Department of the City and County of San Francisco; said dismissals to take effect immediately.

"Ayes: Commissioners Shumate, Kuhl, Cook, Roche.

"The following resolution was then adopted:

"Resolved, That the charges of 'Conduct Unbecoming an Officer' and 'Neglect of Duty' preferred against Detective Sergeant Arthur F. Macphee and Police Officer Charles H. Taylor, continued from July 1, 1913, to this date, be and they are hereby ordered filed.

"Ayes: Commissioners Shumate, Kuhl, Cook, Roche."

Opinion.

The question presented in this request is completely answered by the case of McKannay vs. Horton, 151 Cal. 711. In that case the Supreme Court was called upon to interpret the meaning and effect of Section 10 of Article XVI of the Charter.

Former Mayor Eugene E. Schmitz on June 13, 1907, in the Superior Court of San Francisco, was found guilty of a felony—the crime of extortion—by the verdict of a jury, and on July 8th he was sentenced to five years in San Quentin. Thereafter, on July 9, 1907, the Board of Supervisors adopted a resolution declaring that a vacancy existed in the office of mayor, and immediately afterwards they elected Charles Boxton mayor to fill the unexpired term. On July 16th Mr. Boxton resigned and Edward R. Taylor was elected mayor by the supervisors.

Notwithstanding these facts and the further fact that he was closely confined in jail pending an appeal which he had taken, Mr. Schmitz continued to claim the office of mayor and endeavored to discharge the duties of that office in so far as his unusual situation would permit him to do so. The City and County then found itself in the embarrassing position of having two mayors, one with his offices in the city hall and the other with his official quarters in the county jail. It was this situation which the Supreme Court considered in McKannay vs. Horton. I quote from the opinion of the late Chief Justice Beatty in that case:

"By the Charter of the consolidated city and county it is provided that 'An office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony or of an offence involving a violation of his official duties,' etc. (Art. XVI, Sec. 10) and by Section 996 of the Political Code it is provided that 'An office becomes vacant on the happening of either of the following events before the expiration of the term:

"'1. The death of the incumbent * * *

"'8. His conviction of a felony or of any offense involving a violation of his official duties.'

"It will be seen that with respect to the case in hand the provisions of the Charter and the State law are identical. Either in the absence of the other would give the same effect to anyone of the enumerated contingencies, including conviction of a felony, that ensues in the case of the death of an incumbent—that is to say, the office *ipso facto* becomes vacant. * * * An office becomes vacant when the incumbent is convicted of a felony, and also it becomes vacant when he is convicted of any offense—whether felony or misdemeanor—if it involves a violation of his official duties."

To the same effect see also:

People vs. Brite, 55 Cal. 79, and

People vs. Fleming, 100 Cal. 540.

Each of the officers here in question was convicted in the Superior Court of an offense involving a violation of his official duties. Under the provisions of Section 10 of Article XVI of the Charter upon those convictions *ipso facto* their offices became vacant in the same manner and to the same extent as if they had died in office.

I therefore advise you that your Honorable Board was justified in adopting the resolution declaring their offices vacant upon the conviction of said officers, and that your Honorable Board would not be legally justified in considering an application to reopen the cases.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Insurance of Drivers of Teams Hired by City.

July 23, 1915.

Gentlemen: I am in receipt of your request for an opinion dated June 18, 1915, in which you set out a copy of Resolution No. 38,415 (Second Series) of your Honorable Board, as follows:

"Resolved, That in accordance with the provisions of Journal Resolution No. 1,799 of the Board of Supervisors, the Board of Public Works hereby directs the owners of all teams employed by this Department to insure the drivers of said teams against accident, by providing indemnity insurance for each of such drivers."

In this connection you ask to be advised on the following points:

"1. Does the owner of a team in the service of this Board, which owner drives his own team, and is paid by the City as a teamster, come under the caption 'employee' of the Board of

Public Works, or is he compelled to comply with the direction of this Board as expressed in Resolution No. 38,415 (Second Series)?

"2. Does the driver of a team rented by him from an outside owner, have to insure himself as per the above resolution, when the team is in the name of the driver, on the books of this Board?"

Opinion.

In my opinion rendered to your Honorable Board on May 3, 1915, I said:

"I advise you that your Board in hiring teams can impose such reasonable conditions as may seem desirable. It follows that it will be perfectly legal to protect the City and County from liability by requiring such owners of teams to insure their drivers."

This applies equally to any person who hires a team to your Board. As a condition of the hiring of the team your Board can require the person from whom it is hired to insure the driver, whether the driver is a third person or the hirer himself. I therefore advise you that in the two cases in question the drivers may be compelled to insure themselves.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Workmen's Compensation Act—Total Dependency and Lump Sum Settlement.

July 26, 1915.

Gentlemen: I am in receipt of your request for an opinion dated July 6, 1915, as follows:

"The Finance Committee desires your opinion on the application of Edmond Stack for compensation because of the death of his son who was a city employee.

"Edward J. Stack, the son, an asphalt worker, was injured on January 18, 1915, and died June 17th.

"His father, Edmond Stack, claims that he was wholly dependent upon his son for maintenance.

"This is the first time a case of this kind has arisen, and the Finance Committee desires you to report whether Edmond Stack is entitled to compensation, and whether it shall take the form of monthly payments, or a lump sum settlement."

Accompanying this request is a copy of an application by Edmond Stack, stating that he was entirely dependent upon Edward J. Stack and has no other income and that Edward J. Stack left no one else dependent upon him. He accordingly asks for a death benefit under the Compensation Act.

Opinion.

1. Section 15 of the Workmen's Compensation Act, provides for death benefits as follows:

"Where liability for compensation under this act exists such compensation shall be furnished or paid by the employer and be as provided in the following schedule: * * *

"(c) If the accident causes death, either with or without disability, a death benefit which shall be payable in installments equal to sixty-five per cent of the average weekly earnings of the deceased employee, upon the employer's regular payday, but not less frequently than twice in each calendar month, unless otherwise ordered by the Commission, which death benefit shall be as follows:

"(1) In case the deceased employee leaves a person or persons wholly dependent upon him for support, the death benefit shall be a sum sufficient, when added to the disability indemnity which, at the time has accrued and become payable, under the provisions of subsection (b) hereof, to make the total disability and indemnity and death benefit equal to three times his average annual earnings, such annual earnings to be taken at not less than three hundred and thirty-three dollars and thirty-three cents nor more than one thousand six hundred and sixty-six dollars and sixty-six cents.

"(2) In case the deceased employee leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of three times such average annual earnings of the employee as the

annual amount devoted by the deceased to the support of the person or persons so partially dependent bears to such average annual earnings; provided, that the death benefit shall not be greater than a sum sufficient, when added to the disability indemnity which, at the time of the death, has accrued and become payable under the provisions of subsection (b) hereof to make the total disability indemnity and death benefit equal to three times his average annual earnings, such average annual earnings to be taken at not less than three hundred and thirty-three dollars and thirty-three cents nor more than one thousand six hundred and sixty-six dollars and sixty-six cents."

It thus appears that if Edmond Stack was totally dependent as he claims, or only partially dependent, he is entitled to compensation under Section 15 of the Act. Of course, before determining the existence and extent of the liability of the City and County in this case it would be necessary to investigate and determine whether Edmond Stack was in fact dependent and, if so, to what extent.

2. Section 33 of the Compensation Act provides for lump sum settlements as follows:

"Sec. 33. (a) At the time of making its award or at any time thereafter the commission on its own motion, either with or without notice, or upon application of either party with due notice to the other, may in its discretion, commute the compensation payable under this act to a lump sum, if it appears that such commutation is necessary for the protection of the person entitled thereto, or for the best interest of either party, or that it will avoid undue expense or hardship to either party, or that the employer has sold or otherwise disposed of the greater part of his assets, or is about to do so, or that the employer is not a resident of this State, and the commission may order such compensation paid forthwith or at some future time.

"(b) The amount of the commuted payment shall be determined in accordance with the following provisions: * * *

"(2) If the accident causes permanent disability or death, the Commission shall fix the total amount of the permanent disability indemnity or death benefit payable therefor in accordance with the provisions of said Section 15 and shall estimate the present value thereof, assuming interest at the rate of six per cent per annum, disregarding the probability of the beneficiary's death

in all cases except where the percentage of permanent disability is such as to entitle the beneficiary to a life-pension, and then taking into consideration the probability of the beneficiary's death only in estimating the present value of such life pension."

You will observe that this section leaves the matter of lump sum settlements in the discretion of the Industrial Accident Commission. If it should be deemed desirable to make a lump sum settlement it would, therefore, be necessary to secure the approval of that Commission. I consulted with Mr. Chris Bradley, the attorney for the Commission, and he suggested that the proper procedure in such a case would be to file with the Commission (1) a stipulation as to all the facts, the character of dependency, whether total or partial, and if partial to what extent, and the amount due under the Act, and (2) a request signed by the applicant for the compensation asking for a lump sum settlement and stating briefly his reasons for desiring it. If the Commission was satisfied of the advisability of a lump sum settlement it would then issue its order that such settlement should be made.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Extra Positions in Assessor's Office Lawfully Created.

July 27, 1915.

Dear Sir: I am in receipt of your request for an opinion with reference to the status of the different positions in the office of the Assessor.

The Charter Article IV, Chapter IV, Section 1, provides that the Assessor may appoint six assistant deputies at an annual salary of eighteen hundred dollars each and twenty-one clerks at an annual salary of twelve hundred dollars each.

These positions of twenty-one clerks have not been filled in the Assessor's office and but four of the Charter positions of assistant deputies at eighteen hundred dollars each have been filled.

By Ordinance No. 3335 (New Series), approved June 25, 1915, after recommendation by the Mayor and upon the affirmative

vote of fourteen members of the Board of Supervisors as required by Section 35 of Article XVI of the Charter, the Assessor was authorized and empowered to appoint, subject to the provisions of Article XIII of the Charter, four assistant deputies at an annual salary of twenty-one hundred dollars each and eighteen deputy assessors at an annual salary of fifteen hundred dollars each.

You inquire whether such extra positions can be created and filled when there remain unfilled Charter positions. It is not, of course, mandatory on the part of any public official to appoint all of the help which he is authorized in the Charter to appoint. We must assume that his Honor the Mayor and the Board of Supervisors in the lawful exercise of their judgment concluded that it was necessary to create these extra positions for the proper performance of the duties of the office of the Assessor.

In my opinion the mere fact that the appointing officer does not take advantage of his powers of appointment under the Charter cannot deprive the Board of Supervisors and the Mayor of their powers to determine the necessity for the creation of any positions in the department of said appointing officer. The question of whether, under all the circumstances, it was necessary for such positions to be created and the propriety of requiring the head of the department to fill vacant positions before creating new ones were questions to be determined in the sound discretion and judgment of the Mayor and the Board of Supervisors. The legal presumption is that they were so considered and that it was finally determined that it was necessary to create these extra positions.

In Harrison vs. Horton, 5 Cal. App. at 417, the Court said, referring to an assistant District Attorney, whose position was created by ordinance in this city, following the same Charter procedure as we are here considering:

"Appellant was appointed under the authority of the ordinance, which in turn was authorized by the Charter. After the ordinance was passed it must be read into and as a part of the Charter for the purposes of this case, and when so read the district attorney had the authority to appoint eight assistant district attorneys. The Charter is itself a law of the State. (People vs. Williamson, 135 Cal. 418 (67 Pac. 504).) The ordinance was a statute of the City and County of San Francisco, consistent

with and authorized by the Charter, and when the ordinance was passed and the appellant appointed he received his appointment under a law of the State, to-wit, the Charter. The appointment is of the same weight and dignity as if the ordinance had been embodied in the Charter at the time of its adoption."

You are therefore advised that the salaries of those filling these positions so created are a proper legal claim against the Treasury of the City and County of San Francisco.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Permit to Conduct a Second-hand Store.

July 28, 1915.

Gentlemen: I am in receipt of your communication of the 27th inst., as follows:

"Application has been made to this Board by a man named Miller to conduct a second-hand store on Lyon Street, adjacent to the Presidio, and in view of the fact of the recent decision rendered by Judge Seawell in the case of Frank Franklin vs. James Woods, et al., we would like to be advised as to whether or not this Board has the right or jurisdiction to deny the said application, and if so, how are we to proceed."

Opinion.

I have examined the record in the case of Frank Franklin, plaintiff and petitioner, vs. M. J. Kuhl et al., members of the Board of Police Commissioners et al., No. 59,040, Department No. 1, and find that His Honor, Judge James M. Seawell, on the 28th day of January, 1915, made and rendered his decision in said case adjudging that the plaintiff therein was entitled to a peremptory writ of mandate against the defendants in said case and each of them compelling and directing them to issue to said Franklin a permit under and in accordance with the terms of Ordinances Numbers 168 and 2365 (New Series).

You are advised, that, if the facts surrounding the application of said Miller, named in your communication, are the same as those in the Franklin case, decided by Judge Seawell, it is your duty, in the light of said decision to grant the said application and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Issuance of Certificates of Credits for Grading on Private Survey.

August 7, 1915.

Gentlemen: I am in receipt of your communication of the 2nd inst., enclosing petitions of Bruce Cornwall and John Finn, asking that they be granted certificates of credits for certain grading which they state had been performed at their property on Harrison Street near Second Street, and on Vassar Place, off Harrison Street.

It appears from the letter of the City Engineer to your Honorable Board, dated April 5, 1915, that neither of the petitioners had ordered or received a cross-section survey, before beginning his grading, and failing in this regard, there are no data upon or under which the City Engineer would have his estimate of the amount of grading done for which certificates could be issued.

Subsequently the City Engineer, after considering the supplemental petition of the said Cornwall and Finn, stated that since making his former report, it was called to his attention that a private surveying firm of this City has records of a survey made of a portion of the streets in question, viz., on Harrison Street and on the intersection of Harrison Street and Vassar Place.

The matter has been referred to me with a request for an opinion as to whether or not these private data could be taken into consideration and a certificate of credits issued for grading performed, using said information in calculating the quantity of material removed.

It appears from the petitions filed herein, that the grading was done under a permit issued by the Board of Public Works, by

Resolution No. 4065 (New Series), adopted April 29, 1908, in response to a petition filed by said Cornwall and Finn on April 22, 1908.

Opinion.

I will assume for the purposes of this opinion that the grading referred to was done before the Board of Public Works passed its resolution of intention to recommend grading inclusive of such grading, because should it appear otherwise no credits could be given, nor certificates issued.

The Charter as in force and effect during the period in which this work was done, contained the same provision as Ordinance No. 2439 (New Series).

Subdivision 9, Section 9, Chapter II, Article VI of said Charter provided that any owner or owners of lots or lands fronting upon any street, the width and grade of which have been established by the Supervisors, may perform at his or their own expense (after obtaining permission from the Board of Public Works so to do, but before said Board has passed its resolution of intention to recommend grading inclusive of this), any grading upon said street, to its full width, or to the center line thereof and to its grade as then established and thereupon may procure, at his or their own expense, a certificate from the City Engineer setting forth the number of cubic yards of cutting or filling made by him or them in said grading, and the proportions performed by each owner, and that the same is done to the established width and grade of said street or to the center line thereof, and thereafter may file such certificate in the office of the Board.

There was no provision in the Charter and there is none in the present Street Improvement Ordinance so-called, making it mandatory upon the City Engineer to use any particular data upon which to estimate the amount of grading performed by the lot owner. He may, therefore, use any information which to him seems authentic in the measurement of said work.

In this particular case, if the City Engineer is satisfied that the data in the possession of the private surveying firm mentioned in his letter to the Board of Public Works under date of July 29, 1915, contains sufficient information upon which he can base his measurement as to the amount of grading done by the peti-

tioners, Cornwall and Finn, there is nothing in the Charter or the ordinance to prohibit the use of such information.

I may say also that there was nothing in the Charter or any ordinance as far as I have been able to ascertain, making it compulsory upon the lot owner as a condition precedent to obtaining a certificate of credits for grading to apply for and obtain from the City Engineer's Office a cross-section of the street upon which the grading was to be done before the same was performed.

Therefore, it is my opinion that the City Engineer may use the information in the possession of a private surveying firm in the measurement of the amount of grading performed by the petitioners, Cornwall and Finn, if he is satisfied that the same is correct.

Yours truly,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Cemetery Property Not Assessable for Public Improvement.

August 11, 1915.

Gentlemen: I am in receipt of your communication of the 24th inst. containing a request for an opinion as to whether or not the cemetery property on Arguello Boulevard between the southerly line of Geary Street and the northerly line of Balboa Street can be assessed for the improvement of the street in front thereof.

Opinion.

The Act of April 1859 (Statutes 1859, p. 281), provides in Section 10 thereof as follows:

"The cemetery lands and property of any association, formed pursuant to this Act, shall be exempt from all public taxes, rates and assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors. But the proprietors of lots, or plats, in such cemeteries, their heirs, or devisees, may hold the same exempt therefrom, so long as the same shall remain dedicated to the purpose of a cemetery; and, during that time, no street, road, avenue or thoroughfare shall be laid through such cemetery, or any part of the lands held by

such association, for the purposes aforesaid, without the consent of the trustees of such association, except by special permission of the Legislature of the State."

In the case of the Oakland Cemetery Association vs. City of St. Paul, 32 N. W. Reporter, at page 781, the Supreme Court of the State of Minnesota decided that the lands and property of Cemetery Associations which are exempt by law from "all public taxes and assessments" are exempted from assessments for local improvements, as for example, a sidewalk built in front of the property. An examination of that case discloses the fact that the Statute of Minnesota exempting cemetery lands and property from all public taxes and assessments is identical with the law of this State hereinabove set forth. The question was clearly presented to the Supreme Court of that State, whether the exemption included the assessments levied for local improvements, which in that case was a sidewalk, the cost of which was, in accordance with the Charter of the City of St. Paul, assessed upon the property fronting on the improvement "in accordance with the number of lineal feet of real estate." The Court said:

"Where the terms are used in contradistinction to each other, the word 'taxes' refers to those general burdens or charges imposed upon all property in the whole city, county or state for general public purposes, while the word 'assessment' is used to denote those local burdens or charges imposed by municipal corporations upon property fronting upon or situated near some local improvement. In this statute, both terms, 'taxes and assessments,' are used; the latter evidently in the sense above referred to, viz., burdens or charges to defray the expense of a local improvement. To give the word 'assessment' any meaning or force whatever, it must be held to mean something not included in the preceding word 'taxes.' And it is a familiar rule that a statute should be so constructed that, if it can be prevented, no clause, word, or sentence should be superfluous, void or insignificant."

And again:

"In our judgment the manifest intention of the Legislature was to exempt the property of cemetery associations from all public charges and burdens imposed in the exercise of the taxing power, whether of a general or local character. The construction is in harmony with the object of this exemption, which is not merely to aid cemetery associations in dollars and cents, to the amount

of the tax or assessment which would otherwise be levied against their property, but mainly to preserve cemeteries for the particular use to which they have been appropriated, and secure their perpetuity as places of burial; and thus, in accordance with the common sentiment of mankind, guard against the disturbance of the resting places of the dead, which would naturally ensue if the ground was liable to be sold to enforce the collection of taxes or assessments."

See also Doyle vs. Austin, 47 Cal. 358, for the distinction between the words "taxation" and "assessment."

In my opinion the decision in the case quoted is decisive of this question and in view of the provisions of our State law it is my opinion that a valid assessment cannot be levied or issued against the cemetery property referred to in your communication and you are so advised.

I was informed by the Superintendent of the Odd Fellows Cemetery Association that that Association was incorporated September 28, 1865, under the Rural Cemeteries Act of 1859.

Section 30, Article VI, Chapter II of the Charter provides that the Board of Public Works shall cause to be made all urgent repairs upon the public streets that may from time to time be requisite for the public safety and for that purpose may employ such laborers as may be necessary; but that, when the expense of the repairs shall exceed the sum of $500 exclusive of materials to be furnished from the corporation storeyard, the same shall be done under contract awarded in the manner provided by law.

Under this section you are advised that your Honorable Board may cause to be paved Arguello Boulevard in front of the cemetery property but only so much thereof as would be assessed to the property of the cemetery referred to in your communication.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Civil Service Status of John J. Whelan.

August 16, 1915.

Gentlemen: I am in receipt of your communication of June 11, 1915, as follows:

"Under date of April 28, 1915, we requested your opinion regarding the status of John J. Whelan as copyist in the County Clerk's office under the provisions of Charter Amendment No. 3, which was ratified by the Legislature on March 28, 1913, and under date of May 18 we duly received your opinion. Under date of May 26, 1915, we received a communication from Attorney William A. Kelly, representing said Whelan, a copy of which communication is hereto attached. Will you kindly advise us at your convenience as to whether or not there is anything in Mr. Kelly's communication which alters your opinion regarding the status of the above mentioned Whelan?"

The facts stated in Mr. Kelly's communication are as follows:

"In the year 1907 Mr. John J. Whelan was appointed to a position in the Coroner's office in this City and County and State. He served in said office until on or about January 8, 1908, when he was appointed to a position in the Assessor's office in said City and County and State, and served there until 1909, when he was appointed to a position in the Sheriff's office in said City and County and State, where he served until on or about January 8, 1910, when he was again appointed to a position in said Coroner's office where he served until January 8, 1912, at which time he was appointed to a position in the office of the County Clerk in said City and County and State. * * *

"On September 10, 1912, Mr. Whelan was granted a leave of absence from his position as aforesaid, in the office of the County Clerk, which leave of absence has ever since been and still is in effect."

Opinion.

The provision of the Charter in question, Article XIII, Section 11, Subdivision A, reads:

"Any person who has served in any position in the office of the Assessor, the Coroner, the Recorder, the County Clerk, the Sheriff, the office of the Justices' Clerk, the Board of Supervisors or the Treasurer for a period of one year continuously prior to

the approval of this amendment and who shall be actually employed in any of said offices at such time is hereby declared to be appointed within the provisions of Article XIII of this Charter to the position to which he may be assigned and shall be entitled to all the benefits of said Article thereafter."

It will be seen that a continuous service of one year in any of the offices mentioned therein coupled with an actual employment in any one of such offices at the time the provision became effective is sufficient to entitle a person to the benefits of the provision. Mr. Whelan held a position in the County Clerk's office at the time of the approval of the amendment in question and although not performing any duties at the time, was actually employed in said office within the meaning of the amendment; and while he did not serve, i. e., perform actual service, in the County Clerk's office for one year continuously prior to the approval of the amendment, it appears that he has served continuously for periods of over one year in certain other of the offices mentioned in that position.

I therefore advise you that under the additional facts presented in Mr. Kelly's communication, Mr. Whelan is entitled to a position as a Civil Service appointee in the County Clerk's office, under the provision of the Charter referred to herein.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Regrading of Hayes Street, Between Steiner and Scott Streets, Not a Contract Requiring the United Railroads to Pay $3.00 Per Day.

August 18, 1915.

Gentlemen: I am in receipt of your communication of August 14th, as follows:

"The Board of Supervisors, in the tax budget of the fiscal year 1915-16, has provided the sum of $16,500 to defray the City's portion of the improvement of Hayes Street between Steiner and Scott Streets (Budget Item No. 70), this improvement being commonly termed the Hayes Street re-grade.

"A portion of this work is being performed by the United Railroads on its occupancy on this portion of Hayes Street, the United Railroads defraying the cost of this work out of its own Treasury, as per previous agreement with the City and County of San Francisco.

"President Reardon has received a complaint that in performing this work at its expense, the United Railroads of San Francisco are compelling their employees to work eight hours and are paying less than $3.00 per diem.

"Will you kindly inform this Board whether the provisions of the Charter relating to the minimum wage and maximum hours of labor apply to this work of the United Railroads of San Francisco?"

Opinion.

The Market Street Railway Company of San Francisco, its successors and assigns, were granted the right to construct, lay down, maintain and operate, for the term of fifty years from and after the passage of Order No. 1514, approved September 20, 1879, a single or double track street railroad with all the necessary switches and turnouts along and upon certain streets named therein. Thereafter, on the 5th day of June, 1882, Order No. 1676 of the Board of Supervisors was approved, amending Section 1 of said Order No. 1514, and granting to the Market Street Railway Company of San Francisco, its successors and assigns the right to construct, lay down, maintain and operate, for the term of fifty years from and after the passage of said order, a single or double track street railroad, with all the necessary switches and turnouts along and upon certain streets, among which is Hayes Street, from its intersection with Market Street to the westerly line of Stanyan Street.

Said franchise was thereafter assigned to the United Railroads of San Francisco, a corporation, and said company is now operating said street railroad on Hayes Street between the points mentioned under and subject to all the terms and conditions thereof.

Section 8 of said Order No. 1514 provided that whenever it should be necessary for said Railway Company to plank or pave or macadamize its railway tracks, as provided in Section 498 of the Civil Code of this State, it should use the same material

which is or may be used by said City and County, in respect to the remainder of the street, unless otherwise directed or permitted by the Board of Supervisors of said City and County.

Section 498 of the Civil Code provides that the City authorities, in granting the right of way to street railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with certain conditions therein specified, among which is the following: "To plank, pave or macadamize the entire length of the street used by their tracks, between the rails and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street and with good crossings."

Section 498 of the Civil Code requires a strict compliance upon the part of the railroad company exercising a street railroad franchise, to keep the street used by its tracks between the rails and for two feet on each side thereof and between the tracks, if there be more than one, flush with the street. In order to do so it is necessary for the street railroad company exercising such franchise, to raise or lower its tracks and that portion of the street occupied by it whenever the grade of the street is raised or lowered by the municipal authorities.

This duty, being one imposed by law, must be complied with by the United Railroads to make its tracks and roadbed conform to the newly established grade on Hayes Street. In this matter, as I understand it, the grade of Hayes Street, between Steiner and Scott Streets, was lowered and the United Railroads is performing the work of lowering that portion of said street to conform with the new grade and, in the words of Section 498 of the Civil Code of this State, making its roadbed "flush with the street."

In the case of Mayor, etc., of City of New York, vs. Bleecker St. & F. Ferry R. Co., reported in 115 New York Supplement, at page 592, the law is stated as follows:

"It must, I think, be conceded that it is the duty of a railroad company legally occupying a public street to keep its structure in such a condition of repair that the street will be safe for travel, and it would be liable for a neglect of that duty; and that obligation would undoubtedly continue, notwithstanding any change in the character of the street, the nature of the pave-

ment, or the grade of the street, that was made by the municipal authorities. Thus, if the municipal authorities had changed the grade of a street and laid a pavement at a new grade, the railroad company could not maintain its tracks at the former grade, and thus create a condition which would make the use of the street dangerous or inconvenient for the public."

Section 1 of Chapter III of Article II of the Charter of the City and County of San Francisco provides, in part:

"Every contract for work to be performed for the City and County must provide that in the performance of the contract eight hours shall be the maximum hours of labor on any calendar day and that the minimum wages of laborers employed by the contractor, in the execution of his contract, shall be $3.00 a day."

Said Section 1 provides the complete scheme for awarding all contracts for goods, merchandise, stores, supplies, subsistence or printing for the City and County as well as for certain departments of the City government. It contemplates that said contracts must be made by the Supervisors with the lowest bidder offering adequate security. It provides that all proposals of bidders shall be accompanied by a certificate of deposit or a certified check on a solvent bank in the City and County, of 10 per cent of the amount bid. It also provides that all bids shall be sealed and delivered by the bidder to the Clerk of the Supervisors. It provides also that any contract for work to be performed for the City and County which does not comply with the provisions of this section shall be null and void and any officer who shall sign the same shall be deemed guilty of misfeasance and upon proof of such misfeasance shall be removed from office.

The work being done by the United Railroads on Hayes Street between Steiner and Scott Streets was not bid upon by the United Railroads in the manner specified in said section. No certificate of deposit or certified check was tendered and no contract was ever signed by any official of this City and County with the United Railroads for the performance of said work. Therefore, there being no contract, and the work being done by the United Railroads, is work which it is required under the law to perform, in my opinion does not bring the doing of said work within the provisions of Section 1 of Chapter III of Article II of the Charter, making it compulsory that all contracts shall

provide for a minimum wage of $3.00 per day and the maximum hours of labor on any calendar day shall be eight hours.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Liability for the Cost of Street Work on Geary Street.

August 20, 1915.

Gentlemen: I am in receipt of your communication of the 17th inst., as follows:

"Mr. George Newhall has offered to sell to the City for street purposes four certain narrow strips of land approximately two feet in width on Geary Street between Thirty-eighth and Forty-fourth Avenues.

"Before accepting this offer, the Finance Committee desires to have your legal opinion as to whether the City will be liable for subsequent street work should the Newhall offer be accepted and the property transferred to the City for street purposes.

"The Committee is very anxious to have this matter very thoroughly understood before proceeding any further.

"It is desirous, of course, to have Geary Street paved, but the City does not want to take the chance of having to pay for this street work should the Newhall proposition be accepted.

"It is intended to dedicate these narrow strips as a part of Geary Street and then order the improvement of said street on the assumption that the property owners, whose property will front on the new street line, will be required to pay their proper proportion of the cost of the improvement."

Opinion.

In reply to your communication I advise you that the City and County of San Francisco will not be liable for any street work on Geary Street between Thirty-eighth and Forty-fourth Avenues in the event that the City and County acquires from George A.

Newhall the narrow strips of land mentioned in your communication. On the contrary, the liability for the street work on said street will be upon the property abutting on Geary Street after the same is widened to correspond in width with the property acquired from Mr. Newhall.

I suggest that your Honorable Board adopt a resolution accepting the deed, setting the same out in full in the resolution and declaring that the lands described in the deed form a part of Geary Street, and then pass an ordinance establishing the width of Geary Street from Thirty-eighth to Forty-fourth Avenue, descriptions for that purpose to be obtained from the City Engineer.

Thereafter proceedings can be initiated for the improvement of Geary Street in the same way that other streets are improved.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Union Street Railway Employees Protected by Year's Service Prior to Acquisition.

August 20, 1915.

Gentlemen: I am in receipt of your request for an opinion with reference to the status of Mr. C. W. Madsen, who was in the employ of the Union Street Railroad, as a motorman, at the time of its acquisition by the City, and had been so employed for over a year prior to the City's acquisition.

My understanding is that Mr. Madsen was not retained in the service of the City after the acquisition of the Union Street road because he was not a citizen at that time. Not being a citizen, he was not entitled to the benefit conferred by the Charter (Art. XIII, Sec. 11, Sub. B-2) of continuing in his position after the acquisition of the road.

He has, however, since become a citizen, and has taken the examination for motorman and is now upon the eligible list for such position, and is to be considered, not as one entitled to continuance in his position from the date of the taking over of

the road, but as one on the eligible list, with any preferences on said list that the Charter may confer.

Article XIII, Section 11, Subdivision B-2, of the Charter, provides that:

"The following persons securing standing on the eligible lists in examinations, shall be preferred for appointment: persons employed in the operating service of any public utility acquired by the City, who have been so employed for not less than one year."

In my opinion Mr. Madsen comes within the protection of the above language and should be preferred for appointment.

The question of citizenship is of importance only as being a condition precedent to his actual employment, and in no way takes away from the significance of Mr. Madsen's having been in the actual employ of the Union Street Road for a period of one year prior to its acquisition by the City.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Twenty-five Years' Fire Department Service Pension Requires Continuous Active Service.

August 20, 1915.

Gentlemen: I am in receipt of your request for an opinion in the case of Robert J. Jones, hoseman in Engine Company No. 32, who has made an application for a pension under Article IX, Chapter VII, Section 3 of the Charter, for twenty-five years' service in the Department.

It appears that Mr. Jones was in active service in the Department for ten years prior to the adoption of the Charter in 1900. That upon the adoption of the Charter he was placed on the retired list of temporarily discharged members of the Department under the provisions of Section 1, Chapter II, Article IX of the Charter, which provides that if any reduction is made in the force of the Department at the time of the reorganization of the

Charter "the Commissioners may temporarily discharge those persons whose discharge shall be most conducive to the efficient reorganization of the Department, but in case of a subsequent increase of the force, those temporarily discharged shall be reappointed without Civil Service examination and assigned to the same rank in which they were at the time of their discharge."

Mr. Jones was so temporarily discharged for about two years, and at the end of said period of two years was again made an active member of the Department, in accordance with the above Charter provisions. He has since been regularly an active member of the Department, thus making the period of his active service about twenty-three years.

You inquire whether, under the above facts, he is entitled to a service pension.

The Charter section controlling in this matter is Section 3, Chapter VII, Article IX, which provides that "The Commissioners shall, upon the application, duly verified of any officer or member of the Fire Department who shall have served *as an active member of the Fire Department for twenty-five years continuously* next preceding the date of said application, * * * retire and relieve from service such officer or member, etc."

It is obvious from the above language that the Charter requires twenty-five years' continuous and active service as a member of the Fire Department before such member is entitled to the pension.

You are therefore advised that inasmuch as Mr. Jones has not been so actively a member of the Department for such a continuous period of twenty-five years, that he is not entitled to the pension for which he has applied.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Pension Fund Commissioners.

Emmet Place.

August 30, 1915.

Gentlemen: I am in receipt of your communication of the 26th inst. with reference to Emmet Place at Stockton Street, enclosing a copy of Journal Resolution No. 1907, adopted by the Board of Supervisors on the 23rd day of August, 1915, said resolution directing the Board of Public Works to construct a stairway and fence at Stockton Street and Emmet Place as provided in Resolution No. 11,812 (New Series), estimated cost, $115.00.

Opinion.

One Edouard Mandonnet commenced an action under the McEnerney Act against all persons to re-establish title to certain property in which was included Emmet Place, between Stockton and Powell, Sacramento and California Streets. An answer was interposed in said action on behalf of the City and County of San Francisco, setting up that the land embraced in said action constituting Emmet Place was a public street. On the trial thereof the Superior Court held that our claim was good and decided that Emmet Place was an open public street of this City and County.

Thereafter said Mandonnet commenced an action against the City and County of San Francisco and the Board of Public Works for an injunction from in any wise interfering with the possession by the plaintiff (Mandonnet) of the property in said action described or any portion thereof or from ousting the plaintiff therefrom or from removing any property or fixtures of the plaintiff situated thereon until the determination and adjudication of the McEnerney title suit above referred to or pending the trial of suit for an injunction. The restraining order issued in the action above referred to goes no further than to restrain the Board of Public Works from interfering with the possession, etc., of plaintiff in and to the property therein described, which includes all of Emmet Place. There is nothing to prevent the erection by your Honorable Board of a stairway leading up from Stockton Street to Emmet Place. As long as the Board of Public Works confines its operations to putting up a stairway built entirely on Stockton Street running from the easterly termination of Emmet Place at Stockton Street to a convenient point in

Stockton Street there would be no violation of the restraining order issued in said action and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Municipal Railway in Mission Park.

September 1, 1915.

Gentlemen: I am in receipt of your communication of the 26th of August, 1915, as follows:

"Whereas the Board of Park Commissioners desire to be advised as to their power to grant an easement of a portion of Mission Park as requested by the Board of Public Works, giving the latter Board the right to use all or any part of the land west of the east line of the plat presented by the Board of Public Works for the Church Street Railway now contemplated. Therefore our secretary is requested to ask the City and County Attorney for such opinion."

Opinion.

Mission Block 86 was purchased by the City and County of San Francisco on the 6th day of March, 1905, for the sum of $152,000 from the Congregation Emanu-El and the Eureka Benevolent Association Corporations, and Mission Block 87 was purchased at the same time for $140,000 from the Congregation Sherith Israel, a corporation.

These lands were acquired under and in pursuance of the terms of Ordinance 708, adopted by the Board of Supervisors on the 13th of April, 1903, and approved by the Mayor the same day. Said ordinance declared that the public interest and necessity demand the acquisition by the City and County of lands for an additional public park in that portion of the City and County known as the "Mission," and thereafter bonds in the sum of $292,000 were voted by the people for said purpose.

The deeds under and by which the City and County acquired said properties, conveyed the fee simple title thereto, free from

all incumbrances, and without any terms, conditions or limitations as to the use of said properties by the City and County.

Section 6 of Article XVI of the Charter, prohibits the Commissioners from leasing any part of the parks, etc., under their control, to any person, company or corporation for any purpose except that they are empowered by Section 9 to lease to the State of California ground for an exposition building and by Section 12 the California Academy of Sciences is granted permission to erect and maintain in Golden Gate Park a museum building.

The Commissioners are authorized to lease for a period not greater than one year, such buildings as may be constructed by the Board for the use of the public.

The Commissioners are authorized also to permit the use for a limited time by the Panama-Pacific International Exposition Company of a certain portion of Golden Gate Park and all of Lobos Square for exposition purposes.

The provisions of the Charter here pointed out, prohibit the Board from leasing any part of the public parks to private persons; there is no prohibitory language contained therein as far as the City and County itself is concerned. I do not mean to imply, however, that the City and County could be granted permission by the Board, of the use of said parks for any and all purposes. The right to such use is a limited one and it must be such a use as is consistent with the use of the park by the public for recreation and pleasure. For instance, the Supreme Court, in the case of Spires vs. Los Angeles, 150 Cal., held that the City of Los Angeles had the right to erect a library building in Central Park in that city, and in the case of Harter vs. San Jose, 141 Cal. 659, the same Court held that the City of San Jose had the right to erect a hotel in Alum Rock Park, observing, "'We are not prepared to say that the public authorities in this case did not have the authority to make the contemplated lease under their general power to control and manage the park" * * * and quoting from Gushee vs. City of New York, 42 App. Div. 37, 58 N. Y. Supp, 967, in which the Court said, "that in the control and management of the public parks of a great city it is perfectly proper to furnish not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for

themselves and their animals as may be required will not be disputed." The doing of those things is no part of the public duty imposed upon municipal corporations as the agent of the State in the performance of its governmental functions, but rather a part of the business of the City, which it may or may not undertake in its private capacity, as the owner of the lands which have been set apart for park purposes.

In a case directly involving the construction of a street railroad in Golden Gate Park, People vs. Park and Ocean R. R. Company, 76 Cal. 156, the Court said at page 162:

"A railroad in a public park, constructed and managed as in the case at bar, may be a nuisance, calling for the intervention of the supreme power of the State to conserve the rights of the general public; *or it may be a medium of ingress, egress and transportation essential to the full enjoyment by the people of the privileges and blessings accorded them in the creation and dedication of such park.*"

In my opinion, after reviewing the authorities, your Honorable Board possesses the power and authority to grant the easement mentioned in your communication, as desired by the Board of Public Works, for the so-called Church Street Railway.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Park Commissioners.

Regulation of Private Detectives.

September 2, 1915.

Gentlemen: I am in receipt of your communication under date of August 19th, as follows:

"We respectfully request an opinion from you upon the following matter:

"Ordinance No. 453 (New Series) approved June 10, 1908, regulates the business of furnishing or supplying special or private detectives or watchmen for hire or reward, imposing a license upon the same, and regulates the issuance of said license.

"Enclosed herewith you will find a copy of Senate Bill No. 20, approved June 7, 1915, an Act to regulate the business of private detectives and detective agencies.

"What we would like to be advised upon is whether the State law supersedes the said ordinance, whether the City and County of San Francisco, notwithstanding the passage of the State law, should continue to enforce the provisions of the said ordinance, and whether or not this is a municipal affair upon which the State has no power to act."

Opinion.

The general rule controlling such questions as are asked me is covered in McQuillin on Municipal Corporations, Vol. 1, page 396, stated as follows:

"All of those public matters which concern the people of the State at large in common with the people of the particular locality, as the administration of justice, and the authority of the State generally, through and by legislative enactments administered by State officers or by virtue of the power of the central government, in the preservation of the public peace and affairs of like general character, although some of which may be in the hands of the local or municipal authorities, are matters of State or central jurisdiction."

I am therefore of the opinion that the Act of the Legislature entitled: "An Act to license and regulate the business of private detectives and detective agencies," is the paramount law of the State on this subject and that Section 6 of this Act, which reads as follows: "This Act shall supersede and take the place of any rule, regulation or ordinance of any county, city and county, city or town, in the State of California conflicting herewith," is binding on the officials of the City and County of San Francisco, and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners.

Removal of Obstructions on Stark Street.

September 3, 1915.

Gentlemen: I am in receipt of your communication of the 2nd inst., as follows:

"On July 28, 1915, the Board of Public Works awarded a contract to J. J. McHugh to improve Stark Street from Stockton Street to the easterly termination of Stark Street, the work to be done under the provisions of the Street Improvement Ordinance.

"In making a survey for the purpose of furnishing the contractor with line and grade, the City Engineer determined that a brick building has been constructed over the roadway of Stark Street for a distance of 27 feet on its westerly part, as shown by the attached blue print. Therefore by Resolution No. 40,665 (Second Series), adopted September 1, 1915, the Board of Public Works requested that the City and County Attorney take the necessary legal steps to effect the removal of all encroachments from the roadway of Stark Street from Stockton Street to the easterly termination of Stark Street.

"Awaiting your action on this request the Board of Public Works has denied the application of J. J. McHugh to be released from its contract."

Opinion.

The procedure for causing the removal of obstructions on public streets was set forth in the case of Nerio vs. Maestretti, reported in 154 Cal. at page 580. The opinion rendered by the Court in that action is a short one and for your information and as a guide to your Honorable Board in this case I will set forth said opinion in full.

"This action was brought by plaintiffs, seeking to enjoin the defendants, constituting the Board of Public Works of the City and County of San Francisco, from an alleged unlawful interference with their property. The facts found by the Court are that plaintiffs had erected houses upon a part of a public street of the City and County of San Francisco; that the Board of Public Works had given notice to the plaintiffs to remove these structures and abate the nuisance created by them; that upon plaintiff's failure and refusal so to do, the Board of Public Works

entered and proceeded to remove the obstructions, using no more force than was necessary so to do; that the Board of Public Works, in so demolishing plaintiff's buildings, was authorized and empowered so to do by the laws of the State of California, wherein and whereby the said Board of Public Works was charged with the duty of removing obstructions from the public streets of the City and County.

"The appeal here is from the judgment and upon the judgment roll alone, and the appeal is entirely without merit. The findings abundantly support the judgment. The continued occupation by plaintiffs of a portion of the public street was but the continuance of a nuisance. No lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right."

I advise your Honorable Board to proceed in accordance with said opinion.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Issuance of Deeds to Purchasers at Delinquent Sales.

September 4, 1915.

Gentlemen: I am in receipt of your communication asking to be advised as to whether it is compulsory upon your Honorable Board to issue to the several purchasers of delinquent properties under the proceedings taken for the purpose of opening Arch, Beverly, Bixby, Bright, Head, Monticello, Ralston, Ramsell, Vernon and Victoria Streets, deeds to the same after the expiration of one year from the date of sale where there has been no redemption as provided by the Charter.

Opinion.

Paragraph 6 of Section 14, Chapter III, Article VI of the Charter provides as follows:

"*At any time after the expiration of twelve months from the date of the sale,* the Board of Public Works must execute to the purchaser, or his assignee, *on his application,* * * * *a deed* of the

property sold, in which shall be recited substantially the matters contained in the certificate, also any assignment thereof and the fact that no person has redeemed the property."

You are therefore advised that it is compulsory upon the Board of Public Works to issue to the several purchasers of delinquent property under such proceedings, the redemption of which properties has not been made, a deed upon application at any time after September 3, 1915.

I enclose a form of deed which may be used if the same meets with your approval.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Interpretation of "Rendering or Reducing" in Ordinance 822.

September 16, 1915.

Dear Sir: I am in receipt of your communication of September 8th, reading as follows:

"The Board of Health has received the attached communication after refusing to grant a permit to establish a so-called soap factory at 356 Fremont Street, between Howard and Folsom Streets, interpreting Ordinance 822, as quoted in the letter, to mean that the manufacture of soap whether by the mixing of chemicals or rendering or refining tallow or fats is a process of reduction, and as such this Department could not issue a permit for the establishment of such a factory, excepting within the boundaries named in the ordinance.

"The contention made by the Joseph Gutradt Company is contrary to the above opinion, and we would therefore thank you for an interpretation of the words 'rendering and reducing' as applied to the manufacture of soaps where tallow and other oil products are used as mentioned by the Gutradt Company where no odors or other deleterious substances are given off that would affect the comfort and health of the neighborhood."

Opinion.

Section 1 of Ordinance 822 provides that:

"It shall be unlawful for any person, firm or corporation to maintain or operate any establishment for the *rendering or reducing* of tallow or other animal or vegetable substance or to carry on or conduct the business of rendering the same within the City and County except within that certain tract of land bounded and described as follows." (Here follow the boundaries.)

The question which presents itself is: "Is soap making a process of reduction or rendering?"

The Century Dictionary defines "render," in its chemical sense "to reduce; try out; clarify by boiling or steaming: said of fats. Rendered: i. e., technically, separated from the membranous matter with which it is associated in the form of suet."

Brannt: "Soap Maker's Hand Book," Watt: "The Art of Soap Making," Gadd: "Soap Manufacture" and other standard works on the subject define "rendering" and "reducing" as the operation of separating, by boiling or otherwise, of the fatty substance of animals from the tissues that surround or envelop it.

These authorities are sufficient to demonstrate that "rendering" or "reducing" is a process *precedent* to that of soap making. The modern manufacturer of soap purchases the tallow already rendered and purified, and his business consists of combining tallow with caustics and other saponifying agents.

You are therefore advised that establishments engaged solely in the manufacture of soap, and not undertaking the reduction of animal or vegetable substances, are not embraced in the purview of Ordinance No. 822.

Respectfully,

PERCY V. LONG,

City Attorney.

Health Officer.

Diphtheria Carriers—Legality of Proposed Ordinance Limiting Power of Board of Health.

September 17, 1915.

Gentlemen: I am in receipt of your request for an opinion dated September 14, 1915, as follows:

"The Board of Supervisors has under consideration and up for final passage the attached ordinance relating to diphtheria carriers.

"The Board desires your opinion as to whether this ordinance is in conflict with the State Health Law, and further, if the Board of Supervisors has the power to take from the Board of Health the power to isolate diphtheria carriers."

Section 1 of the proposed ordinance reads:

"The Board of Health of the City and County of San Francisco is hereby authorized and empowered to remove or cause to be removed any person or persons afflicted with smallpox, cholera, yellow fever, bubonic plague, typhus fever, poliomyelitis, diphtheria and scarlet fever residing in or being found in houses, places or districts within the City and County of San Francisco, to such hospital within the City and County of San Francisco, as the Board of Health may designate; *provided that the provisions of this ordinance as to removal of persons shall not apply to diphtheria germ carriers.*"

Opinion.

The following general laws bear upon the question here presented:

"The State Board of Health * * * may advise all local health authorities, and, when in its judgment the public health is menaced, it shall control and regulate their action." (Section 2979, Political Code.)

"It is the duty * * * of every county, city and county, city or town health officer, and every member of the local Board of Health, knowing or having reason to believe that any case of cholera, plague, yellow fever, leprosy, *diphtheria* * * * or any other contagious or infectious disease exists, or has recently existed, within the city, city and county, town or township of which he is such officer to take such measures as may be neces-

sary to prevent the spread of such disease." (Section 2979a Political Code.)

"It shall be the duty of the Board of Health of each municipality and incorporated town * * * to enforce within such municipality and incorporated town all orders, rules and regulations concerning health and quarantine * * * as prescribed or directed by the State Board of Health." (Section 2984, Political Code.)

"It shall be the duty of every county, city and county, municipal, town or other health officer or inspector to enforce diligently within the county, city and county, municipality, town or district of which he is such health officer, all State laws pertaining to health and sanitary matters, and all orders, rules and regulations concerning health, quarantine and disinfection prescribed or directed by the State Board of Health, and all local ordinances, resolutions, orders and regulations concerning health, of the Board of Supervisors which shall not be in conflict with the general laws or the orders, rules and regulations of the State Board of Health." (Section 11, Public Health Act, Statutes 1907, p. 895.)

You will observe that Section 2979a of the Political Code above quoted makes it the duty of the local Board of Health and the Health Officer to take such measures as may be necessary to prevent the spread of all contagious or infectious diseases, including diphtheria. Insofar as this ordinance attempts to take away entirely from the Board of Health the power to isolate diphtheria germ carriers it is in conflict with this section of the Political Code, because if it is necessary to prevent the spread of diphtheria to isolate diphtheria germ carriers this section makes it the imperative duty of the Board of Health to isolate them.

In addition to this the other sections of the Political Code above quoted make it the duty of the local Board of Health to enforce the orders, rules and regulations of the State Board of Health with regard to matters concerning the public health, and Section 11 of the Public Health Act, after providing that every local health officer must enforce diligently all State laws pertaining to health and sanitary matters, and all orders, rules and regulations concerning health, quarantine and disinfection prescribed or directed by the State Board of Health, adds that they shall enforce "all local ordinances, resolutions, orders and

regulations concerning health, of the Board of Supervisors *which shall not be in conflict with the general laws or the orders, rules and regulations of the State Board of Health.*"

Pursuant to the power vested in them, the State Board of Health has adopted certain regulations for the prevention and control of diphtheria. These are embodied in Special Bulletin No. 8, issued by the California State Board of Health, August 1, 1914. Rule 11 therein reads as follows:

"Any person who has been free from symptoms of diphtheria for a month or longer and who harbors diphtheria bacilli is a carrier. Any known or suspected diphtheria carrier shall be reported to the local health authority, who shall investigate and report to the State Board of Health. Pending the receipt of instructions from the State Board of Health, the local health authority shall isolate or quarantine the carrier if, in his judgment, the danger to the community necessitates such action. In the event of any known or suspected carrier leaving the jurisdiction of a local health authority, the State Board of Health shall be notified by the local health authority of the name of the carrier and his destination."

It is evident that this ordinance is also in conflict with this rule of the State Board of Health which, by Section 11 of the Public Health Act and the above quoted sections of the Political Code, it is made the express duty of the local Board of Health to enforce.

Section 6 of Article XI of the Constitution of California provides that:

"Cities and towns * * * are hereby empowered * * * to make and enforce all laws and regulations in respect to municipal affairs subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

The public health is not exclusively a municipal affair. It is a matter which vitally concerns the people of the entire State. Judge McFarland, in his concurring opinion in the case of People vs. Williamson, 135 Cal. 415, says:

"The public health is a matter in which the whole people of the State are concerned; and as the preservation of the public health of all the people depends upon proper regulations in

every part of the State, the Legislature has power to pass laws on that subject enforcible in every nook and corner of our territory, including those localities embraced within the municipalities as well as the most sparsely settled agricultural or mining districts. And, in my opinion, whenever the provisions of a municipality, by charter or otherwise, on the subject of public health, conflict with laws of the Legislature on that subject, the former must yield because 'in conflict with general laws.' The public health is not a 'municipal affair' in the sense of excluding the jurisdiction of the State over it."

Judge Van Dyke, in the same case said:

"It is quite true that the preservation of health concerns the whole State as well as the city. In such matters it may be found necessary for the State, by general laws operating outside as well as in cities, to provide against the spread of contagious diseases and like matters."

I agree with this view and I must, therefore, advise you that insofar as this proposed ordinance is in conflict with general laws, as herein pointed out, it will be void, and that your Honorable Board cannot by ordinance or otherwise take from the Board of Health the power to isolate diphtheria germ carriers lodged in them, by the laws of the State.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Exchange of Market Place and Produce Exchange Lots.

September 21, 1915.

Gentlemen: I am in receipt of Journal Resolution No. 1762, as follows:

"Whereas, a petition has been filed by the Recreation League of San Francisco for the exchange of certain city land for other land belonging to the Southern Pacific Company, the purpose of such exchange being to provide an aquatic park at the foot of Van Ness Avenue, and

"Whereas, a communication has been filed by the said Southern

Pacific Company setting forth its willingness to enter into negotiations with the city for the exchange of the following lands, to-wit:

"Land vested in the Southern Pacific Company situate and being W. A. Block No. 33, bounded by Beach, Jefferson, Larkin and Polk Streets; part of W. A. Block No. 35 on Lewis Street extending from Polk Street to Larkin Street, and part of W. A. Block No. 36 on Jefferson Street extending from Larkin Street to Polk Street, and part of W. A. Block No. 37 at Jefferson and Polk Street, for city land known as 'Market Place' and comprising South Beach Block No. 381 bounded by Tennessee, Minnesota, El Dorado and Alameda Streets and South Beach Blocks Nos. 53 and 54, bounded by Irwin, Channel, Hudson and Fifth Streets; all of which above lands are more specifically described upon the official map of the City and County; therefore be it

"Resolved, That the City Attorney be and he is hereby requested to furnish an opinion as to the legal authority for such exchange by the City of its lands with the Southern Pacific Company for other lands as herein set forth, and if the same should be found to be legal to further advise as to the correct procedure necessary to execute such exchange.

"Adopted April 19, 1915."

Opinion.

South Beach Blocks 53 and 54 designated as "Market Place" and Potrero Nuevo Block No. 381, designated as "Produce Exchange" were reserved by the Board of Tide Land Commissioners, composed of B. F. Washington, Rodman Gibbons and L. S. Bullock, under the provisions of an Act of the Legislature, entitled "An Act to survey and dispose of certain Salt Marsh and Tide Lands belonging to the State of California," approved March 30, 1868 (Stats. 1867-68, page 716), and granted to the City and County of San Francisco by the provisions of an Act of the Legislature, approved March 11, 1874 (Stats. 1873-74, page 359), but with no power to donate, sell or alienate said lands or any part thereof, otherwise than by lease for a period not to exceed five years.

On March 24, 1903, the Legislature passed an Act (Stats. 1903, p. 363) entitled "An Act to amend an Act entitled 'An Act to vacate certain streets, alleys and market places in the City and

County of San Francisco, and to donate the same, and other tide lands belonging to the State of California to said City and County of San Francisco for commercial purposes, and other matters relating thereto,' approved March 30, 1872; approved March 11, 1874."

Two important changes in the law respecting the leasing and sale of said Market Place and Produce lots were made by the Act of 1903. One was extending the leasing period from five years to twenty years, and the other, authorizing the Board of Supervisors of this City and County whenever, in its judgment it should be necessary, for terminal purposes for the use of any transcontinental railroad or railroad having transcontinental connections, and having its terminus in the City and County of San Francisco, to sell said blocks or either of them, with the intervening streets, to the owners of said railroad, for the fair and reasonable value thereof, to be determined by a board of three arbitrators to be appointed as follows: One arbitrator by the owner of said railway, one by the Board of Supervisors of the City and County of San Francisco and the third by the two arbitrators so appointed, the decision of a majority of whom thereon should be final; or, if the Board of Supervisors should determine that the interests of said City and County would be subserved by an exchange of said blocks or either of them for other property of equivalent value owned by the owners of such railroad, such value to be determined by arbitration as aforesaid, then and in that case said City and County of San Francisco might exchange such blocks or either thereof, for such other property of equivalent value, and thereunto might execute and accept all deeds or conveyances necessary and proper to effect such exchange.

Pusuant to the provisions of Sub. 32, Sec. 1, Chap. II, Art. II of the Charter of the City and County of San Francisco and of said Act of March 24, 1903, also to the provisions of Ordinance No. 1672 of the Board of Supervisors, approved November 29, 1905, also to the provisions of Resolution No. 6183 of the Board of Supervisors, approved December 30, 1903, the Southern Pacific Company entered into a lease with the City and County of San Francisco for the rental of Produce Exchange Block, Potrero Nuevo Block No. 381, and Market Place lots, South Beach Blocks Nos. 53 and 54 for twenty years from January 1, 1906, in terms as follows: The sum of six hundred dollars per month

for the first five years and thereafter an amount equivalent to three per centum per annum of the value of said properties, said valuation, in case of disagreement, to be determined by arbitration: the City to select one arbitrator, the tenant another and these two to select a third, the values so fixed to be final, provided, however, that the rental after the expiration of the first five years shall at no time be less than $750.00 per month.

Sec. 9, Chap. II, Art. II of the Charter provides that the City and County shall have power to sell all lands owned by the City and County between Ninth and Eighteenth Streets lying in what was formerly Mission Creek and any and all lands that may hereafter be acquired excepting lands for parks, squares and children's playgrounds, and the Board of Supervisors of said City and County may by ordinance determine that the public interest or necessity demands the sale of such land so owned or held by the City and County.

The Charter provision, quoted above, refers to lands owned by the City and County in fee simple; lands acquired by or granted to it without any restrictions on the power of sale or disposal. The term "owner" has been defined by the Courts, and they have held that "it has a definite meaning, and signifies one who has a dominion over a thing, which he may use as he pleases, except as restricted by law or agreement. The precise meaning, perhaps depends upon the nature of the subject-matter, and the connection in which it is used; but when applied to real estate without any qualifying words, in common as well as legal parlance, it prima facie, means an owner in fee."

Johnson vs. Crinkshamks, 20 Oregon 340;

See also

Bowen vs. John, 66 N. E. 357;
Phillips vs. Hardenburg, 80 S. W. 891.

It does not, in my opinion, include lands granted to it in the manner in which the Produce Exchange lot and Market Places were granted by the State of California. The power to sell these lots, except in the manner set forth in the Act of 1903, was expressly withheld: consequently, the provision of the Charter, could not limit the general power of sale of lands, which the City and County never could sell, except as provided by statute. The estate granted to the City and County of said lands was

not an absolute one; the fee simple title never passed from the State; it was in the nature of a trust to the City and County, to be executed by the municipality in accordance with the terms of the statute granting them, or as the same might be amended by the Legislature, representing the granting power.

The grant by the State of California is very similar to that by which the Congress of the United States in the year 1864, granted to the State of California, by special Act, the Yosemite Valley and the grove of Big Trees in Mariposa County. This was a grant for certain purposes, and with a proviso that they should remain inalienable forever, but with power to make leases of portions of the land for a term or terms not exceeding ten years.

The Supreme Court, in discussing the terms of the grant by Congress, in the case of Low vs. Hutchins, 41 Cal. 634, held that the grant was a trust, and that the State of California had no power to make a grant of any part of the lands; that any grant attempted to be made would have been clearly void for want of power in the Legislature to make it, and that it would have been in open and flagrant violation of the trust on which these lands were conveyed to the State, and therefore void.

So that I have reached the conclusion that these lands having been conveyed to the City and County, in trust, by the State, could never be sold by the City and County, except as provided by the Act of 1903; that a sale thereof otherwise would be in violation of the trust and void; that the City and County never having possessed the power of sale, except as provided by the Act of 1903, the Charter does not interfere with or alter the powers possessed by the City and County concerning said lands.

If the Charter was silent on this subject; if Section 9 was entirely eliminated therefrom, in my opinion, the Board of Supervisors would, under the Act of 1903, possess the undoubted power of disposing of the lands mentioned in the manner provided therein. Such being the case, the situation is in no manner changed by the adoption of the amendment to the Charter in 1907, from what it was before that time.

You are therefore advised that your Honorable Board has the power and authority, proceeding in the manner set forth in the

Act of March 24, 1903, to exchange the lands mentioned in Journal Resolution No. 1762.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Extension of Time on Municipal Contracts.

October 14, 1915.

Gentlemen: I am in receipt of your communication of September 24, 1915, in which you transmitted to me a copy of a protest of one Thomas F. Williams made to the Auditor in which it is claimed that no further payments can legally be made to R. C. Storrie & Company, the present contractor on the Mile Rock Tunnel and no further payments can be made to the same company on the Bakers Beach Outfall Sewer contract. A history of both contracts by the City Engineer accompanies your communication. You desire my opinion as to the validity of Mr. Williams' contentions.

Mile Rock Tunnel Contract.

It appears that the contract for the construction of the Mile Rock Tunnel was originally let to Ed. Malley. It provided that the work should be completed within three hundred and sixty-five days. A bond was required of Malley in the sum of $50,000 for the faithful performance of the contract. This bond was furnished by Malley with the Commonwealth Bonding and Casualty Company as surety. Malley failed to prosecute the work in accordance with the terms of the contract and on the 10th day of August, 1914, the Board of Public Works, by resolution, informed the Bonding Company of Malley's said failure and the company was notified to perform, or cause to be performed, the work required by the contract. On August 7, 1914, the Bonding Company by letter informed the Board of Public Works that the Company was in a position and ready to take up and complete the contract abandoned by Malley.

On August 12, 1914, the Bonding Company and the R. C. Storrie Company addressed a communication to the Board of

Public Works in which the above facts were recited and notified the Board of Public Works that the Bonding Company had entered into a contract with R. C. Storrie and Company to complete Malley's abandoned contract, and that the Company assigned to R. C. Storrie and Company all payments which might become due to the Company under the terms and provisions of the contract. It is further stated that R. C. Storrie and Company by said contract with the Bonding Company undertook to perform said contract in accordance with the provisions thereof.

It further appears that said Malley assigned and set over to the Bonding Company all his right, title and interest in and to said contract and that the Board of Public Works accepted the offer of said Bonding Company to perform said contract through R. C. Storrie & Company and recognized the assignment by the Bonding Company of the payments under the contract to R. C. Storrie & Company. All these transactions transpired on or prior to August 14, 1914.

It further appears that upon the recommendation of the City Engineer the Board of Public Works recommended to the Board of Supervisors that extensions of time be granted to R. C. Storrie & Company within which to complete the said contract, it appearing that it was impossible to complete said contract within the time originally allowed. The last extension recommended by the Board of Public Works on August 10, 1915, was for a period of one hundred and twenty days from July 8, 1915. These extensions were granted by the Board of Supervisors but were made, however, after the expiration of the date upon which the work should have been completed.

It is asserted by Williams that the failure of the Board of Supervisors to grant said extensions after the time had elapsed for the completion of the work invalidated the contract and under the Charter no further payments can be made thereon. It is to be noticed that if the extensions were valid the time has not yet expired within which R. C. Storrie & Co. may complete the contract.

It appears that R. C. Storrie & Co. has faithfully prosecuted the work with all possible speed and that in all respects the work is being performed fully in accordance with the contract. Since February 28, 1915, monthly progressive payments have been regularly made to R. C. Storrie & Company.

Bakers Beach Outfall Sewer Contract.

This contract was awarded to R. C. Storrie & Company on July 24, 1914, and the original time permitted under the contract for its completion was one hundred and fifty days from that date. It appears from the report of the City Engineer that owing to the inclemency of the weather and tidal conditions existing at Bakers Beach the contractors were unable to perform the contract within that time, the contract among other things requiring the contractor to lay a sewer pipe out into the Bay from Bakers Beach. At various times the City Engineer recommended to the Board of Public Works that the time within which the contractors might perform the contract be extended. These extensions were recommended to and granted by the Board of Supervisors and if they are valid the time for the completion of the contract has not as yet expired. It appears, however, that the first extension was granted after the date originally set for the completion of the work.

It further appears that progressive payments have been made to said contractors since that time upon recommendation of the Board of Public Works approved by the Board of Supervisors upon warrants audited by the Auditor.

Opinion.

It has been customary in contracts entered into by the Board of Public Works and contractors for the construction of sewers, the erection of buildings, and work of that character, to grant extensions after the time set for the completion of the contract has expired. In fixing the time within which a contract should be completed it has been the practice of the Board of Public Works to place a minimum time limit in view of the provisions of the Charter, which permits the Board of Supervisors upon the recommendation of the Board of Public Works to extend the time for good cause. In this way the City has been enabled to secure the completion of contracts within the least possible time for the reason that it is an effective way of controlling the speed of contractors in the completion of their contracts.

I am informed that there are many contracts at the present time where extensions have been granted under the same circumstances as these extensions were granted. This was the case in most of the contracts on the City Hospital and is the case in many other important contracts on the City Hall.

It is to be assumed that officials honestly perform their official duties. Extensions of time are permitted so that the City may deal justly with contractors when it transpires that the work could not be completed within the time originally specified. A variety of reasons may justify such an extension. In the Mile Rock Tunnel contract it appears that after Storrie & Company had taken over the contract the work could not possibly have been completed within the time. In the Bakers Beach Outflow Sewer contract owing to the weather and tidal conditions the contract could not possibly have been performed within the time originally set.

The Charter safeguards the granting of time extensions by requiring that only the Board of Supervisors can grant the extension and then only upon recommendation of the Board of Public Works. Chapter I, Article VI, Section 21 of the Charter in part reads:

"The contract shall specify the time within which the work shall be commenced, and when to be completed, as was specified in the notice inviting proposals therefor. Upon the recommendation of the Board, the Supervisors may extend said time, but in no event shall the time for the performance of said contract be extended by the Supervisors more than ninety days beyond the time originally fixed for its completion; but, on the unanimous recommendation of the Board of Public Works, a further extension may be granted by vote of fourteen members of the Board of Supervisors."

The Charter does not specifically state when the extension shall be made, and I am convinced that the proper interpretation of the section permits an extension to be granted after the time which was fixed originally for the completion of the contract. There is a line of cases holding that where a superintendent of streets, under the law, is permitted to make extensions of street improvement contracts, his act in granting an extension is purely ministerial and the law does not permit him to make the extension after the time for the completion of the contract has expired. Subsequent cases have confined this principle to street improvement contracts and no case has extended the rule to general municipal contracts. The Courts of this State have generally applied a strict, harsh rule to street improvement contracts, due to the fact that property may be assessed to pay the

cost. In consequence, the courts have laid down principles applicable solely to street improvement contracts, whether the cost is borne by the City generally or by an assessment upon benefited property. They have taken pains, however, to confine these rules to street improvement contracts.

In both these cases it appears that the contractor has diligently prosecuted his work, that the City has received the benefit therefrom, and that the work had been completed as speedily as it possibly could have been completed. No objection has heretofore been raised to payments to the contractor and he has been permitted to prosecute his work under an impression from the past practice of the City in making extensions that he would receive his money when the contract had been completed. To refuse him payment would be working a great injustice upon him and refusal under the same circumstances by a private individual would be considered dishonest. Rules of the character under discussion are made for the public benefit to prevent the City from being cheated by its contractors, but they must be interpreted in the light of the things sought to be accomplished and the evils to be avoided.

I am unable to see what purpose could be served by requiring that an extension must be granted before the expiration of the time rather than after the expiration of the time. The same reasons should actuate the Supervisors in granting an extension after the time as should actuate them in granting an extension before the time fixed in the contract had expired. Of course, the contractor takes his chance that the Board of Supervisors will grant an extension, but if it appears that the contract could not have been completed within the time allowed it could not be assumed that the Board of Public Works and the Board of Supervisors would unjustly refuse to grant an extension. The contracts in question were lawfully entered into. All legal formalities in their letting were complied with. No taint of fraud is attached to them. The City has received the benefits of the work and no injury appears to have been suffered by the City in the excusable failure of the contractor to complete them within the time originally allowed. Under the circumstances, for the City to escape payment would practically be working a forfeiture which the law jealously seeks to avoid.

I advise you that in my judgment the contractor is entitled to

receive payment upon his contracts and that the City is not justified in refusing payment thereon.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Power to Suspend Plumbing Inspector for Eighteen Months.

October 20, 1915.

Gentlemen: I am in receipt of your request for an opinion in which you ask to be advised as to whether the action of the Board of Health in suspending Thomas Casserly, a plumbing inspector, for a period of eighteen months is in conflict with Section 12 of Article XIII of the Charter.

Opinion.

The section of the Charter referred to, in so far as it is material to the question here, reads as follows:

"No person employed in the classified civil service shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Pending the hearing of such charges, the appointing officer or department may suspend the person so accused, but such suspension shall not be valid for more than thirty days upon any charge unless the hearing thereon shall be delayed beyond such time by the act of the person so accused. * * * The appointing officer or officers of a department may, for disciplinary or penal purposes, suspend a subordinate for a period not exceeding thirty days, and such suspension shall carry with it the loss of salary for the period of suspension."

It will be seen that this section provides for removal or discharge for cause and after hearing. In addition to this it expressly provides that "the appointing officer or officers of a department may, for disciplinary or penal purposes, suspend a subordinate for a period not exceeding thirty days, etc." Under a familiar rule of construction this express grant of power to suspend for not exceeding thirty days limits the power of suspension to that length of time.

I therefore advise you that the suspension of Thomas Casserly for a period of eighteen months is in conflict with Section 12 of Article XIII of the Charter.

Respectfully,

PERCY V. LONG,
City Attorney.

Civil Service Commission.

Vacations for Per Diem Employees.

October 28, 1915.

Dear Sir: I am in receipt of your request for an opinion as follows:

"Please advise me relative to Bill No. 3746, Ordinance No. 3426 (New Series), approved by His Honor the Mayor and by the Board of Supervisors September 14, 1915, wherein Section 2, Ordinance No. 2297 (New Series), is amended, so that all Civil Service employees of the City and County of San Francisco are entitled to an annual vacation; will it be legal for me to approve demands for 'per diem' employees who are granted vacations under the amended ordinance?"

Opinion.

The ordinance referred to in your communication and the amendment thereto were passed under the power of the Board of Supervisors to increase efficiency in the public service by promoting the welfare of those engaged therein. As originally enacted Ordinance No. 2297 (New Series) was not broad enough to include per diem employees in its operation, but the amendment is made applicable to deputies, clerks and employees without exception. It is the evident purpose of this amendment to include per diem men and as the reason for the ordinance applies equally to them, I advise you that since the adoption of Ordinance No. 3426 (New Series) per diem employees are entitled to the vacation privilege with pay as contemplated by Ordinance No. 2297 (New Series). You may therefore approve such demands.

Respectfully,

PERCY V. LONG,
City Attorney.

Auditor.

Charge for Service Connections—County Line Municipal Water Works.

October 29, 1915.

Gentlemen: I am in receipt of your request for an opinion under date of October 16, 1915, as follows:

"Will you kindly inform this Board whether it is justified in exacting a deposit from prospective consumers for water connections at their premises from the County Line Municipal Water Works."

Opinion.

Decision No. 2689 of the Railroad Commission of California, Rule 13 thereof, provides as follows:

"A water, gas, electric or telephone utility which operates upon, under or along any public street, highway, alley, lane or road shall at its own expense install a service connection of normal size to the property line or curb line of property abutting upon said public street, highway, alley, lane or road or to such point on the consumer's premises as the utility may agree upon. The term 'service connection,' as herein used, shall include water and gas pipes, electric and telephone wires, water, gas and electric meters, electric transformers, gas regulators, telephone instruments, and appurtenances. Subject to review by the Railroad Commission, a water, gas, electric or telephone utility may refuse to make a service connection if it believes that the service will not be used in the reasonably immediate future."

This rule became effective October 11, 1915. Under this rule no water company may make a charge for a so-called "service connection," that is, for installing a service pipe to the property line of the consumer, or for installing a meter. This rule is a general one applicable to all water utilities, and the County Line Municipal Water Works is bound thereby. I therefore advise you that such "service connection" must hereafter be made free of charge.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Power of Board of Supervisors to Reduce Amount of Street Assessment.

November 8, 1915.

Gentlemen: I am in receipt of your communication as follows:

"By direction of the Committee on Streets and Sewers, I refer to you the appeal of property owners from the assessment issued to G. W. McGinn & Co. for the improvement of Santa Marina Street between Mission and Elsie Streets, performed under a public contract.

"Request is made that you advise the Board of Supervisors whether or not it is within the power of the Board of Supervisors to reduce or order reduced the price to be charged by the contractors for the performance of the work done by G. W. McGinn & Co. on Santa Marina Street between Mission and Elsie Streets."

Opinion.

The powers and duties of the Board of Supervisors upon appeals from assessments levied under the provisions of Ordinance 2439 (New Series) (Street Improvement Ordinance) are set forth and defined in Section 21 of said ordinance. Therein it is provided that the owners of the property assessed, feeling aggrieved by any act or determination of the Board of Public Works in relation to said assessment or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment, or other act, determination or proceeding of the Board of Public Works, shall, within thirty days after the date of the warrant, appeal to the Supervisors by briefly stating their objections in writing and filing the same with the Clerk of the Board.

Section 21 further provides that upon such appeal the Supervisors may remedy or correct any error or informality in the proceedings and revise and correct any of the acts or determinations of the Board of Public Works relative to said work, and may conform, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to their directions and may instruct and direct the Board of Public Works to correct the warrant, assessment or diagram in any particular,

or to make or show a new warrant, assessment and diagram to conform to their decision in relation thereto at their option.

The Board of Supervisors is not given the power to reduce or order reduced the price to be charged by the contractors for the performance of the work on Santa Marina Street between Mission and Elsie Streets. The only thing that your Honorable Board may do is one of the things which you are empowered to do in Section 21 of Ordinance No. 2439 (New Series), hereinabove set forth.

The powers given to the Board of Supervisors on an appeal from an assessment have merely to do with the correction of any mistake or informality of the assessment, or if the assessment is an illegal one your Honorable Board may set the same aside.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Assessment for the Improvement of the Crossing of Randall and Whitney Streets.

November 19, 1915.

Gentlemen: I am in receipt of your communication of the 30th ult., as follows:

"The Board of Public Works desires to transmit herewith an appeal of property owners from the assessment issued by the Board of Public Works for the improvement under the provisions of the Street Improvement Ordinance of the crossing of Randall and Whitney Streets.

"Office Deputy A. J. Donovan of the Bureau of Streets will call upon you personally to confer concerning this matter and concerning the legality of the assessment issued by this Board."

Opinion.

My investigation of this matter discloses the fact that the assessment for the improvement of the intersection of Whitney and Randall Streets, where not already improved, by the con-

struction of granite curbs, where not already constructed; by the construction of artificial stone sidewalks on the southeasterly angular corner; by the construction of a brick catch basin with cast-iron frame, grating and trap and ten-inch, vitrified, salt-glazed, ironstone pipe culvert on the southeasterly angular corner by the construction of an asphalt pavement, consisting of a six-inch concrete foundation, and a two-inch asphaltic wearing surface on the roadway thereof, as per contract made with Church and Clark on the 27th day of March, 1915, was issued by the Board of Public Works on the 27th day of September, 1915.

I find also that the names of property owners, who appealed to the Board of Supervisors on October 6, 1915, from said assessment, appear thereon.

Said assessment was made in strict accordance with Sub. 3, Sec. 17 of Ordinance No. 2439 (New Series), commonly known as "The Street Improvement Ordinance." In fact, there is no complaint made by the appellants that said assessment does not fully comply with the provisions of Sub. 3 of Sec. 17 of said ordinance. One of the grounds stated by appellants on their appeal to the Supervisors is that said assessment is unjust and should have no bearing upon their individual property because they were heretofore assessed to pay for the crossing at the intersection of Fairmount and Whitney Streets, the only crossing applicable to their property as they allege, as determined by the Board of Public Works on or about June, 1911, at which time this crossing was provided as stated in said appeal.

I also find that on the 12th day of April, 1910, the Barber Asphalt Paving Company, a corporation, made and entered into a contract between the owners of certain property fronting on Fairmount and Whitney Streets, wherein and whereby said Company agreed to perform the work and furnish all materials to grade the roadway at the intersection of Fairmount and Whitney Streets and pave the same with an asphalt pavement consisting of a six-inch concrete base and an asphalt wearing surface two inches in thickness; also construct granite curbs where not already laid; and also construct catch basins where ordered by the City Engineer.

I find that none of the owners of property appealing to the Board of Supervisors from the assessment issued by your Honorable Board on the 17th day of September, 1915, for the improve-

ment of the crossing on Randall and Whitney Streets, signed the contract of the Barber Asphalt Paving Company on the 12th day of April, 1910. The property owners appealing from the assessment of September 15, 1915, are mistaken in their statement, as contained in their appeal to the Board of Supervisors, that they were heretofore assessed for the crossing at the intersection of Fairmount and Whitney Streets. Said work was done under a private contract as heretofore pointed out and therefore no assessment was issued by your Honorable Board for the doing of said work. If any payments were made by the property owners who have appealed to the Board of Supervisors from the said assessment, to the Barber Asphalt Paving Company at the crossing of Fairmount and Whitney Streets said payments were voluntary and they paid for something for which they were not liable under the law.

Such payments, however, afford no basis or ground for defeating the assessment levied by your Honorable Board for the work at the intersection of Randall and Whitney Streets. Another ground of objection urged by appellants is that this assessment discriminates against them as individual property owners, because they would be paying for two crossings, whereas it is not applied to other property owners on the northeasterly line of Randall Street, as colored green on diagram, commencing at said crossing and running northerly on Randall Street towards Sanchez Street, a distance of half that block, as prescribed by law; that these property owners should participate in this assessment in lieu of themselves and share their quota of the assessment, together with other property owners more adjacent to this crossing. (Randall and Whitney Streets.)

I find, on this branch of the matter, that the work of improving the other portion of the crossing of Randall and Whitney Streets was provided for in a private contract under date of December 13, 1911, between Flinn and Treacy Contracting Company, and the property owners mentioned by appellants owning property on the northerly side of Randall Street and that said property owners should not be required to pay for any portion of the work embraced in your assessment of September 17, 1915.

You are therefore advised that the assessment issued by your Honorable Board for the improvement of the intersection of Randall and Whitney Streets levied by your Honorable Board September 17, 1915, in all respects complies with the provisions

of Subdivision 3, Section 17 of Ordinance No. 2439 (New Series), and that the fact that some of the owners of property assessed to pay for said work have heretofore voluntarily and without being required by law made payments for the work of improving the intersection of Fairmount and Randall Streets has no bearing upon the validity or the correctness of said assessment.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Assessment for Work Done on Bemis Street Between Miguel and Mateo Streets.

November 19, 1915.

Gentlemen: I am in receipt of your communication as follows:

"The Board of Supervisors at the meeting held Monday, October 18, 1915, referred to you the appeal of A. Jackson Building and Realty Co. from the assessment issued to State Improvement Company for street work done on Bemis Street between Miguel and Mateo Streets as ordered by Ordinance No. 3158 (New Series) in accordance with the recommendation of the Board of Public Works and Resolution of Intention No. 35,688 (New Series).

"Request is made that you advise the Board of Supervisors whether or not the assessment issued to the State Improvement Co. should be confirmed."

Opinion.

The first point made by the appellant A. Jackson Building and Realty Company, is that the assessment is too high, taking into consideration the valuation put upon this property by the Assessor.

Subdivision 3 of Section 8 of Chapter II of Article VI provides that no assessment shall be levied upon any property which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum

of the value at which said property was assessed upon the last preceding assessment book of the City and County.

Section 33 of the same chapter and article provides that "in any proceeding for the improvement of streets, wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in Subdivision 3 of Section 8 of this chapter."

It appears from the petition of appellant that the amount called for by the assessment for the street improvement is to be payable in annual installments and in accordance with the provisions of Section 33 herein stated the fifty per centum limitation does not apply.

The appellant also contends that the Street Improvement Ordinance, "insofar as it attempts both directly and by evasion to make an assessment for street work a charge upon the property involved in an amount higher than $105.00, which $105.00 is one-half of the assessed value of said property," is unconstitutional. In other words, that the ordinance makes an arbitrary apportionment of the expense according to the frontage of the lot and does not require that the assessment upon each lot shall be made in proportion to the benefits received by that lot.

The leading case in opposition to the contention of appellant is Hadley vs. Dague, reported in 130 Cal. at page 207. On pages 217 et seq. the Court very elaborately discusses this proposition and decides it adversely to the appellant herein.

The Court, on page 220, says:

"The mode in which the expense of the local improvement shall be borne, as well as the district which is to bear such expense, and the manner in which the expense is to be distributed, is a legislative question. The principle upon which the expense is charged on the property in that district is that that property has received a particular benefit. But, as was said by Mr. Justice Temple in Lent vs. Tillson, 72 Cal. 428: 'The benefit is not the source of the power.' Nor does the validity of the assessment depend up the ability to show that the property assessed was specifically benefited by the amount of the assessment or received that particular amount of benefit. Courts will uphold an assessment made upon such legislative authority, even though the bene-

fits are not shown to be identical with the burden. In Litchfield vs. Vernon, 41 N. Y. 123, the Legislature had authorized the improvement of a street and designated the district upon which an assessment for the expense thereof should be made. The Court said: 'This local assessment, it is apparent, was based upon the ground that the territory subjected thereto would be benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should, for this or any other reason, be made upon the district, the Legislature was the exclusive judge.' In Walston vs. Nevin, 128 U. S. 582, the Court said: 'The determination of the taxing district and the manner of the apportionment are all within the legislative power.' In Norwood vs. Baker, 172 U. S. 669, the Court said: 'According to the weight of judicial authority the Legislature has a large discretion in defining the territory to be deemed specifically benefited by a public improvement and which may be subjected to special assessment to meet the costs of such improvements.'"

Quoting from Fallbrook Irrigation District vs. Bradley, 164 U. S. 176, the Court said:

"The way of arriving at the amount may be, in some instances, inequitable and unequal, but that is far from arising to the level of a constitutional problem, and far from the case of taking property without due process of law In Lent vs. Tillson, supra, the Court said: 'The benefits need not be immediate. I see no just limitation in this respect, except that a tax will not be upheld when the courts can plainly see that the Legislature has not really exercised its judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the Legislature.' In Sears vs. Boston, 173 Mass. 71, the case of Norwood vs. Baker, 172 U. S. 669, 43 L. Ed. 443, was invoked against the legality of an assessment which had been made in proportion to the frontage of the property bordering upon the improvement, but the Court held that the statute authorizing such assessment was not unconstitutional in its application to the facts of that case saying: 'No facts appear in the present case to show that this rule is not proper in its application to the petitioner's property as a method of determining benefits with such approximation to accuracy as can reasonably be required.' (See, also, Ramish vs. Hartwell, 126 Cal. 443.)"

It is my opinion that the Street Improvement Ordinance is constitutional.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

United Railroads Has Right to Install Track Connection—Masonic Avenue at Haight Street.

December 2, 1915.

Gentlemen: I am in receipt of your communication requesting that I advise your Board "whether the United Railroads of San Francisco has the right, under its franchise, to install a track connecting on Masonic Avenue at Haight Street at the southeast corner of the crossing of Haight Street and Masonic Avenue (as per attached diagram), and to advise the Board of Public Works in writing of its authority in the premises."

Opinion.

I am of the opinion that the United Railroads being the owner of franchises on Haight Street and on Masonic Avenue, and actually operating street railroads on such streets which street railroads intersect each other, that the said United Railroads is entitled to construct a curve from one line to the other. It is your duty to grant the permit requested and to see that the curve is probably constructed.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Blackwood Street Is a Public Street.

December 3, 1915.

Gentlemen: I am in receipt of your communication of the 30th ult., as follows:

"The Board of Public Works respectfully requests that you advise it whether Blackwood Street, so-called, off of Ninth Street, between Harrison and Bryant Streets, is an open public street of this City and County."

Opinion.

Blackwood Street, referred to in your communication above, is an open public street of this City and County.

In the case of Kate Kirkham Wheeler, Plaintiff, vs. Mary Leilah Yarde-Buller, et al., Defendants, in the Superior Court of the City and County of San Francisco, Judge Seawell, on the 13th day of May, 1898, made and rendered a final decree confirming partition by George F. Bowman, referee, and a final judgment in said action. The land partitioned is described as follows:

"Commencing at the point formed by the intersection of the northeasterly line of Ninth Street and the southeasterly line of Harrison Street; running thence southeasterly along said line of Ninth Street 275 feet; thence at a right angle northeasterly 275 feet; thence at a right angle northwesterly 275 feet to said line of Harrison Street; thence southwesterly along said last named line 275 feet to the point of commencement. Being known on the official map of said City and County of San Francisco as 100 Vara lot No. 295."

The following order is a part of the final decree and judgment:

"And it is further ordered, adjudged and decreed, that that certain portion of the real property set forth in said interlocutory decree, particularly described as follows, to-wit:

"Commencing at a point on the northeasterly line of Ninth street, distant thereon 170 feet southeasterly from the southeasterly line of Harrison Street; running thence northeasterly at right angles to said line of Ninth Street 275 feet; thence at right angles southeasterly 30 feet; thence at right angles southwesterly 275 feet to said line of Ninth Street and thence north-

westerly along said last named line 30 feet to the point of commencement

"be and the same is hereby set apart for a public street to remain open as such and to be called 'Blackwood Street.'"

Said decree is recorded in Liber 1779 at pp. 73 et seq. At page 83 appears a map showing the various parcels partitioned and also Blackwood Street.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Stark Street.

December 8, 1915.

Gentlemen: I am in receipt of your communication as follows:

"In connection with a request of this Board dated October 27, 1915 (in which you were requested to advise the Board of Public Works whether that portion of Stark Street upon which a brick building, known as the Liberty Theatre, encroaches, is a portion of an open public street of this City and County), there is herewith respectfully referred to you statement of Samuel Crozier, 318 Kearny Street, that he is the owner of the portion of what has been presumed by the City Engineer to be a portion of the roadway of Stark Street, as per City Engineer's report which was transmitted to you with our prior communication of July 28, 1915, concerning the improvement of Stark Street."

Opinion.

Stark Street was formerly named Polk Street and under such name appeared on the Humphreys Map of 1870; also on the Humphreys Atlas of 1878 and it appears on the Tilton Map of 1899 as Stark Street.

The easterly boundary line of Stark Street on the Humphreys Map of 1870 is not well defined. The map is drawn on a small scale and as far as some of the smaller and more unimportant

streets are concerned, it is very indistinct. As an aid in the discernment of said line, the Humphreys Atlas is looked to, and it discloses that Stark, or Polk Street as it was then named, did not extend further easterly from Stockton Street than 137 feet, 6 inches. Mr. Tilton extended the street more than 137 feet, 6 inches easterly from Stockton Street.

I have been informed that the lot on the south line of Broadway commencing at a point 137½ feet easterly from Stockton Street running thence easterly on Broadway 81 feet 1½ inches by a uniform depth of 137 feet 6 inches was entirely covered by improvements for some time prior to the fire of 1906. A McEnerney decree has been obtained by the owner of the property, and the report of the California Pacific Title Insurance Company, rendered on November 12, 1915, shows that the title of said lot, on September 1, 1915, was vested in Samuel Crozier. The lot at present is improved by a brick building, occupied by the Liberty Theatre.

The report of the Title Insurance Company shows that there never was any offer of dedication and the only other manner in which this small portion of what is called Stark Street could be dedicated to public use is by use by the public with the knowledge and consent of the owner, for such length of time as precludes the owner from asserting private ownership.

No claim is here made that the public has used the land for any such period, and the absence of such claim, or showing to that effect, coupled with the report of the Title company and the further fact that a decree under the McEnerney Act has been obtained leads me to the conclusion that the parcel of land referred to in your communication is not a public street and you are advised accordingly.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Election Laws.

December 28, 1915.

Gentlemen: I am in receipt of your resolution under date of December 24th, as follows:

"Resolved, That the opinion of the Law Committee relating to the subject of registration of party affiliation of voters commencing with January 1, 1916, be and the same is hereby referred to the City Attorney for his opinion as to the correctness of the recommendation of the said Law Committee, and that he return such opinion with his opinion thereon if he finds it his duty to give such opinion, and with the action that he takes thereon, so that the same shall be before the Board of Election Commissioners of the City and County of San Francisco, on or before Wednesday, December 29, A. D. 1915."

I have before me the opinion rendered your Board by your Law Committee.

I might say that in all questions involving the construction of the election laws of the State of California as applied to the City and County of San Francisco there has never been a difference of opinion between Commissioner Cator and myself. Mr. Cator's knowledge of the law and his industry in legal research always command my respect.

After reading the opinion I find no occasion to question its soundness as applied to your responsibility and which, owing to the fact that no session of the Legislature has been held since October 26, 1915, was designed to meet an emergency which your Board will have to face on January 1, 1916.

However, I am strongly of the view that the Legislature should immediately convene in session to enact laws necessary to relieve the uncertainty which exists regarding the registering of the party affiliation of voters. This course is the only certain method by which confusion can be avoided. Further than this I do not deem it necessary to express any opinion.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Election Commissioners.

Proposed Amendment to Moving Picture Ordinance.

December 30, 1915.

Gentlemen: I am in receipt of your communication of December 18, 1915, in which you submit a proposed amendment to Section 2 of Ordinance No. 761 (New Series). This section, as amended, reads:

"It shall be unlawful for any person, firm, association or corporation to display, or cause or permit to be displayed at any moving picture exhibition or at any entertainment at which moving pictures are exhibited, any picture, illustration or delineation of any nude human figure or of any lewd or lascivious act, or of any other matter or thing of an obscene, indecent or immoral nature, or offensive to the moral sense, or (in such details as to offend public morality and decency) any murder, suicide, robbery, holdup, stabbing, assaulting, clubbing, burning, hanging, or beating of any human being, or that reflects reproach upon any race, or tends to incite race hatred or stirs up race prejudice."

The amendment consists in the addition of the words "or that reflects upon any race, or tends to incite race hatred or stirs up race prejudice."

It is well settled that it is within the power of the municipality to adopt ordinances regulating the character of moving pictures which may be exhibited. (Block vs. Chicago, 87 N. E. 1011.) The proposed amendment constitutes a reasonable exercise of this power as it is designed to promote public peace and welfare.

I therefore advise you that it is within the power of your Honorable Board to prohibit the exhibition of pictures of this character.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim of Harry E. Grant for Medical Services Under Workmen's Compensation Act.

December 30, 1915.

Gentlemen: I am in receipt of your request for an opinion dated December 23, 1915, as follows:

"By direction of the Public Utilities Committee I refer claim of Margaret Grant for $526.85, hospital and doctor fees for injured son. I understand that you have had cognizance of this matter. The Committee desires you to report as to the City's liability."

From the accompanying petition of Margaret Grant it appears that Harry E. Grant was injured in a collision on August 15, 1914, in the course of his employment as a motorman on the Municipal Railways. He was treated in the San Francisco Hospital for five and one-half weeks, at the end of which time, his mother, being dissatisfied with the treatment he was receiving, had him removed to the German Hospital and placed under the care of a physician of his own choice. She is asking your Honorable Board for $526.85 for hospital and doctor's fees from September 22nd to December 22nd.

Opinion.

Section 15 (a) of the Workmen's Compensation Act provides:

"Where liability for the compensation under this Act exists such compensation shall be furnished or paid by the employer and be as provided in the following schedule:

"(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required at the time of the injury and within ninety days thereafter, unless such time is extended by the commission, to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal reasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same."

You will observe that the treatment therein referred to is to be furnished by the employer and, ordinarily where the employer offers to furnish treatment, if the employee prefers to go to his

own physician and hospital, the employer is not liable for the expenses incurred. It is only where the employer fails or refuses to supply the necessary treatment, or where the treatment furnished by him is inefficient or inadequate, that he will be liable to pay for treatment secured by the employee. I will quote briefly from the opinion of the Industrial Accident Commission on this point.

"The right of the employer, and of his insurance carrier, to furnish the medical treatment is absolute, provided there is no neglect or refusal seasonably to furnish such treatment, and this commission has no power to take that right away where, as in this instance, there is no reason for believing that the treatment offered was not adequate."

Evans vs. Pac. Coast Cas. Co., 1 Repts. of Ind. Acc. Comm. 140.

"Where it is understood by the workmen of the defendant employer generally, and by the applicant in particular, that the employer maintains a hospital upon its grounds in which all the employees are entitled to treatment free of charge for accidental injuries received by them, and the applicant after treatment at such hospital becomes dissatisfied and secures other treatment of his own choice without the consent of the employer, the applicant is not entitled to an award for the cost of the treatment rendered by such outside physician in the absence of proof that the employer's hospital service was inefficient and inadequate."

McBride vs. Union Iron Works, 1 Repts. of Ind. Acc. Comm. 376.

See also

Van Lanker vs. Los Angeles, 1 Repts. of Ind. Acc. Comm. 107;

Kelley vs. Pac. El. R. Co., 1 Repts. of Ind. Acc. Comm. 150.

Under these decisions there is no obligation upon the City and County to pay the bills here presented, unless, as a fact, the treatment that Mr. Grant was receiving at the San Francisco Hospital was inefficient and inadequate. Mrs. Grant claims that it was, and that is a question of fact which must be determined by your Honorable Board. If you cannot determine it satisfactorily, then the advisable procedure, as in all cases of uncertainty or doubt as to the facts, is to refer the matter to the Industrial Accident Commission.

But in any event the employer is only required to furnish medical treatment for a period of ninety days after the accident occurs "unless such time is extended by the Commission." The obligation of the City and County to furnish treatment to Mr. Grant came to an end ninety days after August 15, 1915. Unless an application is made to the Commission to extend this time, and granted by them, your Honorable Board would in no event be justified in making any expenditure for treatment furnished after the expiration of the ninety-day period.

Permit me to call to your attention the fact that, regardless of whether the City and County is under any obligation to pay for the medical services here in question, Mr. Grant is entitled to compensation equal to 65 per cent of his average weekly earnings as long as he remains under a total disability as a result of his accident, under Section 15 (b) 2, of the Workmen's Compensation Act.

Respectfully,

PERCY V. LONG,

City Attorney.

Public Utilities Committee,
Board of Supervisors.

Case of Edward M. Greene—Civil Service Standing.

December 30, 1915.

Sir: I am in receipt of your communication under date December 21, 1915, in which you ask to be advised as to the Civil Service standing of Edward M. Greene, under Section II of Article XIII of the Charter.

In my opinion in the case of Mr. R. V. Crosky, rendered July 31, 1913, I advised the Civil Service Commission that the question of whether or not an employee was performing such duties in a department which had been placed under the Civil Service by the amendment of 1913, as to entitle him to Civil Service standing was a question of fact which must primarily be determined by that Commission. The case of Mr. Greene is similar in every respect and his rights depend upon a like question of fact

which must be determined by the Civil Service Commission. In the absence of such a determination I am unable to give you the advice that you desire.

Respectfully,

PERCY V. LONG,

City Attorney.

Sheriff.

Lease of Market Place and Produce Exchange Lots.

January 3, 1916.

Gentlemen: I am in receipt of your communication as follows:

"On December 6, 1915, the Board of Supervisors adopted Journal Resolution No. 1991, a copy of which is hereto attached, directing the Finance Committee to obtain from the Southern Pacific Company increased rentals for 'Market Place' and 'Produce Exchange' lots.

"At a meeting of the Finance Committee yesterday when the matter was under discussion, a representative of the Southern Pacific Company took the position that by reason of the adoption of Resolution No. 7151 (New Series) on January 9, 1911, copy of which is hereto attached, and under the terms of the lease, a copy of which may be found on page 607 of the Municipal Reports of the years 1904-5, no increased rental can be charged for these lands for the remaining fifteen years of the lease.

"Will you kindly furnish the Finance Committee at an early date with your opinion as to whether or not under the terms of the lease the City has the legal right and authority at this time to make any increased rental charges?"

Opinion.

By an instrument of lease, dated December 29, 1905, recorded January 4, 1906, in Liber 132 of Leases at page 389 (a record destroyed in the fire of April, 1906), the City and County of San Francisco leased to the Southern Pacific Company for a term of twenty years that certain property in the City and County, known as Produce Exchange and Market Place; also known as P. N. Block No. 381, and Blocks 53 and 54, South

Beach. (For a detailed description of said property see Municipal Reports, 1904-05, page 604.)

The clause in said lease concerning the payment of rent is as follows:

"The sum of six hundred dollars ($600.00) per month for the first five (5) years, and thereafter an amount equal to three (3) per centum per annum on the value of said properties, said valuation in case of disagreement to be determined by arbitration, the City to select one arbitrator, the tenant another, and these two to select a third, the value so fixed to be final; provided, however, that the rental after the expiration of the first five (5) years shall at no time be less than seven hundred and fifty dollars ($750.00) per month. All rentals to be paid monthly in advance."

On January 10, 1911, the then Acting Mayor approved Resolution No. 7151 (New Series) adopted by a unanimous vote of the Board of Supervisors on January 9, 1911, wherein and whereby the Board of Supervisors determined the value of the lands so leased to be $600,000.00 and the rent for said premises to be $18,000.00 per annum, payable in monthly installments of $1,500.00 each in advance.

The contention of the lessee in regard to the amount of rent to be paid under the lease for the remaining period thereof, in my opinion, cannot be sustained. As I understand it, the lessee claims that by reason of the use of the word "final" in the clause in the lease "the value so fixed to be final" that the valuation as determined by the board of Supervisors in Resolution No. 7151 (New Series), adopted January 9, 1911, fixed, for the remaining years of the lease, the value of the property upon which was to be estimated the amount of rent to be paid. No such construction, in my opinion, can be placed upon the word "final" as used in the lease. The word is defined in Burrill's Law Dictionary, part 1, page 490, to be "that which terminates or ends a matter or proceeding." Rondeau vs. Beaumette, 4 Minn. 224. The matter or proceeding to be terminated or concluded was the valuation of the property at some particular time, and the word "final" is used in the sense that any valuation arrived at, either by the parties to the lease, or by a board of arbitrators to be selected and appointed as therein provided, should be conclusive and binding upon the parties for the period

of the ensuing year, and that said parties would accept such valuation without question and without resorting to any other methods or means looking to any other appraisement of the value of the property.

When the Board of Supervisors, in January, 1911, adopted Resolution 7151 (New Series), that resolution fixed the value of the property for one year thereafter or for such further time as the Board of Supervisors might desire to allow such valuation to be used for the purpose of estimating the rent to be paid. That valuation, in my opinion, did not and does not preclude the City and County of San Francisco, the lessor, from requiring a further valuation of said properties at this time or from requiring a new valuation of said properties from year to year. There is nothing in the lease which in so many words makes the first valuation arrived at, after the first period of five years had expired, binding and conclusive for the last fifteen years of the lease. The language employed in the lease negatives such a conclusion. It provides as hereinabove pointed out, that for the first five years of the lease the rent shall be $600 per month and thereafter an amount equal to 3 per centum per annum on the value of said properties. This language leaves the way open for an agreement as to the value of said properties or an appraisement in case of a disagreement annually.

The parties at the time of making the lease had in mind the definite meaning. It means that, after the first period of five years, for the remaining fifteen years of the lease, the amount of rent to be paid shall be an amount equal to 3 per cent per annum on the value of said properties.

The parties at the time of making the lease had in mind the fact that the value of said properties would vary from time to time during the life of the lease and they employed this means of providing for the amount of the rent to be paid during the final period of fifteen years. If, as contended by the lessee, the valuation fixed by Resolution 7151 (New Series) be final in the sense as contended for by the lessee, that is, to fix the valuation of the property for all time during the remaining fifteen years of the lease, then the language employed in the lease would have to be construed narrowly and in opposition to the plain intent of the parties. There can be no question that the amount of rent to be paid is an amount equal to 3 per cent of the value of the property and that valuation cannot be determined with

justice to both parties if the valuation is not made annually. I do not wish to be understood, however, as holding that it is compulsory upon the parties to the lease to have a valuation every year. If the parties are satisfied, one to pay, and the other to accept, the monthly rent estimated on the basis of 3 per cent of any previous valuation for more than one year, it is perfectly proper, under the lease, to do so. In other words, there is nothing in the lease to compel a new valuation from year to year. In my opinion, both the lessor and the lessee have equal rights to require a new valuation every year.

You are therefore advised that, under the terms of the lease, the City and County of San Francisco has the legal right either to require a new valuation of the properties leased to be made in accordance with the method provided in the lease, that is, by an agreement between the City and County and the Southern Pacific Company, or in case of a disagreement, the City to select one arbitrator, the tenant another, and these two to select a third.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Appointment of Manager of Auditorium.

January 8, 1916.

Sir: I am in receipt of your communication of January 3rd, reading as follows:

"In the regular order of business I received the salary warrants and pay sheet of the Board of Public Works which included the name of Louis Levy and salary allowed him for a proportion of the month at the rate of $300.00 a month as manager of the Civic Auditorium. The pay sheet was approved by the Board of Public Works and the Civil Service Commission, but was not approved by the Finance Committee of the Board of Supervisors as is customary. As the withholding of his approval of the pay sheet held up the names of many others besides Mr. Louis Levy, I had a talk with Mr. Jennings and he said he objected to the approval of that name only but he had no

objection to signing for the balance of the list, which he did and particularly excepted the approval of Louis Levy's salary demand. It was arranged that payment of Levy's salary be from Budget Item No. 423, 'Maintenance and Operation City Hall and Auditorium . . . $5,000.' As it is evident that no provision was made in the budget to pay the salary of a manager of the Auditorium, do you think that payment can be made out of this Budget Item No. 423 as noted above without the approval of or a resolution by the Board of Supervisors?"

Opinion.

Your communication does not state what duties were prescribed for Mr. Levy by the Board of Public Works. However, from my discussion of the questions involved you will be able to determine whether or not Mr. Levy's appointment is valid, by investigating the facts of his appointment.

At the outset it should be pointed out that it was not necessary for the Finance Committee to approve of Mr. Levy's salary if his appointment was a valid one. The duties and powers of the Finance Committee are set forth in Sections 3 and 4 of Chapter II, Article II of the Charter and nowhere in those sections is found the power or duty of the Finance Committee to approve of salary demands or approve of appointments of employees.

If it were within the power of the Board of Public Works to appoint Mr. Levy to the position to which he was appointed the Finance Committee has no control over the matter.

The Charter prescribes in Section 3 of Chapter I, Article VI, as follows:

"The Board may appoint a Secretary who shall receive an annual salary of eighteen hundred dollars. The Board may employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects and workmen as shall be necessary to a proper discharge of their duties under this article, and fix their compensation; but no compensation to any of said persons shall be greater than is paid in the case of similar employments."

The very important question involved in your communication is what are the relative powers and duties over the Auditorium conferred respectively upon the Board of Public Works and the Board of Supervisors.

The land upon which the Auditorium is located was purchased by the City from the funds of a bond issue authorized by the electors of the City. The Auditorium itself was built by the Panama-Pacific International Exposition, the City contributing a part of its cost. At the conclusion of the Exposition the Exposition directors turned over the entire management and control of the Auditorium to the City and the City now owns that structure as fully and completely as if it had been constructed entirely by the City.

The Board of Supervisors has, in Ordinance No. 3521 (New Series), to which my attention has been called in your communication, provided for the appointment of a committee of three of its members to serve as an Auditorium Committee, which committee shall have "control and management of the Municipal Auditorium as in this ordinance provided." (Section 1 of Ordinance.) The ordinance then goes on to provide how the Auditorium shall be used and lays down a schedule of rentals, and further provides for the disposition of the income. It was evidently intended by the ordinance to retain in the Board of Supervisors complete management and control of the Auditorium.

In Section 7 of the Ordinance, providing for the disposition of the funds derived from rentals, it is declared that the fund "is hereby created in accordance with provisions of Section 16 of Article XII of the Charter." It probably was in the minds of the Supervisors that the Auditorium is to be treated as a public utility, since the section of the Charter referred to deals with the subject of the disposition of funds of a public utility.

Subdivision 4, Section 9, Chapter I, Article VI of the Charter provides that the Board of Public Works shall have "charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors.

"4. Of the cleaning of all the public buildings of the City and County and of the appointment of such janitors and employees as are needed for such purpose."

Subdivision 6 of the same section, chapter and article provides that the Board of Public Works shall have "charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors:

"6. Of the construction of any and all public buildings and

structures, under plans duly approved by the various departments, including all school houses and Fire Department buildings, and the repair and maintenance of any and all buildings and structures owned by the City and County."

Subdivision 8 of the same section, chapter and article provides that the Board of Public Works shall have "charge, superintendence and control under such ordinances as may from time to time be adopted by the Supervisors:

"8. Of any and all public utilities owned, controlled or operated by the City and County, or which may hereafter be so owned, controlled or operated."

So far as the control over public buildings is concerned, the Board of Public Works has only charge of the cleaning, repair and maintenance of them, and the appointment of such janitors and employees as are needed for those purposes.

So far as public utilities are concerned the Board of Public Works has complete charge and superintendence of the utilities under such ordinances as the Supervisors may pass.

The charge, superintendence and control, therefore, of the Board of Public Works over public utilities is far more extensive than the Board's power over public buildings. If the Auditorium were to be considered as a public utility I am of the opinion that the Board of Public Works would have the power to appoint a manager thereof who would perform practically the same functions as are performed by the manager of a private hall or theater. If it is not to be considered as a public utility, but merely as a building owned by the City and County of San Francisco, then the power of the Board of Public Works is limited merely to the appointment of such janitors and employees as are necessary to clean, repair and maintain the building.

The question then narrows itself to what is the meaning of the term "public utility" as used in Subdivision 8 of Section 9, Chapter I, Article VI of the Charter quoted above.

In Oklahoma it was held in the case of State ex rel. Manhattan Construction Co. vs. Barnes, 97 Pac. 997, that a convention hall to be owned by the municipality was a public utility.

In the same State it was also held that a Fire Department was a public utility. (See Oklahoma City vs. State, 115 Pac. 1108.)

Also that a public park was a public utility. (See City of Ardmore vs. State ex rel. Best, 100 Pac. 913.) Also that a sewer was a public utility. (See State ex rel. Edwards vs. Miller, 96 Pac. 747.)

In all these cases, however, the Supreme Court of Oklahoma was dealing with the interpretation of the term "public utility" as found in the Constitution of that State governing the issuance of bonds and the limit of the bonded indebtedness and the Supreme Court interpreted the language of the Constitution as including public structures and works which were in the ownership of a municipality and devoted to public purposes. In other words, the important thing determining what is a public utility in Oklahoma is ownership. If the thing is in public ownership and devoted to the public use then it is to be considered a public utility. This, however, as already stated, is a question of interpretation and I am convinced that the term "public utilities" as found in Subdivision 8, Section 9, Chapter I, Article VI of the Charter does not have that extended meaning.

If the same interpretation were to be given to the term as was given by the Supreme Court of Oklahoma, then the Fire Department, the school houses and the public parks would be considered public utilities and under the language of the subdivision the Board of Public Works is to have "charge, superintendence and control of *any and all public utilities.*" The Charter, however, has confided to other departments the control of the City's Fire Department, parks and school houses.

Article XII of the Charter deals with the acquisition of public utilities. The preamble of that article reads:

"It is hereby declared to be the purpose and intention of the people of the City and County that its public utilities shall be gradually acquired and ultimately owned by the City and County."

It could hardly be contended that it was the declared intention of the freeholders that all public halls should be acquired by the City or that all the private schools in the City should be acquired by the City or even that private parks should be acquired by the City.

Section 1 of Article XII, as originally adopted, provided that at least every two years until the object of Article XII had been attained the Supervisors should procure, through the City En-

gineer, plans and estimates of the actual cost of the original construction and completion by the City of "water works, gas works, electric light works, steam, water or electric power works, telephone lines, street railroads *and such other public utilities* as the Supervisors or that the people by petition to the Board may designate."

Those utilities which are therein enumerated are utilities which are properly known as public utilities. It is the character of the service rather than the ownership which makes them public utilities. Whether owned by the public or by private concerns they are under the law deemed public utilities. The services rendered by them are considered necessary to the every-day affairs of a municipality and under the law, owners of such utilities have contracted obligations and duties not contracted in ordinary pursuits.

The section also used the language, underscored above, "and such other public utilities as the Supervisors or that the people by petition to the Board may designate." I do not believe that the term "and such other public utilities" was intended to embrace everything which might be acquired for public use.

Applying the rule of *ejusdem generis* the term means "such other public utilities of a similar nature as that enumerated in the section." In other words, it was the intention of the charter framers to define as public utilities those things of the same peculiar nature as water works, light works, etc. It could hardly be contended that a convention hall in private ownership was a public utility, yet the utilities enumerated in the section are public utilities whether operated by private concerns or by the public.

Section 1 of Article XII was amended December 4, 1902, by eliminating the enumeration of the utilities and eliminating also the requirement that every two years the Supervisors must procure estimates from the City Engineer for the construction and completion of the different utilities named.

The Supreme Court in the case of Platt vs. City and County of San Francisco, 110 Pac. 304, held that the term "public utilities" or "utilities" as used in the amended section was as broad as the enumeration of the utilities in the original section.

Subdivision 8 of Section 9, Chapter I, Article VI of the Charter was inserted in the Charter as originally adopted.

It is a firm principle of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute unless there is something to show that there is another meaning intended. (See Pitte vs. Shipley, 46 Cal. 154; Hoag vs. Howard, 55 Cal. 565.)

Applying this rule of construction it would be presumed that the Charter framers intended the term "public utilities" as used in Subdivision 8, Section 9, Chapter I, Article VI to bear the same meaning as the term "public utilities" as used in Article XII. In addition, in the same section of the Charter the control of the Board of Public Works over public buildings is laid down. In other portions of the Charter the control over other public buildings, such as school buildings, buildings of the Fire Department and police stations are confided to other departments.

I am convinced that the true interpretation of the term "public utilities" is such public utilities as are contemplated by Article XII. I am further convinced that the Auditorium is not a public utility within the purview of Article XII. It would hardly be contended that in the proceedings for a bond issue, the proceeds of which were to be used for the construction of an auditorium, it would be necessary, as is necessary in bond proceedings relating to the purchase of a public utility, for the City to solicit and consider offers for the sale to the City and County of an auditorium. The fact that rentals are to be charged, in my opinion, makes no difference, although a different rule as to the City's liability might be applied because rentals were charged, that is, the City might be treated simply as a proprietor. There is nothing requiring the charging of rentals, excepting the will of the Supervisors, and rentals could be discontinued at once. Likewise the use of the Auditorium could be extremely limited to large public gatherings or it could be devoted to some other public use.

This brings us to the question, if the Board of Public Works has not been confided with the management and superintendence of the building, in what body is that power confided? It is not conferred directly in any board or commission of the City government. The residuum of power of a municipality is in the legislative body. That is a fundamental principle. Such powers of

a municipality as are conferred upon it by law or by its Charter and which have not been expressly delegated to commissions or officials of the municipality are to be exercised by the legislative body.

There can hardly be any question of the right of the City to own and manage the Auditorium. In Section 10, Chapter III, Article II of the Charter the Board of Supervisors is authorized to acquire land in a given district for the purpose of establishing a Civic Center and in the same section the Board is permitted to authorize the erection of an Auditorium by the Panama-Pacific International Exposition. The Auditorium having reverted to the City, it has now become a part of the Civic Center and, in my opinion, is under the charge, superintendence and control of the Board of Supervisors. Whether the Board could delegate to the Board of Public Works the superintendence and maintenance of the Auditorium it is not necessary here to decide. The Board has not done so in the ordinance referred to.

If, therefore, Mr. Levy was appointed by the Board of Public Works under the provisions of Subdivision 4, Section 9, Chapter I, Article VI, to superintend the cleaning of the Auditorium and the repair and maintenance thereof I am of the opinion that his appointment is entirely valid and that he is entitled to his salary. If, however, those are not his duties, but his duties are to superintend and manage the building in the same manner as superintendents and managers of private buildings superintend and manage those buildings then the Board of Public Works has exceeded its power.

The question, therefore, for you to determine is, what are the duties of Mr. Levy as prescribed by the Board of Public Works. If his duties are to superintend the cleaning, repair and maintenance of the building his appointment is entirely lawful.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Validity of Demands for Purchase of Land for the Daniel Webster School.

January 12, 1916.

Sir: I am in receipt of your communication of the 6th inst., as follows:

"The Board of Supervisors in their Annual Budget for the Fiscal Year 1915-16, Item No. 61, appropriated the sum of $120,000 for a new building and the purchase of adjoining land for the Daniel Webster School. Two demands have reached me, one payable to David J. Counihan in the sum of $7,200 and the other to John Reis in the sum of $6,000 for the payment of property for said Daniel Webster School. Now I understand, and have been informed, that the land purchased under this Budget Item No. 61, as represented by the two demands referred to above, is two blocks distant from the present Daniel Webster School.

"I will thank you to advise me if you consider these valid claims inasmuch as the property purchased is not the same as has been described in Budget Item No. 61.

"I am in doubt as to whether I can legally approve these demands."

Opinion.

Chapter I, Article III, of the Charter provides for the making, by the Board of Supervisors, a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the City and County for the next ensuing fiscal year. It also provides for the manner in which demands shall be drawn and paid.

Section 2 of said chapter and article provides, inter alia, that the Auditor, at a time specified, shall transmit to the Supervisors an estimate of the probable expenditures of the municipal government for the next fiscal year, * * * showing specifically the amount necessary to be apportioned to each fund in the treasury.

Section 1, Chapter II, Article III, of the Charter, is as follows:

"The income and revenue paid into the treasury shall be at once apportioned to and kept in separate funds. It shall not be lawful to transfer money from one fund to another or to use the same in payment of demands upon another fund. The pro-

visions of this section shall not apply to fees paid into the treasury and placed temporarily to the credit of the Unappropriated Fee Fund under the provisions of Chapter III of this article."

Section 2, same chapter and article, first provides that the several funds in the treasury authorized by law at the time the Charter took effect (January 8, 1900), or provided for by the Charter, shall continue therein so long as there shall be occasion therefor; *and the moneys therein shall not be used for any purpose other than for which the same were raised except as otherwise provided in the Charter.* It then proceeds to designate the several funds and the moneys of which the same shall consist, as follows:

The General Fund, to consist of moneys received into the treasury and not specifically appropriated to any other fund;

The Park Fund, to consist of moneys appropriated for the maintenance, etc., of parks and public grounds;

The Library Fund, to consist of moneys appropriated for the maintenance of library and reading rooms.

Section 3 provides for a Surplus Fund, to consist of the moneys remaining at the end of a fiscal year in any other fund (except the Common School Fund, and the other funds by the Charter otherwise expressly provided for), and, also, for the purposes and use of the money in the Surplus Fund.

Section 5 provides for the carrying forward of any money in the several funds therein designated, mentioning the interest and sinking fund and fund provided by a special bond issue for a specific purpose, the Common School Fund, the Park Fund, the Library Fund, the Firemen's Relief and Pension Fund, Police Relief and Pension Fund and the Public Building Fund. There exist other funds, consideration of which is not necessary in connection herewith.

Ordinance No. 3295 (New Series), approved June 16, 1915, is an ordinance fixing and appropriating the aggregate sum and the items thereof allowed to each department, office, board and commission for the fiscal year ending June 30, 1916, and making a budget of the same, in pursuance of the provisions of Article III, Chapter I of the Charter.

The General Fund, as therein fixed and designated, consists of 719 items, the total aggregate of which is the sum of $9,379,739. Item No. 61 thereof is as follows:

Budget Item No. 61. Daniel Webster School—New building and purchase of adjoining land—$120,000.

Budget Item No. 61 is a part of the General Fund of the City and County, although it appears in the Budget under the heading "Special Funds," preceding Budget Item No. 51. The use of that heading does not operate to take it out of the General Fund, and thereby place it in a particular fund, concerning which Sections 1 and 2, Chapter II, Article III, provides that moneys therein or which may belong thereto shall not be used for any purpose other than that for which the same were raised.

The control of the Board of Supervisors over the General Fund or the moneys therein is not restricted by the Charter; that is to say, that the right of the Board of Supervisors is not limited as to the expenditure of the moneys in the General Fund in the same way that the powers of said Board are limited in the matter of the expenditure of moneys which have been fixed and apportioned to the several funds provided for or created by the Charter, or by any powers therein granted, which moneys, as the Charter provides, shall not be used for any purpose other than that for which they were raised.

That being so, it follows that the Board of Supervisors may, in its judgment, expend the amount fixed by Budget Item No. 61, in the erection of a new building for the Daniel Webster School, either on the present location of said school, or on a new location, and may purchase such lands as are necessary for said new building, on either location, provided that the Board of Education expresses its concurrence therewith, under the powers granted to said Board in Subdivision 1 of Section 1, Chapter III, Article VII, of the Charter, as follows:

"To establish and maintain public schools as provided in this article, and to change, modify, consolidate or discontinue the same as the public welfare may require."

The question of the powers of control of the Board of Supervisors over the General Fund was before the Supreme Court in the case of San Francisco vs. Broderick, 111 Cal., p. 302, wherein at page 306, the Court used the following language:

"The provision in Section 71 of the Consolidation Act requiring

the Board of Supervisors, when making the levy of taxes to apportion and divide the taxes to be collected to certain specific funds, 'according to the estimate of said Board of the necessities of said funds,' is limited to an apportionment of the taxes to those funds which are therein designated, viz.: 'Corporation Debt Fund, General Fund, School Fund, Street Light Fund, and Street Department Fund,' and does not confer authority to subdivide those funds, or either of them, and restrict the several subdivisions to the objects for which they may be indicated."

It will be seen, from the above excerpt, that the subdivision of the moneys apportioned to the General Fund, such as the subdivision used in the ordinance creating the budget for this fiscal year, wherein the amount set apart for the Daniel Webster School, follows the heading "Special Funds," is without any force and effect to create a fund for that purpose which may not be used except for the purchase of lands adjoining the present location of the Daniel Webster School.

On the other hand, I do not think it is necessary, in order to uphold the power of the Board of Supervisors in this respect, to go to this length. Budget Item No. 61 simply specified that the sum of $120,000 is to be used for a new building for the Daniel Webster School, and purchase of adjoining land. There is nothing therein to indicate that the new building must be erected on the present site or that the lands authorized to be purchased therewith, must be lands adjoining the present location. It can very well be said that the Board of Supervisors may assume that it had the power, and such an assumption would be justified, in view of the language used, to build the Daniel Webster School on a site more suitable and convenient to the Board of Education and one more in keeping with the necessities of the particular district to be served by said school, still keeping in mind the fact that said sum was designated in the Budget as a "Special Fund."

Taking either view of the matter, it is my opinion that the Board of Supervisors has exercised a valid power in the contemplated purchase of the land mentioned in your letter, and that the claims therefor presented to you are valid claims.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Power of Board of Supervisors to Change Positions of Employees of Board Having Benefit of Charter Amendment 3, Approved April, 1913.

January 22, 1916.

Gentlemen: I am in receipt of a communication from the Clerk of your Board under date of January 17, 1916, reading as follows:

"I am instructed by order of the Board of Supervisors to submit to you certain resolutions relating to the application of Civil Service laws in the office of the Clerk of the Board of Supervisors.

"I hand you herewith in this connection reports of the Civil Service Committee and reports of the Finance Committee, and Resolution No. 12,466 (New Series), adopted this day.

"You are requested to report on this whole subject matter, as to its legal phases at the next meeting of the Board of Supervisors, January 24, 1916."

Accompanying and referred to in your communication are the following documents, Resolution No. 12,466 (New Series), a report of your Committee on Civil Service, a report of your Finance Committee and a proposed resolution. These respective documents read as follows:

"Resolution No. 12,466
(New Series)

"Resolved, That the City Attorney be and he is hereby requested to furnish the Board of Supervisors with an opinion at as early a date as possible on the following matter:

"1st. Do the Civil Service provisions of the Charter apply to the office of the Board of Supervisors: if so, to what extent? What positions, if any, are exempt?

"2nd. Has the Board of Supervisors the power or legal authority to demote, transfer or assign to any other position in its office the present Chief Assistant Clerk who was appointed to said position January 8, 1912, has occupied the same continuously ever since and has been certified thereto by the Civil Service Commission pursuant to the adoption of so-called Charter Amendment No. 3, adopted by the people at a special election

December 10, 1912, and ratified by the Legislature March 28, 1913?"

"January 17, 1916.

To the Honorable Board of Supervisors,
City Hall.

Gentlemen: Your Committee on Civil Service which under the new rules recently adopted by the Board of Supervisors is expected 'to consider all matters relating to Civil Service in the several departments and to promote efficiency and economy in expenditures,' is desirous of securing legal information as to the exact status from a Civil Service standpoint of all employees in the office of the Board of Supervisors. It therefore recommends the adoption of a resolution requesting the City Attorney for a legal opinion covering this matter."

"San Francisco, January 17, 1916.

To the Honorable, the Board of Supervisors,
San Francisco, Cal.

Gentlemen: Your Finance Committee, acting under the rules adopted on January 8, 1916, has assigned several assistant clerks to duties to various committees, and in making these assignments, the experience and capabilities of the individuals have been taken into consideration. After carefully considering the matter of assignment, the Committee now recommends that Assistant Clerk David A. Barry be and is hereby directed to assume the duties of Chief Assistant Clerk to the Board, and that John W. Rogers, heretofore Chief Assistant Clerk, be assigned to the duties of Assistant Clerk."

Proposed resolution.

"Resolved, That, in accordance with the recommendation of the Finance Committee of the Board of Supervisors, David A. Barry be and is hereby directed to assume the duties of Chief Assistant Clerk to the Board of Supervisors at a salary of $250.00 per month, and that John W. Rogers, heretofore Chief Assistant Clerk, be and is hereby directed to assume the duties of Assistant Clerk at a salary of $175.00 per month."

Opinion.

First question:

Do Civil Service Provisions of the Charter Apply to the Office of the Board of Supervisors?

Section 11 of Article XIII of the Charter enumerates the offices, boards and departments subject to Civil Service. Among those enumerated is the Board of Supervisors. This section also enumerates those positions which are exempted from Civil Service. So far as the Board of Supervisors is concerned, the clerk and persons employed by the Board for temporary service requiring high technical skill are the only persons exempted. The employees of the Supervisors came under the provisions of Civil Service by an amendment to the Charter approved by the Legislature on March 28, 1913, known as "Charter Amendment No. 3." Prior to that date those employees were not subject to Civil Service.

I know of no rule which prohibits freeholders in adopting a Charter under Section 8½, Article XI of the Constitution providing that the employees of the legislative body shall be subject to Civil Service. It is purely a matter of governmental policy to be determined by the electors. Employees of the Board of Supervisors are engaged in clerical and administrative work and if the electors deem it to the public interest that those employees be under Civil Service the law of the State permits them to do so. I therefore answer the first question in the affirmative.

Second question:

May the Board Change the Positions of Rogers and Barry in Accordance with the Resolution Proposed by the Finance Committee, Quoted Above?

Subdivision a of Section 11, Article XIII in part, read as follows:

"Any person who has served in any position in the office of the Assessor, the Coroner, the Recorder, the County Clerk, the Sheriff, the office of the Justices' Clerk, the Board of Supervisors or the Treasurer for a period of one year continuously prior to the approval of this amendment and who shall be actually employed in any of said offices at such time is hereby declared to be appointed within the provisions of Article XIII of this Charter

to the position to which he may be assigned and shall be entitled to all the benefits of said article thereafter."

This provision of Section 11 was added by "Charter Amendment No. 3," and the amendment referred to in the quoted part of the section is Amendment No. 3.

At the date of the approval of the amendment Rogers was serving in the position of Chief Assistant Clerk at a salary of $250 per month. At the same time Barry was serving in the position of Assistant Clerk at a salary of $175 per month. Both Rogers and Barry had occupied their respective positions continuously for more than one year previous to the approval of the amendment. Upon the approval of the amendment Rogers automatically became appointed to the position of Chief Assistant Clerk and Barry to the position of Assistant Clerk and both became entitled to all the benefits of Article XIII of the Charter.

Since 1902 the Board of Supervisors has designated one of its employees as "Chief Assistant Clerk." Likewise the title of "Assistant Clerk" has been given to other employees.

Ordinance No. 3535 (New Series), known as the "Additional Positions Ordinance," was finally adopted by the Board of Supervisors on December 13, 1915. One of the purposes of the ordinance was to restore the records destroyed by fire of ordinances passed by the Board of Supervisors which authorized the appointment of additional clerks, deputies and employees in and by the several officers, boards and departments in accordance with the provisions of Section 35 of Article XVI of the Charter. Another purpose was to bring all of those positions under one ordinance. It is recited in the ordinance that theretofore all the positions mentioned in the ordinance were legally created under and in accordance with Section 35 of Article XVI and that all conditions required to be done in order to make the creation of such positions legally valid were had and done by the Board of Supervisors.

Section 3 of Ordinance No. 3535 (New Series) provides that the designations of positions created by said ordinance were provided by the Civil Service Commission on the 8th day of November, 1915, as required by Section 2 of Article XIII of the Charter.

Section 17 of the ordinance authorizes the Board of Supervisors

to appoint, besides other employees: "b. One Chief Assistant Clerk at a salary of $3000 per year," and "e. Three Assistant Clerks at a salary of $2100 per year." There are seventeen different titles to the positions enumerated. Those seventeen titles cover twenty-three separate positions.

On the 30th day of March, 1915, the Civil Service Commission notified the Board of Supervisors that the persons named in the communication had been entered on the records of the Commission as entitled to the benefits of Article XIII of the Charter as employees in the office of the Board of Supervisors in the positions set opposite their respective names by virtue of the provisions of Charter Amendment No. 3. Among the names appearing is that of John W. Rogers, declared to be entitled to the position of Chief Assistant Clerk, and David A. Barry, declared to be entitled to the position of Assistant Clerk; Rogers' salary being given as $250 per month and Barry's salary at $175 per month. The Civil Service Commission in that communication classified the positions in the Board of Supervisors in the same manner that Ordinance No. 3535 (New Series) classifies them.

It therefore appears that the positions of Chief Assistant Clerk and Assistant Clerks of the Board of Supervisors have been regularly created in accordance with the provisions of the Charter and the designations of those positions properly made. Rogers holds his position by virtue of the Charter amendment quoted above and Barry holds his position by virtue of the same amendment. The Charter has appointed these men to their respective positions and has declared that they are entitled to all of the benefits of Article XIII.

Ordinance No. 3535 (New Series) of the Board of Supervisors and the declaration of the Board of Civil Service Commissioners, as set forth in the communication from that Board to the Board of Supervisors, above referred to, both place Rogers and Barry in different classifications. Likewise the salaries of the two employees are different, although it is to be noted that the difference in salaries does not necessarily make a difference in classification under the provisions of civil service.

The Civil Service Commission has recently adopted a classification of the classified Civil Service of the City: Class 21 of that classification is "Assistant Clerks of Board of Supervisors promoted from Class 4 (general clerks) and includes all other

positions in the office of the Board of Supervisors that have similar duties and that are not separately classified and carry salaries of more than $125 a month." Class 22 is "Chief Assistant Clerk of Board of Supervisors promoted from Class 21." This classification is authorized by Section 2 of Article XIII of the Charter, which in part reads as follows:

"The Commisioner shall classify, in accordance with duties attached thereto, all places of employment in or under the offices and departments of the City and County, not exempted under Section 11 of this Article, or which may be created hereafter and not specifically exempted by this Charter."

By this action the Civil Service Commission has declared the classification of Chief Assistant Clerk of the Board of Supervisors to be a higher classification than that of Assistant Clerks.

Among the benefits to which Rogers and Barry both became entitled upon the adoption of Charter Amendment No. 3, are those contained in Section 12 of Article XIII. The important part, so far as this opinion is concerned, is contained in the first sentence thereof:

"No person employed in the classified civil service shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense."

I am firmly of the opinion that changing Rogers from his position of Chief Assistant Clerk to that of Assistant Clerk violates the provisions of Section 12 above quoted. By this action Rogers would be reduced in grade and Barry promoted.

In case of People ex rel. Callahan vs. Board of Education of the City of New York, 79 N. Y. Sup. p. 624, it was held that "a reduction of a teacher from one grade to another accompanied by a decrease in pay, constitutes a removal and reappointment rather than the reassignment provided for in Section 1117 (Code of New York), and hence can only be brought about for cause." This case was approved in the case of Waters vs. City of New York, 88 N. Y. Sup. 238. The same rule obtains in this State.

The Supreme Court, in the case of Kennedy vs. Board of Education, 82 Cal. 483, held that to remove a teacher from the grade in which her certificate entitled her to teach was as much a violation of the Statute which provided that a teacher could not

be removed except for cause as if the teacher had been dismissed and not given another position.

The Civil Service Commission, pursuant to its authority conferred by the Charter, has declared that the position of Chief Assistant Clerk shall hereafter be filled by promotion from the class designated as "Assistant Clerks," to which class Barry belongs. This action of the Civil Service Commission is authorized by Section 8 of Article XIII of the Charter.

If a vacancy existed in the position of Chief Assistant Clerk it would therefore be filled from a list of eligibles created by examination of persons holding the position of Assistant Clerks. Pending such an examination the Board of Supervisors could, under the provisions of Article XIII, make a temporary appointment to Chief Assistant Clerk. However, there is no vacancy in that position. On the other hand, the position is actually held by one who is entitled thereto under the Charter. Therefore, the promotion of Barry to the position of Chief Assistant Clerk would be in violation of the Charter and the rules and regulations of the Civil Service Commission.

Subd. (b) of Sec. 11, Art. XIII, provides that:

"All officers, courts, boards or heads of departments vested in this Charter with the power to appoint deputies, clerks, stenographers or other employees of any designation whatsoever shall make appointments only in accordance with the provisions of this Article and the rules adopted thereunder and any appointment not so made shall be void."

I therefore advise you as to the second question that the action proposed by the resolution introduced by the Finance Committee would not be valid.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Interpretation of Act 127 of the General Laws of California—Claim of Alien.

January 28, 1916.

Dear Sir: I am in receipt of your communication of the 26th inst., as follows:

"In re claim Battaini Window Cleaning Company vs. Board of Education for services amounting to $600—will you kindly furnish me with your opinion concerning the legality of the same, as I have been notified by one of the Surety Companies on my Official Bond that such a claim cannot be paid for the reason that this money would go to an alien, which would be in direct violation of one of the Statutes of the State of California No. 127—approved March 27, 1901."

Opinion.

Act 127 of the General Laws of California, approved March 23, 1901, provides as follows:

"An Act to secure to native-born and naturalized citizens of the United States the exclusive right to be employed in any department of the State, county, city and county, or incorporated city or town government in this State. (Approved March 23, 1901; Stats. 1901, p. 589.)

"Sec. 1. No person, except a native-born or naturalized citizen of the United States, shall be employed in any department of the State, county, city and county, or incorporated city or town government in this State.

"Sec 2. It shall be unlawful for any person, whether elected, appointed or commissioned to fill any office in either the State, county, city and county, or incorporated city or town government of this State, or in any department thereof, to appoint or employ any person to perform any duties whatsoever, except such person be a native-born or naturalized citizen of the United States.

"Sec. 3. No money shall be paid out of the state treasury, or out of the treasury of any county, or city and county, or incorporated city or town, to any person employed in any of the offices mentioned in Section 2 of this act, except such person shall be a native-born or naturalized citizen of the United States.

"Sec. 4. This act shall take effect immediately."

The claim now before you, arose, I understand, as the result of a contract made by the Board of Education with the Battaini Window Cleaning Company for the cleaning of the windows in the buildings of the school department for the current year, and you have withheld payment on the ground that Act 127 prohibits the payment of any moneys to an alien by the City and County.

Such, however, is not the case. Act 127 prohibits the appointment or employment of aliens in any branch of the State or local governments. That prohibition does not, however, extend to persons who contract with the City and County, since a contractor is not an employee of the person, firm or corporation with whom he contracts.

Statutes in derogation of natural rights, such as this, are to be strictly construed, and are not to be extended so as to include matters and things clearly not within their scope, as indicated by the language employed therein.

You are therefore advised that there would be no violation of Act 127 of the State law in the payment of such a claim, and that no liability would accrue to your bondsmen by such payment.

Respectfully,

PERCY V. LONG,

City Attorney.

Treasurer.

Workmen's Compensation Act—Liability for Nurse Contracting Typhoid.

February 15, 1916.

Gentlemen: I am in receipt of your request for an opinion dated January 24, 1916, as follows:

"I would respectfully call your attention to the following resolution adopted at a meeting of the Board of Health held on January 20, 1916:

"Whereas, Graduate Nurse Agnes Tobin, Emergency Hospital Service, is now suffering from an attack of typhoid fever, and

while it is probable that said employee contracted such disease in the discharge of her duties as such graduate nurse; therefore, be it

"Resolved, That the Health Officer be directed to present these facts to the City Attorney and ask that official for an opinion on the following point, namely—

"If it is demonstrated that said employee contracted such disease while an employee of the Board of Health and in the proper discharge of her duties, would such a case come under the Employers' Liability Act and should provision be made for the payment of the salary of said employee under such Act?"

Opinion.

Section 12a of the Workmen's Compensation Act reads:

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

"(1) Where, at the time of the injury, both the employer and employee are subject to the compensation provisions of this act.

"(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment as such.

"(3) Where the injury is proximately caused by the employment, either with or without negligence, and is not so caused by the intoxication or the wilful misconduct of the injured employee."

The section, in its present form, was amended at the last session of the Legislature and became effective on August 8, 1913. Prior to that time this section provided that liability for compensation should exist against an employer only when the injury to the employee was sustained by accident arising out of and in the course of the employment. The amendment omits altogether any reference to accident, so that now the employer is made liable for any personal injury arising out of and in the course of the

employment. The only question which is necessary to be determined therefore, is whether typhoid fever may be considered a personal injury within the meaning of this section of the compensation act. It has been frequently held that "the incurring of a disease or harm to health is such a personal wrong as to warrant a recovery if the other elements of liability for tort are present."

Bayne vs. Riverside etc. Co., 148 N. W. 412;
Hewitt vs. Hospital, 64 Atl. 190;
Kliegel vs. Aitken, 94 Wis. 432;
Edwards vs. Lamb, 69 N. H. 599;
Franklin vs. Butcher, 144 Mo. Ap. 660;
Hendricks vs. Butcher, 144 Mo. Ap. 671;
Allan vs. Boston, 34 N. E. 519;
Larsen vs. Boston Ry. Co., 90 N. E. 1048;
Wagner vs. Chemical Co., 23 Atl. 772.

Many other cases to the same effect will be found collected in a note in 19 L. R. A. 725.

It has also been frequently held that disease caused by bodily contact is accidental injury within the meaning of an accident insurance policy. So it was held in Hood & Sons vs. Md. Casualty Company, 92 N. E. 329, that an employee who contracted glanders through cleaning a stall which had been occupied by infected horses came within the terms of an accident policy which insured against "bodily injuries or death accidentally suffered." And see a number of cases cited by the Court on page 330 of the opinion in that case.

The Massachusetts Workmen's Compensation Act is similar to ours in the fact that it makes any personal injury arising out of and in the course of the employment compensable without regard to accident. The Supreme Judicial Court of Massachusetts has held that a disease arising out of and in the course of the employment is a personal injury within the meaning of this act.

Johnson vs. London etc. Company, 104 N. E. 735;
In re Hurle, 104 N. E. 336.

In the Johnson case the Court used the following language:

"Aside from the decisions under the English act which provides

for compensation for 'personal injuries by accident,' it is clear that 'personal injury' under our act includes any injury or disease which arises out of and in the course of the employment, which causes incapacity for work and thereby impairs the ability of the employee for earning wages."

Typhoid fever is specifically held to be a "personal injury" under the Wisconsin Compensation Act in

Vennen vs. Lumber Company, 154 N. W. 640.

I therefore advise you that if as a matter of fact Mrs. Tobin contracted typhoid fever during the course of her employment in the Emergency Hospital Service, and this was proximately caused by her said employment, she is entitled to compensation under the act as recently amended.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Abandonment of Franchise by United Railroads on Ocean Avenue.

February 17, 1916.

Gentlemen: I am in receipt of your communication as follows:

"The Street Committee of the Board of Supervisors requests your approval of the attached form of ordinance, providing for the abandonment by the United Railroads of San Francisco of its franchise on Ocean Avenue between Mission Street and Onondago Avenue."

Opinion.

Order No. 2904 passed by the Board of Supervisors on September 16, 1895, granted to the Market Street Railway Company, of which the United Railroads of San Francisco is the successor and assign, a franchise along and upon various streets, among which is the following:

"Commencing at the intersection or junction of Mission Street or Mission Street Road with Ocean Avenue (formerly Ocean House Road), there connecting with the tracks of the Market Street Railway Company, on Mission Street or Mission Street

Road; thence along and upon said Ocean Avenue (formerly Ocean House Road) to the westerly end thereof and thence along and upon any extension of said Ocean Avenue (formerly Ocean House Road) or along and upon any intersecting street or streets which are now or may be hereafter laid out under the authority of the Board of Supervisors of said City and County to the Ocean Beach or Great Highway."

Said ordinance also provided:

"This franchise is granted on the condition that the portion of the street railroad commencing at the intersection or junction of Mission Street or Mission Street Road with Ocean Avenue (formerly Ocean House Road) there connecting with the tracks of the Market Street Railway Company on Mission Street or Mission Street Road; thence along and upon said Ocean Avenue (formerly Ocean House Road) contiguous to and adjoining the premises on said road known as the Ingleside, shall be completed and in operation within a period of 180 days from and after the granting of the franchise by this Board."

Section 502 of the Civil Code, as it existed prior to February 26, 1895, provided as follows:

"Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation and the same must be completed within three years thereafter. A failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation with the consent of the authorities granting the right of way—such abandonment and consent to be in writing."

On February 25, 1895, Section 502 of the Civil Code was amended by adding a proviso that the governing body of such municipal corporation at the time of granting such right of way shall have the power to fix the time for either the commencing or completion, or both, of said work; not, however, to a time less than six months for commencing and not less than eighteen months for completing the same. The mandatory section also gave to the authority granting the right of way the power to grant an extension of time for the completion of said work if it should appear that the work has been commenced within the time fixed and prescribed in good faith, but no extension of time

shall be granted for the commencement of said work and shall not be granted for more than one year for the completion of the same.

The period limited by Order 2904, to-wit, 180 days from and after the granting of the franchise by the Board for the completion of that portion of the street railroad commencing at the intersection or junction of Mission Street or Mission Street Road with Ocean Avenue (formerly Ocean House Road) is in conflict with the provisions of Section 502 concerning the power of the Board of Supervisors of the City and County of San Francisco to fix the time for the completion of the same, as it will be seen that Section 502, as amended in 1895, provided that the period for the completion should not be less than eighteen months. However that may be, it is not important, as more than eighteen months have expired since the granting of the franchise to the Market Street Railway Company.

The Supreme Court of this State, in the case of People vs. Sutter Street Railway Company, reported in 117 Cal. at page 604, held:

"If the law be, as it is claimed by some, that such a franchise is not lost until it has been declared forfeited in a judicial proceeding, the City could but acquiesce. It has no power to institute an action to secure the forfeiture. That power is vested in the Attorney General. As it could not enforce a forfeiture, it could not waive it."

It seems to me that a failure to comply with the condition imposed upon the railroad company to which the franchise was granted or its successors or assigns, to complete that portion of the street railroad commencing at the intersection or junction with Mission Street or Mission Street Road with Ocean Avenue (formerly Ocean House Road) there connecting with the tracks of the Market Street Railway Company on Mission Street or Mission Street Road, thence along and upon Ocean Avenue (formerly Ocean House Road) contiguous to and adjoining the premises known as the Ingleside, within a period of 180 days as specified in said order, or within a period of not less than 18 months as specified in Section 502 of the Civil Code as amended February 25, 1895 (Statutes 1895, p. 17), places the entire franchise granted by said Order 2904 in jeopardy and furnishes

grounds upon which the franchise granted by Order 2004 may be forfeited.

While the Supreme Court in the Sutter Street Railway case, 117 Cal. 604, holds that the City and County of San Francisco cannot waive a forfeiture, yet the passage of the ordinance submitted to me for my approval may have the effect of evidencing a willingness on the part of the municipality, so far as it is able, to waive the same. In my opinion the City cannot, in view of the opinion of the Court in the Sutter Street Railway case, waive the forfeiture of the franchise. I cannot approve the form of the ordinance transmitted to me for my approval. If this matter were the ordinary one of a franchise granted on several streets and application was made by the company holding the franchise to abandon a portion of its franchise for some reason that appeared to your Honorable Board to be well founded, then undoubtedly your Board could with propriety give your consent to such abandonment. But in this case, where the portion of the road petitioned to be abandoned is that portion of the road, the completion of which is made a condition for the enjoyment of the entire franchise, the power of your Board to consent to such abandonment seems to me to be doubtful if not lacking altogether.

I therefore return the ordinance prepared by the United Railroads and filed with its petition, without my approval.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Interpretation of Section 171, Ordinance No. 615—Plumbers' Signs.

February 18, 1916.

Gentlemen: I am in receipt of your communication of February 9, 1916, in which you ask for an interpretation of Section 171, Ordinance 615, otherwise known as the "Plumbing Law." The section in question reads:

"It shall be the duty of every licensed master plumber to display at his place of business, outside thereof, a sign with his

full registered name, and no other person or persons than a registered plumber shall be allowed to display any such sign, carry on or engage in the plumbing business."

The specific point upon which you ask to be advised is as to the character of signs which are forbidden to be used by those who are not registered plumbers. The section is in this regard so vague that a satisfactory interpretation is impossible. Taking the section literally, any person not a registered plumber is forbidden to display outside his place of business "a sign with his full registered name."

I would suggest that your Honorable Board take measures to have this section so amended as to express plainly the purpose which it is intended to serve.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

State Motor Vehicle Act—Application to Motor Vehicles in Use by the Fire Department.

February 18, 1916.

Gentlemen: I am in receipt of your communication of January 17, 1916, as follows:

"Will you kindly favor this Board with an opinion as to whether or not the State Motor Act applies to the automobiles belonging to this Department and used strictly for Fire Department business, such as responding to alarms of fire, etc.

"Last month we made application on exemption blanks to the Motor Vehicle Department of the State of California for registration and licenses under the Act. Before making application the writer personally took this matter up with Mr. Benjamin, the Assistant United States Attorney General, and he informed me that as long as our machines were used for fire purposes only they would come under the exemption. However, we are in receipt of a letter today from H. A. French, Superintendent of the Motor Vehicle Department, in which he says:

"'We are returning herewith applications for registration of motor vehicles under the city and county exemption clause. The law includes under this exemption only those cars used in police patrol work and those peculiarly constructed for special service. The cars covered by your applications are not included in either class and we therefore enclose the proper forms for their registration.'"

Opinion.

After receiving this communication I took up this matter with Mr. Nourse of the Attorney General's office and was informed by him that the Attorney General was at that time preparing an opinion for Mr. French, Superintendent of the Motor Vehicle Department, upon the very question here presented. Since that time this opinion has been rendered by the Attorney General. Referring to the previous ruling of Mr. French, that the law exempted only those cars used in police patrol work and those peculiarly constructed for special service, this opinion says:

"From an examination of the Vehicle Act and the opinion referred to I am satisfied that the ruling of your department extends the limitations of the Act beyond the legislative intent thereof. Section 3 of the Act authorizes you to demand additional particulars to those required by the Act upon application for registration of any motor vehicle. Under this authority it is proper for you to require any city or other public subdivision of the State to file with their applications satisfactory proof of the use made and to be made of the vehicle desired to be registered. If, from such proof, or otherwise, you are satisfied that the vehicle is not used and is not to be used 'for the conveyance of persons for hire, pleasure or business, nor for the transportation of freight,' then a distinguishing plate should be issued for such vehicle without charge. Such distinguishing plate is sufficient to permit the use of such vehicle upon the public highways for official and public business only.

"If such a vehicle is thereafter used for purposes other than those upon which it was exempted from the payment of registration fees such fees become delinquent 'forthwith upon the operation of the vehicle on the public highways.' Such fees may then be collected from the owner of the vehicle, together with the penalties prescribed in Section 11 of the Vehicle Act, and pay-

ments may be enforced by seizure and sale of the vehicle in the manner prescribed in that section."

In accordance with this opinion, with which I fully agree, I advise you that any motor vehicle which is used exclusively for fire department business is exempted from the payment of license taxes under the Motor Vehicle Act.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Fire Commissioners.

Use of Streets by Power and Lighting Companies.

February 24, 1916.

Gentlemen: By direction of the Public Utilities Committee of your Board there has been transmitted to me certain correspondence of the Department of Electricity referring to the distribution of power by the Sierra and San Francisco Power Company, and I am requested to advise such committee as to the rights of that company and other companies which may be operating without franchises.

Opinion.

On November 6, 1915, I advised the Chief of the Department of Electricity that the Sierra and San Francisco Power Company had no authority to string wires and cables for the purpose of conducting electricity for power purposes over public streets of San Francisco without a franchise therefor. This opinion followed a former opinion dated January 21, 1910. (Opinions of City Attorney of 1910-12, p. 19.)

In the communication from the Department of Electricity, upon which the opinion of November 6, 1915, was based, it was stated that the power wires therein referred to had been erected by the Sierra and San Francisco Power Company on the poles of the United Railroad Company. The franchise of the United Railroads for erection and maintenance of such poles was granted for the purpose of the operation of a street railway system and not for the purpose of entering into the commercial business of furnishing power to customers. The Railway Com-

pany would, therefore, have no authority, under its franchise, to sell power commercially and what it cannot do directly it cannot do indirectly by allowing another corporation to use its poles for such purpose.

The letter of transmittal from your Public Utilities Committee raises a broader question as to the right of public service corporations to engage in the business of furnishing power without a franchise. As the law upon that question has been modified by recent decisions, I am taking this opportunity of stating the present situation with regard thereto.

Prior to October 10, 1911, public service corporations enjoyed the constitutional privilege of using the streets of California municipalities for the purpose of furnishing water and light without the necessity of obtaining a franchise therefor. The constitutional provision on this subject was entirely altered by the amendment adopted October 10, 1911. The effect of this constitutional amendment upon the rights of public service corporations whose systems had been established prior to the adoption thereof, was discussed at length in my opinion to the Board of Supervisors and the Board of Public Works, dated January 13, 1912. (Opinions of City Attorney 1910-12, p. 493.)

It was there held that the privilege acquired under the Constitution prior to this amendment extended only to such streets as had been actually occupied prior to the date of the amendment, and that the use of a portion of the street of a municipality prior to that date did not confer upon a public service corporation any rights in the remaining streets thereof. The questions therein discussed were subsequently submitted to the Supreme Court of California and that Court gave judicial sanction to the views set forth in said opinion. (Ex parte Russell, 163 Cal. 668.) An appeal was taken from the above decision to the Supreme Court of the United States and that Court reversed the Supreme Court of California upon the question above referred to. (Russell vs. Sebastian, 233 U. S. 195; 59 L. ed. 912.) The latter court held that the offer, which was extended to public service corporations prior to the amendment of the Constitution, of the privilege of establishing systems for the distribution of light and power, in municipalities "was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was

made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted."

In the case last referred to it was held that a gas company, having established its plant with a view to supplying the entire City of Los Angeles, but only having used a portion of the streets prior to the amendment of the Constitution, nevertheless, had a vested right to the use of all the streets of that city without the necessity of obtaining a franchise, which right was not divested by the amendment to the Constitution.

As the Supreme Court of the United States is the final authority upon the question here involved, the law is now established to the effect that public service corporations which had, prior to October 10, 1911, taken any action which committed such corporations to furnish the City with gas light or other illuminating light, or with fresh water for domestic or other purposes, acquired a vested right to use all the streets of the City for that purpose without the necessity of obtaining a franchise therefor. It will be noted, however, that the provisions of the Constitution prior to the amendment of October 10, 1911, extended the privilege of using the streets only for certain designated purposes, namely, "for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes." Under this provision as it existed prior to the amendment, it was held by this office that a franchise was necessary for the erection of poles or stringing wires for the furnishing of electricity for power purposes alone. While there can be no question as to the correctness of that view, a more difficult question now arises under the law as announced by the Supreme Court of the United States, namely: to what extent may equipment installed for the purpose of furnishing water or light be used without a franchise for the purpose of furnishing power?

It has been held by the Supreme Court of this State that a gas company having a constitutional right to use the streets of a city for the purpose of laying its pipes for furnishing gas for illuminating purposes may also, without additional franchise or permit, use such pipes for the purpose of furnishing gas for heat; that, even though the pipes when laid, were used for purposes

other than supplying light, the corporation was not thereby deprived of its constitutional right to lay and maintain its pipes in the streets. (People vs. L. A. etc. Gas Co., 150 Cal. 557; In re Johnston, 137 Cal. 115; Denninger vs. Recorder's Court, 145 Cal. 638.)

It has also been assumed, without a direct decision upon the subject, that the constitutional privilege of erecting poles for the purpose of furnishing electricity for lighting purposes included the right to furnish such electricity for power purposes. (Pereria vs. Wallace, 129 Cal. 397.)

Under the authority of the cases above referred to it must be held that, if a public service corporation has the right to erect poles and string wires for the conduct of electricity for lighting purposes, such poles and wires may also be used for the conduct of electricity to be used for power purposes, without the necessity of obtaining a franchise covering this latter use.

You are therefore advised:

1. The Sierra and San Francisco Power Company has no legal right to engage in the commercial business of furnishing power to customers by use of poles and wires erected by the United Railroads under its franchise for the operation of a street railway system.

2. The constitutional rights of the Sierra and San Francisco Power Company, if any, to the use of the streets of the City for purposes of furnishing light and power through the installation of other equipment depend on the facts which may have existed prior to October 10, 1911, as to the actual lighting business in which the company was engaged prior to that date. Concerning those facts I am not advised.

Upon the general questions above discussed you are further advised:

1. Every public service corporation which had, prior to October 10, 1911, taken such action as committed it to the duty of furnishing either water or light to the inhabitants of the City and County of San Francisco, thereby obtained a vested right to use all the streets of the City for that purpose, and that such use by such a corporation may be had without a franchise.

2. A public service corporation, having rightfully erected and

maintained upon the streets of the City the necessary equipment for furnishing electricity for lighting purposes, may also furnish by means of the same equipment electricity for purposes of power, without the necessity of obtaining a franchise covering this latter use.

3. All public service corporations that had not obtained the constitutional privilege of using the streets prior to October 10, 1911, cannot now so use the same without obtaining a franchise therefor from your Board.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Payment of Assessment Before Acceptance of Street by City.

February 25, 1916.

Gentlemen: I am in receipt of your communication as follows:

"The Committee on Streets and Sewers directed me to send you the communication of G. Toyne, Secretary Mission Political Improvement Association, requesting an opinion relative to payment for street work prior to full acceptance by the Board of Public Works."

Opinion.

The question propounded by the Mission Political Improvement Association, through its Secretary, Mr. G. Toyne, is "Can payment for street work done under public contract be enforced before the Board of Public Works and the Board of Supervisors fully accept the work done, when such full acceptance cannot be made under the Charter?"

This question cannot be categorically answered, because it is formed in a manner which requires and calls for an explanatory reply. In the first place, street work is not "accepted" by the Board of Public Works. All work performed on the streets of this City, under public contract is done in accordance with the

provisions of Ordinance No. 2439 (New Series), known as the "Street Improvement Ordinance."

Section 15 of said ordinance provides that the work provided for must be done under the direction and to the satisfaction of the Board of Public Works and when the work shall have been completed to the satisfaction of said Board it shall so declare by resolution and thereupon the Board shall deliver to the contractor who performed the work a certificate of completion.

Section 16 of the Ordinance provides that when any work in or upon any public street shall have been completed according to contract the Board of Public Works shall make an assessment to cover the sum due for the work performed and specified in the contract.

After providing for the making of the assessment, Section 19 of said ordinance provides that to the assessment shall be attached a warrant which shall be signed by the President of the Board of Public Works and countersigned by the Secretary thereof and the form of the warrant is set out in said Section 19. It is further provided in said section that said warrant, assessment and diagram shall be recorded in the office of the Board of Public Works. When so recorded the several amounts assessed shall be a lien upon the lands, lots or portions of lots assessed respectively for the period of two years from the date of said recording, unless sooner discharged. After said warrant, assessment and diagram are recorded the same shall be delivered to the contractor or his agents or assigns on demand and by virtue of said warrant said contractor or his agents or assigns shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contract.

So that, according to the provisions of Ordinance No. 2439 (New Series) herein referred to, the contractor who performs work upon any public street in San Francisco under contract in the manner specified by said ordinance, upon receiving the assessment, warrant and diagram referred to, may proceed to collect the several amounts due for said work. In other words, it is only necessary, in order to enable the contractor to collect his money, to have the Board of Public Works pass a resolution of completion as provided in Section 15 of the ordinance that the work has been done according to the plans and specifications

and to the satisfaction of the Board of Public Works, and to receive his warrant.

Section 22, Chapter II, Article VI of the Charter provides that when any street or portion of a street has been or shall hereafter be fully constructed to the satisfaction of the Board of Public Works and the Supervisors and is in good condition throughout, and the sewer, gas pipes and water pipes are properly laid therein the same shall be accepted by the Supervisors by ordinance and thereafter such street or portion of the street shall be kept in repair and improved by the City and County.

The purpose of Section 23 is to relieve the property owner of liability for repairs or replacement of streets which have been once improved, and casts the burden upon the City. Obviously, the City does not wish to accept that burden, if the pavement is to be afterward torn up for the purpose of installing sewer pipes, etc., and for that reason said pipes must be laid before the street is accepted by the City.

Therefore the answer to the question asked is, that the payment of the cost of street work done under public contract, may be enforced by the contractor, after the Board of Public Works has issued to him the warrant, assessment and diagram and has adopted a resolution that the work has been completed according to the specifications and the terms of the contract. The right of the contractor to his money does not depend upon the acceptance of the street by the City and County through action of the Board of Supervisors. Such a theory is opposed to and by the Street Improvement Ordinance which contemplates the performance of street work, the completion thereof to the satisfaction of the Board of Public Works and the payment of the cost thereof by the owners of property assessed therefor.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Permit for Stable Erected Prior to Passage of Ordinance No. 334 (New Series).

February 28, 1916.

Gentlemen: I am in receipt of your communication of February 18, 1916, as follows:

"The Public Health Committee has directed me to request you for an opinion as to whether or not Ordinance No. 334 (New Series) would prohibit the issuing of a permit for a stable for more than four horses under the following circumstances:

"For many years prior to the passage of Ordinance No. 334 (New Series) a stable for more than four horses was maintained at 1237 Folsom Street. The stable was vacated about two weeks ago and new tenant applied to the Supervisors for permission to stable 40 horses in the building. An attorney representing protesting property owners contends that Ordinance No. 334 (New Series) became operative against the premises when they were vacated by the former tenant.

"The Committee wishes to know if this contention is correct and if Ordinance No. 334 (New Series) applies to old stables when once they have been vacated."

Opinion.

Ordinance No. 334 (New Series), approved January 9, 1908, provides that it shall be unlawful for any person, firm or corporation to hereafter construct, maintain within fifty feet of any residence, dwelling-place, schoolhouse, or church any stable for more than four horses, or to maintain as a stable for more than four horses within fifty feet of any residence, dwelling-place, schoolhouse or church any existing structure not used at the date of the passage of this ordinance for stable purposes.

It appears from your communication that for many years prior to the passage of Ordinance No. 334 a stable for more than four horses was maintained at the location indicated in your letter. If Ordinance No. 334 provided that it would be unlawful to hereafter construct and maintain or to maintain as a stable for more than four horses any building within fifty feet of any residence, etc., then I would be constrained to say that upon the vacation of the building used for stable purposes or the abandonment of the stable business formerly carried on in the premises,

the ordinance would be operative and would prevent the said premises from thereafter being used for stable purposes for more than four horses, but the language used in Section 1 of said ordinance, "Any existing structure not used at the date of the passage of this ordinance for stable purposes" takes the particular case mentioned in your communication out of the operation of the ordinance for the reason that it appears that the structure at 1237 Folsom Street was used for many years prior to the passage of Ordinance No. 334 as a stable for more than four horses and that fact brings it within the exception in said ordinance noted.

It is my opinion that the ordinance does not apply to the premises here involved because said premises were used at the date of the passage of said ordinance for stable purposes and, therefore, under the provisions of Ordinance No. 2639 (New Series), approved February 26, 1914, page 459 of the Ordinance Book dated December 1, 1915, your Honorable Board has authority to issue a permit for said stable, providing that the provisions of Ordinance No. 2639 (New Series) are complied with.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Right of Civil Service Commissioners to Fix Compensation of Investigators.

March 10, 1916.

Sir: I am in receipt of your communication under date of March 8, 1916, as follows:

"The following is a copy of a letter received from the Civil Service Commission which is in reply to a request from me for information as to the employment of Mr. Wm. Golden, whose position was changed from Assistant Examiner to Assistant Inspector, and the salary increased from $150 to $200 a month:

"'In reply to your letter of February 18, 1916, relative to the position of First Assistant Inspector, we beg leave to state that the compensation of said position is to be drawn from the fund of five thousand dollars allowed by Section 1 of Article XIII of the

Charter for the Inspection Service provided in Section 14 of said Article. This position was not created by Ordinance of the Board of Supervisors but was established by this Commission under authority of Section 17 of Article XIII of the Charter, which provided that "The compensation of special examiners employed under Section 5 *and of the investigators employed to perform the duties set forth in Section 14 shall be fixed by the Commission*".'

"Will thank you to advise me if the Civil Service Commission has the power under the section referred to in the Charter to create the position and also raise the salary."

Opinion.

Section 1 of Article XIII of the Charter provides that "the Supervisors shall appropriate annually not less than twelve thousand five hundred dollars for the expenses of the Commission, and not less than five thousand dollars additional for the inspection service provided in Section 14 of this article."

Section 14 imposes upon the Civil Service Commission the duty of investigating the enforcement of the provisions of Article XIII, and Section 17 provides that "The compensation of Special Examiners employed under Section 5 and of the investigators employed to perform the duties set forth in Section 14 shall be fixed by the Commission."

You are advised that the Charter contemplates that the Civil Service Commission shall be given a very great measure of power in the selection of Special Examiners and Investigators and that in the fixing of the compensation of such employees the Commission has full authority. It is only when the Commission seeks to employ permanent assistants that the salaries must be fixed by the Board of Supervisors.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Right of Supervisors to Allow Supply Committee to Incur Expenses.

March 10, 1916.

Sir: I am in receipt of your communication under date of March 2, 1916, as follows:

"From about the beginning of His Honor Mayor Rolph's administration there has been in operation a Bureau of Supplies, established by the Board of Supervisors. The Board appointed a superintendent who receives an annual salary of $3000 as per Budget Item No. 6. It has been customary during all this time for the Board to appoint assistants to help the superintendent, the demands, which do not cover services of a permanent nature, reaching me at different times and reading 'For services rendered the Supplies Committee.' These demands, which are not in the form of salary warrants, are approved by the Finance Committee and the Supplies Committee of the Board of Supervisors and then are passed in open session by the whole Board. These demands have been approved by me heretofore, and I would now thank you to advise me if in your opinion the Board of Supervisors has the authority to make these appointments. I might add that the Board of Supervisors has provided funds for the payment of these services in Budget Item No. 21. The approval of these demands has never been questioned, but recently it has been suggested to me that there might be some question as to the validity of these appointments."

Opinion.

Budget Item No. 21 of the General Fund of the Board of Supervisors reads as follows: "Supply Committee Expenses, $1200."

I am of the opinion that the demand passed by the Board of Supervisors reading "For services rendered the Supply Committee," as indicated in the above request, is valid and you are justified in approving the same.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Exposition Auditorium—Salary of Manager for Services Performed Under Appointment of Board of Public Works, Not Affected by Action of Board of Supervisors.

March 13, 1916.

Gentlemen: I am in receipt of your communication under date of February 28, 1916, in which you ask to be advised in the matter of payment of the salary of Mr. Louis Levy, appointed Manager of the Exposition Auditorium by the Board of Public Works. You enclose a report of the Civil Service Committee of your Board under date of February 28, 1916, reading as follows:

"Your Committee on Civil Service, charged under the rules with promoting efficiency in the several departments, desires to report that its attention has been called to the fact that for more than two months past there has been an Acting Superintendent at the Exposition Auditorium, appointed by the Board of Public Works; that he has rendered service to the City and the City has received value therefrom; that his salary during the period of his employment has been refused payment, owing to the question as to the validity of his appointment.

"It is the belief of this Committee that, irrespective of any legal question involved, the salary of said superintendent should be paid and your Committee recommends for the purpose of paying said salary, the validity of his appointment be conceded for this purpose and that the Finance Committee approve his claim therefor. That the adoption of this report by this Board by a majority vote of the Supervisors carry with it the recommendation herein set forth."

Opinion.

My understanding is that your Honorable Board desires advice as to whether under the law it should approve the salary of Mr. Louis Levy.

In my opinion action by your Board in this case can have no possible bearing upon the payment of Mr. Levy's salary for services already performed. Under date of January 8, 1916, I advised the Auditor in the matter of the appointment of Mr. Levy that the sole question to be determined by the Auditor was the character of the duties to be performed by Mr. Levy under his appointment by the Board of Public Works. I advised that if

his duties were to superintend and manage the Auditorium building in the same manner as superintendents of private buildings generally superintend such buildings, having a general control in the matter of renting, etc., that his appointment by the Board of Public Works was illegal inasmuch as this general control of the Auditorium was under the jurisdiction of the Board of Supervisors.

I also advised that if Mr. Levy's duties were simply to superintend the cleaning, repair and maintenance of the Auditorium, as contemplated in Subdivisions 4 and 6 of Section 9, Chapter I, Article VI of the Charter, that his appointment was valid and the Auditor should pay his salary irrespective of whether or not the salary demand was approved by the Finance Committee of the Board of Supervisors.

I am therefore writing to respectfully advise that I cannot see how action one way or the other by the Board of Supervisors in this matter can have any possible effect upon the payment of Mr. Levy's salary for services already rendered.

Mr. Levy's position has been created by the Board of Public Works either legally or illegally. If lawfully created, as explained in my opinion to the Auditor, the salary should be paid without any action at all by the Board of Supervisors. If unlawfully created, the mere approval of the demand by the Board of Supervisors will be a vain act since the Board certainly can have no greater control over such a position unlawfully created than it could have over a regularly created position.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Power of Board of Supervisors to Pass Resolution Limiting Employment on Public Work to Citizens and Residents of San Francisco.

March 14, 1916.

Gentlemen: I am in receipt of your communication of the 8th inst., as follows:

"By direction of the Board of Supervisors I hand you resolution introduced by Supervisor Walsh regarding the employment of none but citizens on the Church Street Railway.

"Discussion followed the introduction of this resolution along the line of making it apply to all public work.

"The Supervisors desire to know if such a resolution can be legally passed and enforced.

"The resolution referred to is as follows:

"'Resolved, That all people employed on the Church Street extension of Municipal Railways and on all public work during its construction shall be none other than citizens and residents of San Francisco, and be it further

"'Resolved, That the Board of Public Works be and is requested to instruct and direct its inspector or inspectors on said construction to enforce the letter and spirit of this resolution'."

Opinion.

In the case of Neal Publishing Company vs. Rolph, reported in 169 Cal., pages 190 et seq., the Supreme Court of this State in deciding an application for a writ of mandate commanding the appellant as Mayor of the City and County of San Francisco to sign and execute a certain contract with the petitioner for the furnishing of certain supplies in the way of printed forms and blanks for use in the several departments of the City government, which contract had been awarded to the petitioner as the successful bidder for such supplies, after deciding that the furnishing of supplies was simply one for the sale and delivery of printed forms and blanks and was not the performance of *work* for the City, discussed Resolution No. 2458 (Fourth Series) of the Board of Supervisors, passed in the year 1899, before the going into effect of the present Charter. That resolution provided

that the heads of departments be instructed to patronize only printing establishments that paid full wages and as a guarantee thereof the City and County printing thereafter should bear the label or be done in offices entitled to the use of the label of the Allied Printing Trades' Council of the City and County of San Francisco as registered with the Secretary of State of California and that the Printing Committee be instructed to award all jobs for printing to union offices.

The Court on page 197 held that the resolution was clearly inconsistent with the provisions of the Charter of San Francisco and must be held to be without force. The Court proceeded to say:

"But regardless of this, and construing the resolution as purporting to apply to the Board of Supervisors, it is clearly inconsistent with provisions of the Charter of San Francisco, and must be held to be without force. It is needless to say that the provisions of the Charter are paramount. Only ordinances, orders and resolutions that were not inconsistent with the present Charter were continued in force at the time of its adoption, so that if the resolution was valid under the old Consolidation Act, which is not at all clear, it died with the adoption of the new Charter, if inconsistent therewith. The matter of stationery and supplies in the way of printed blanks is regulated by the provisions of Sections 1 and 3 of Chapter III of Article II of the Charter. A method of competitive bidding for contracts to furnish such supplies is provided, and the Board of Supervisors has no power to purchase or pay for the same unless the provisions in regard thereto are strictly followed. Advertisement for bids for at least ten days, requiring the bidder to state the prices at which each article will be furnished as the same may be required, must be made, and as to printed blanks, 'the contract or contracts must be made with the lowest bidder offering adequate security, quantity and quality being considered.' The only condition imposed by the Charter is that no article furnished shall have been made in any prison. Subject only to the right of the Supervisors, provided for by Section 5 of the same Charter, when they 'believe that the prices bid are too high, or that bidders have combined to prevent competition, or that the public interest will be subserved thereby' to 'reject any and all bids,' they must award the contract to the lowest bidder offering adequate security, 'quantity and quality being considered.' *They*

cannot impose additional conditions, and any ordinance or resolution purporting to do so is ineffectual. The inconsistency of the resolution relied on with these provisions of the Charter is obvious."

While the resolution passed upon by the Supreme Court in the Neal case differs from the proposed resolution in that Resolution No. 2458 (Fourth Series), prescribed those printing offices to whom contracts were to be let for said printing and the proposed resolution prescribed the kind of laborers or mechanics to be employed upon all public work, yet the principles involved in both cases are the same. The Supreme Court held that the Board of Supervisors had no power or authority to impose additional conditions upon the making of contracts in the City and County of San Francisco and that any ordinance or resolution purporting to so impose additional conditions is ineffectual.

The method of competitive bidding for public work is provided in Chapter 1, Article VI, of the Charter (Secs. 14, 15, 16, 17, 18 and 21). Nowhere in any of said sections is it made a condition for the awarding of the contract for public work that the contractor employ none but citizens and residents of the City and County of San Francisco. Obviously it would not be necessary for your Honorable Board to adopt a resolution of this character if the same was a part of the Charter itself. Not being a part of the Charter itself the Supreme Court of the State of California has held in the case decided that your Honorable Board has no power to legally pass this resolution and you are so advised.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Validity of Ordinance Requiring Report of Engine Numbers from Persons Altering or Repairing Motor Vehicles.

March 15, 1916.

Sir: I am in receipt of your request for an opinion as follows:

"I would like to have you advise me your opinion as to whether it would be possible to have drafted and passed in this City and County an ordinance compelling all firms who make a business of altering or repainting motor vehicles to file with the Police Department the engine numbers of all such vehicles, which come to them for alterations, or which are to be repainted, stating at the time the numbers are filed, the character of the work to be done upon the vehicle.

"This would, in a way, serve as a check on motor vehicles which are stolen, and which are altered or painted another color in order that the thieves may operate same, or dispose of them without fear of detection.

"Trusting that I may be advised of your decision in the matter as soon as possible, I remain,"

Opinion.

It has been universally held that an ordinance requiring reports of articles pawned to be made to the Police Department or requiring pawnbrokers to keep a book in which should be entered a description of the property pawned with them, together with a description of the person leaving it, and to submit such book to the police for inspection on demand is a valid police regulation.

Harrison vs. People, 121 Ill. App. 189;
Launder vs. Chicago, 111 Ill. 291;
Shuman vs. Ft. Wayne, 26 N. E. 560;
Kansas City vs. Garnier, 46 Pac. 707;
Grand Rapids vs. Braudy, 64 N. W. 29;
St. Joseph vs. Levin, 31 S. W. 101.

The reason for these ordinances is well stated in the opinion of the Court in the Garnier case above cited:

"In view of the nature of the business, the character of many that are engaged in it, and the well-known fact that the pawn-

shop is frequently made a hiding place for the fruits of crime, the regulations prescribed by the ordinance cannot be regarded as unreasonable or oppressive. They are intended for the protection of the public and they also tend to protect the pawnbroker himself from imposition and loss."

Likewise, in Alabama and North Carolina, laws have been upheld regulating the sale of seed cotton in less quantities than a bale on the ground that seed cotton in smaller quantities was peculiarly liable to theft.

Davis vs. State, 68 Ala. 58;
State vs. Moore, 104 N. C. 714.

The Davis case cited with approval by the Supreme Court of the United States in Budd vs. N. Y. 143, U. S. 517, 539.

It is evident from these cases that where any business is particularly apt to be resorted to by thieves it is subject to reasonable police regulation.

I therefore advise you that if as a matter of fact stolen automobiles are commonly disguised by altering or repainting them, then such an ordinance as you have suggested would be a proper and reasonable police regulation.

Respectfully,

PERCY V. LONG,

City Attorney.

Chief of Police.

License to Be Paid Monthly by Ticket Sellers.

March 27, 1916.

Dear Sir: I am in receipt of your communication of the 22nd inst., as follows:

"Operating under Section 58, Ordinance No. 3361 (New Series), relative to ticket peddlers, scalpers, etc., it has been the custom since the adoption of said license ordinance for this office to issue a one-day license at the rate of $10.00 per day, this office realizing that where a person wishes to operate for a special

event, that a $300 imposition for the month is out of all proportion.

"Would you kindly advise me at once as to the shortest possible time the license can be issued for under this section?"

Opinion.

Section 58 of Ordinance No. 3361 (New Series), makes it obligatory upon every person selling any theatre or opera ticket or other ticket of admission to any place of amusement or entertainment at any place other than the office of the management of any theatre, place of amusement, or entertainment to take out and obtain a license to be known as a Ticket Peddler's License. The amount of such license is set forth in the following paragraph of Section 58:

"Said license shall be issued by the Tax Collector at the rate of three hundred ($300) dollars per month for each license."

The Tax Collector of the City and County of San Francisco is a ministerial officer, exercising such duties as may be imposed upon him by the Charter or by the law of the State of California (Charter, Sec. 2, Chap. V, Art. IV), and therefore he is restricted in the performance of his duties by the Charter or by general laws.

His duty as to the collection of licenses is clearly set forth in Section 2, as follows:

"The Tax Collector *must* collect all licenses which may at any time be required by law or ordinance to be collected within the City and County."

Applying the above provisions to the question involved herein I am of the opinion that it is incumbent on the Tax Collector to regard a license issued under the provisions of Section 58, Ordinance No. 3361 (New Series) as a monthly license and to receive and collect from each applicant for such license the sum of $300.

The Board of Supervisors have not seen fit to prescribe a so-called one-day license in the ordinance. It might very well be that the Board, not wishing to fix a quarterly or an annual license has determined that the smallest period of time for

which the license should be issued, under Section 58, should be one month.

It is not within the province of a ministerial officer to construe an ordinance such as this, and put his own construction upon its terms, and decide that the ordinance imposing a license "at the rate of $300 per month" means "at the rate of $10 per day."

If a change is needed so as to make it possible for the Tax Collector to issue one-day licenses at $10, the change should be made by the Board of Supervisors, in which resides the power to fix the amount and the terms of all licenses within the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Regulation of Moving Pictures.

March 29, 1916.

Gentlemen: I am in receipt of your communication under date of March 16th, as follows:

"Enclosed please find copy of proposed amendments to Ordinance 761 (New Series) regulating moving picture exhibitions.

"The Police Committee of the Board of Supervisors wishes to know if it is within the power of the Board of Supervisors to enact legislation of this character. Your attention is called to your opinion dated December 30, 1915, relating to the same subject."

Opinion.

On December 30, 1915, I advised the Board of Supervisors that it had power to enact such legislation as it deemed necessary to control moving picture exhibitions. The Supreme Court of the United States in Mutual Film Corporation vs. Industrial Commission, decided February 23, 1915, has in a very sweeping opinion held such control to be a proper exercise of police power.

The opinion of this office rendered December 30, 1915, did not attempt to discuss the phraseology of the proposed amend-

ment, but your query at this time indicates a desire to be informed as to the effect of such a change as is now sought to be made.

The proposed amendment making unlawful the displaying, etc., of any picture "that reflects reproach" upon any race or tends to incite race hatred or stirs up race prejudice" is far reaching. Under this amendment discretion is vested in the Advisory Board to reject films which seek to delineate character or picture periods of history, if such pictures, though true to life, tend to offend the sensibilities of some race or its descendants. War pictures and the filming of stories and plays which have become classics could be barred if the people of any race felt that such books or plays or war films in any way reflected reproach upon such race. So far reaching is the scope of the amendment that its possibilities in the matter of prohibition are almost unlimited where portrayal of character, individual or type is sought.

I doubt very much whether it would be possible to enforce such a provision, owing to its failure to define what would be calculated to "reflect reproach upon any race, or tend to incite race hatred or stir up race prejudice."

The Supreme Court of California, in the case of Hewitt vs. Board of Medical Examiners, 148 Cal. 590, held that a license to practice medicine could not be revoked under a provision of a statute which read "that all advertising of medical business in which grossly improbable statements are made" shall constitute unprofessional conduct, for which the medical examiners may revoke the certificate, without defining what statements shall be deemed "grossly improbable" and which leaves it to the whim or caprice of medical examiners without any standard for their guidance. This language is held to be too indefinite and uncertain to be enforced by the revocation of the physician's certificate and the provision is void.

The Court goes on to say:

"We hardly think it necessary to further pursue this subject. The right which a person possesses under the constitution and the laws to practice his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain and indefinite as is the provision we have been considering. If a physician's license is to be revoked for 'grossly

improbable statements'; if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made 'grossly improbable statements' in advertising his medical business—it is requisite that the statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them. It is an easy matter for the Legislature to declare what statements in the advertisement of medical business shall be deemed 'grossly improbable,' and it must do so, and not leave it to a board of medical examiners after the publication is made to determine in its judgment whether the statements were or were not 'grossly improbable,' and according to its particular view of the matter revoke or refuse to revoke the license. The right to practice medicine cannot be made to depend upon such a vague, uncertain, and indefinite provision. The conclusion we reach as to the invalidity of this provision is, in our judgment, sustained by the general principles announced in the main and concurring opinions in Ex parte McNulty, 77 Cal. 164 (19 Pac. 237, 11 A. St. Rep. 257), and in Matthews vs. Murphy, 23 Ky. Law Rep. 750 (63 S. W. 785)."

In my opinion this case has direct application to the amendment and makes it non-enforceable. In all other respects the ordinance is unobjectionable.

Respectfully,

PERCY V. LONG,

City Attorney.

Police Committee,
Board of Supervisors.

Supervisors to Make Contracts for Hiring of Horses and Buggies and for Horseshoeing.

April 3, 1916.

Gentlemen: I am in receipt of your communication as follows:

"The Board of Public Works is in receipt of the two following communications from the Chairman of the Supplies Committee of the Board of Supervisors:

'January 31, 1916.

Board of Works—

Gentlemen: The Supplies Committee has made the following allotment of hired buggies in your department:

To J. G. Martin,	4	buggies
To Halloran and Hession,	2	"
To M. Gilmore,	3	"
To Center Stables,	2	"
To P. J. Kelly,	4	"

Requisitions therefor should be filed monthly for approval by the Supplies Committee; unless so approved the demands for this service will not be approved by the Finance Committee.

Yours truly, Andrew J. Gallagher, Chairman Supplies Committee.'

'February 5, 1916.

Board of Public Works, City—

Gentlemen: The Board of Supervisors has imposed on the Supplies Committee the duty of passing upon all requisitions for non-contract supplies.

In the performance of said duty the Committee has considered a number of applications for the City's horseshoeing.

The Committee has investigated the skill of these horseshoers, believing a good shoe as essential as good forage; it also considered if the applicant's shop was conveniently located for your department, and with these facts before it, made the following allotment, viz.:

Felix McCue, 2 horses, from Municipal Railway.
James Lynch, 2 horses, from Street Repair Dept.

These horseshoers will be held to the performance of first-class work, the furnishing of a good shoe, pads with heavy leather backs, and prompt service.

The Committee invites your co-operation—asks you to consult with it freely to the end that the tax-payer shall get good value for his money, which is an obligation resting equally upon both of us.

Yours truly, Andrew J. Gallagher, Chairman Supplies Committee.'

"At its meeting held March 10, 1916, the Board of Public Works directed me to request you to advise it whether it is within the province of the Supplies Committee to issue instructions concerning from whom buggies shall be hired by the Department of Public Works, and by whom the horseshoeing of the Department is to be done."

Opinion.

On the 17th day of July, 1912, I rendered an opinion to the Board of Supervisors holding that the furnishing of horses and buggies to the various departments, offices, boards and commissions of the City and County of San Francisco is a "supply" within the meaning of the word as used in Section 1, Chapter III, Article II of the Charter, which provides that "all contracts for goods, merchandise, stores, supplies * * * must be made by the Supervisors, with the lowest bidder offering adequate security * * * *."

Hon. Franklin K. Lane, as I stated in my said opinion, on the 7th day of April, 1900, to the Board of Fire Commissioners held that a horseshoeing contract is a contract for supplies, and he also on the 21st day of December, 1901, in an opinion given to the Superintendent of Schools (Lane's Opinions 1899-1902, p. 590) incidentally held that a horse and buggy was a "supply" within the meaning of the above Charter provision.

In answer to your inquiry whether it is within the province of the Supplies Committee of the Board of Supervisors to issue instructions concerning from whom buggies should be hired by the Board of Public Works and by whom the horseshoeing of the Department is to be done, you are advised that all such contracts are regulated by the provisions of Section 1, Chapter III, Article II

of the Charter and in said Section 1 it is provided that all contracts for supplies for the various departments must be made by the Supervisors and that means the Board of Supervisors and not a committee thereof.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Claims of John R. Maxwell and James F. Layden for Salaries as Assistant Chiefs, Fire Department.

April 11, 1916.

Sir: I am in receipt of your communication requesting my opinion as to claims filed by John R. Maxwell and James F. Layden for back salaries as Assistant Chiefs.

It appears from your communication that John R. Maxwell served as First Assistant Chief Engineer in the Fire Department for a period dating from April 1, 1913, to May 27, 1914, and James F. Layden served during the same period as Second Assistant Chief. During this period the Civil Service Commission did not approve of the demands of said Maxwell and Layden as Assistant Chiefs but only allowed said parties the salaries of Battalion Chiefs.

Both Maxwell and Layden held ranks in the Fire Department according to classification of the Civil Service Commission as Battalion Chiefs. During the period in question there were no civil service eligibles for Assistant Chiefs. The Fire Commissioners appointed Maxwell as First Assistant Chief and Layden as Second Assistant Chief, temporarily under the provisions of the Charter. The Civil Service Commission, however, refused to give their consent to the appointment of Maxwell and Layden as Assistant Chiefs for the period in question, although prior thereto the Civil Service Commission had consented to such temporary appointments. Both Maxwell and Layden, in presenting their demands, claimed salaries as First and Second Assistant Chiefs respectively and these demands were approved by the Fire Commission. As already stated, the Civil Service Commission ap-

proved of only so much of these respective demands as would amount to the salary of Battalion Chief.

On January 8, 1915, however, a demand was duly presented to you by John R. Maxwell, duly approved by the Fire Commission and the Civil Service Commission for the sum of $1040.00, being the difference between the salary of First Assistant Chief Engineer and that of Battalion Chief from April 1, 1913, to May 27, 1914. Layden also presented a demand on said date for $346.65 duly approved by the Fire Commission and the Civil Service Commission, being the difference between the salary of Second Assistant Chief Engineer and that of Battalion Chief for the same period.

During the period in which Maxwell and Layden received only the salaries of Battalion Chiefs both protested against the deductions made by the Civil Service Commission. The demand coming to you on January 8, 1915, was filed for the purpose of obtaining the deducted portion of their respective demands filed during the period in question for the salaries attached to the position of First Assistant Chief Engineer and Second Assistant Chief Engineer respectively.

Prior to May 27, 1914, the Civil Service Commission regularly held an examination for the position of Assistant Chiefs and certified to the Fire Commission the name of an eligible for First Assistant Chief Engineer and the name of an eligible for Second Assistant Chief Engineer, and on said May 27, 1914, the Fire Commission duly appointed said eligibles to the positions.

You state that the amounts of the demands of Maxwell and Layden are in the City Treasury and if their demands are valid the money is available for payment. You ask to be advised whether or not these claims for back salaries are legal claims.

Opinion.

The positions of First Assistant Chief Engineer and Second Assistant Chief Engineer are recognized by the Charter and they are Charter positions.

In Section 1 of Chapter III of Article IX of the Charter, it is declared that "The Chief Engineer shall be the chief executive officer of the Fire Department, and it shall be his duty and that of the *Assistant Chief Engineers* and of the Battalion Chiefs to

see that all laws, orders, rules and regulations in force in the City or County, or made by the Commissioners concerning the Fire Department, are enforced."

In Section 1 of Chapter VIII of Article IX the salary of *First Assistant Chief Engineer* is fixed at $3600.00 per annum, and the salary of *Second Assistant Chief Engineer* is fixed at $3000.00 per annum.

These positions, however, are subject to the provisions of Article XIII of the Charter, pertaining to civil service, and it was in the power of the Civil Service Commission to hold an examination for these positions and certify to the Fire Commission eligibles for the position, in which case it would become the duty of the Fire Commission to appoint the eligibles.

Prior to May 27, 1914, no list of eligibles had been created and it is my opinion that the Civil Service Commission did not have the power to refuse permission to the Fire Commission to fill the positions of First Assistant Chief and Second Assistant Chief by temporary appointments.

While the Charter provides in Section 10 of Article XIII that "To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this Article (Article XIII) can be made," this provision is for the purpose of protecting the Civil Service requirements of the Charter and to prevent the filling of positions by non-eligibles when eligibles are available. It would be an abuse of discretion, however, for the Civil Service Commission to refuse approval of a temporary appointment in a position created by Charter when the Civil Service Commission did not have a list of eligibles for the position. Otherwise it would be in the power of the Civil Service Commission to cause an entire stoppage of public business in a department if a list of eligibles for a department were not created by the Civil Service Commission. No such drastic result could have been intended by the Charter framers in enacting the provision referred to.

I am convinced, therefore, that the appointment of Maxwell to the position of First Assistant Chief and the appointment of

Layden to the position of Second Assistant Chief were entirely valid and that they became entitled to the salaries attached to those respective positions.

Section 19 of Article XIII of the Charter requires that the pay rolls or demand for salaries, wages or compensations of the deputies, assistants, clerks and employees of all departments subject to Civil Service shall be transmitted to the Civil Service Commission before presentation to the Auditor. The section further provides that "The Auditor shall not approve and the Treasurer shall not pay any demands or warrants for salaries, wages or compensation unless said demands shall have been approved by the Civil Service Commission."

Notwithstanding that a demand may be legal the Auditor is not compelled to approve of the same until it has been properly presented to him in the manner provided by the Charter. So long as the Civil Service Commission disapproved of so much of Maxwell's and Layden's demands as represented the difference between the salaries of Assistant Chiefs and that of Battalion Chiefs, you were not legally required to audit the same. However, as pointed out, the Civil Service Commission subsequently approved of these demands in full in the form of a separate demand for the difference between the amounts that they were legally entitled to and that which they had been paid. There is no particular form required by the Charter for the approval made by the Civil Service Commission to salary demands. It is my opinion that the subsequent approval by the Civil Service Commission meets the requirements of the Charter.

I therefore advise you that in my opinion Maxwell and Layden are entitled to the amounts of their respective claims.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Use of Money Received From the Said Highway Taxes on Automobiles for the Improvement of the Great Highway.

April 11, 1916.

Gentlemen: I am in receipt of your communication of March 24th, reading as follows:

"I have been directed by the Board of Park Commissioners to request you to inform this office whether or not the money derived from the State Highway Tax on automobiles can be used for the improvement of the driveway along the Ocean Beach, known as the Great Highway.

"We have a communication from the San Francisco Chamber of Commerce recommending that the taxes from automobiles be used to improve the Great Highway and in the morning's newspapers we see an article stating that the law prohibits the use of this money for the improvement of roads or driveways under the jurisdiction of the Park Commission.

"We would like to be informed whether or not the law prohibits the use of this money for the improvement of the Great Highway, provided it is transferred to the Park Fund."

Opinion.

Two questions are involved in your communication: (1) Under the State law from which the City and County of San Francisco obtains a portion of the State Highway Tax on automobiles, can this money be used for the improvement of the Great Highway? (2) can it be used for that purpose under the provisions of the Charter?

Section 35 of the Act approved by the Legislature on May 31, 1913 (Statutes 1913, page 639), known as the Motor Vehicle Act, provides:

"All fees or other moneys paid to or collected by the state treasurer, under the provisions of this act, shall be placed in a fund which shall be known as the 'motor vehicle fund,' which fund is hereby created; provided, that one-half of the net receipts under this act shall be returned to the counties from which received, as determined by the places of residence of the persons to whom the licenses are issued, and all such amounts returned shall be paid into the road funds of the several counties receiving the same. * * *"

This section further provides that for the purposes of Section 35 the City and County of San Francisco shall be considered as a county.

The Great Highway is a boulevard in the City and County of San Francisco under the jurisdiction of the Board of Park Commissioners and there is nothing contained in the Act of the Legislature which would prevent the City and County of San Francisco from using money received from this fund for the improvement of that boulevard. The purpose of the Act is to permit counties, the City and County of San Francisco being so considered under the Act, to improve principal arteries of travel. The improvement of a boulevard of the character of the Great Highway comes within the spirit and letter of the Act.

The second question is: Does the Charter prevent the use of this money for the improvement of the highway? As already stated, the jurisdiction over the Great Highway is under the Park Commission and its repair and upkeep has been maintained by the Park Commission from the tax annually levied by the Board of Supervisors for the purposes of the Park.

Section 11 of Article XIV reads:

"The Supervisors shall provide all necessary money for the maintenance, preservation and improvement of said parks, squares, avenues and grounds, and to that end shall annually levy a tax on all property in the City and County not exempt from taxation, which shall not be less than five cents nor more than seven cents upon each one hundred dollars assessed valuation of said property."

This provision is simply a limitation on the power of the Board of Supervisors to levy a tax for the purposes of the Park. The Supervisors cannot levy a tax upon property in the City and County of San Francisco which shall be more than seven cents upon each one hundred dollars assessed valuation of said party. The tax for park purposes for the fiscal year 1915-16 was seven per cent. If a part of the automobile state tax fund is devoted to the improvement of the Great Highway the amount expended for the park will, therefore, be in excess of seven per cent upon the assessed valuation of all property in the City and County of San Francisco. This money, however, does not come from a tax on property in the City and County of San Francisco.

It is a tax levied by the State and there is nothing in Section 11 of Article XIV which would prevent the expenditure by the City and County of San Francisco of moneys in excess of seven per cent which came to the City and County of San Francisco from sources other than a tax on property in the City and County of San Francisco levied by the Supervisors. The same situation would occur if there were a donation to the Park of a sufficient amount of money to improve the Great Highway. The limitations of Section 11, Article XIV would not control and though there were a donation of such an amount to be expended in the next fiscal year the Board of Supervisors could still levy a tax of seven per cent on the assessed valuation of all property in the City and County for the use of the Park.

The Motor Vehicle Act provides that the money shall be expended by the Board of Supervisors. This money is not a part of the funds under the exclusive control of the Park Commission. If any portion of the State Highway Tax on automobiles is used for the improvement of the Great Highway it must be made through the Board of Supervisors.

I therefore advise you that in my opinion the Board of Supervisors may devote any part of the tax received from the State coming from the tax levied by the State on automobiles for the improvement of the Great Highway.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Park Commissioners.

Petition of Ocean Shore Railroad Company for a Double Crossing on Howard Street East of Twelfth Street, Etc.

April 12, 1916.

Gentlemen: I am in receipt of your communication requesting whether or not there are any legal objections to granting the petition of the Ocean Shore Railroad Company for the re-arrangement of tracks and station buildings at the corner of Twelfth and Mission Streets, necessitating a double crossing on Howard Street east of Twelfth Street and the re-arrangement of the sidewalk on Twelfth Street.

Opinion.

I hereby advise you that in my opinion there are no legal objections to granting the permission to said company.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Proposed Agreement Between City and United Railroads Concerning Church Street Railroad.

April 19, 1916.

Gentlemen: I am in receipt of your communication of April 13th, reading as follows:

"The Public Utilities Committee submits to you herewith tentative draft of a proposed agreement between the United Railroads and the City, regarding the use of two blocks of United Railroad tracks on Church Street, and transfers at Church and Market Streets.

"Will you please advise the Committee as to the legal form and conditions of this proposed agreement, and further advise the Committee as to your judgment of the desirability of entering into this arrangement. Further, will any of the proposed conditions impair in any way any right of the City of San Francisco?"

Opinion.

1. Upon the "legal form and conditions" of the proposed agreement I cannot fully advise you for the reason that I do not know the desires of the committees as to what shall be contained in the agreement. Before I can clearly advise you as to this matter I should have presented to me what conditions the committee desires to be incorporated in the agreement. If it is to be assumed that the agreement covers all the conditions that are desired I see no objection to the form in which they are stated excepting in the preamble. The City claims the absolute right to use the tracks owned by the United Railroads on Church Street upon the payment by the City of the cost of connections and an equal portion of the cost of construction of the tracks and appurtenances to be used by the company and the City jointly. The City likewise claims the absolute right to lay down tracks on Market Street between Van Ness Avenue and Church Street. The company denies that the City possesses such rights. The preamble ought to proceed upon the theory that both parties claiming these things and the matter not having been adjusted between the parties or settled in the courts, the parties are willing to enter into a temporary agreement until such an adjustment or settlement is had. The point is probably covered in the last paragraph of the agreement and so far as the legal effect is concerned the form in which the agreement now is does not impair the City's right in its contentions. It is purely a matter of form rather than one of legal effect. However, if the form should be changed as I have suggested it would conform more clearly to the facts. However, until negotiations between the company and the City settle the terms and conditions of the proposed agreement I am unable to fully advise you on the subject matter of the agreement.

2. You further ask me to advise your committee as to the desirability of entering into this agreement. That question is solely a question of policy to be determined by the Board of Supervisors and the Mayor. It is not my official province to advise you as to matters depending solely upon policy. If the City desires to enter into a temporary arrangement with the United Railroads such as is embodied in the agreement, it is my judgment that the City has the power to do so. Whether it shall or not must be decided by the Supervisors and the Mayor.

3. You further ask—"Will any of the proposed conditions impair in any way the right of the City of San Francisco?" The

theory of the agreement is that until final settlement, either in the Courts or without, of the claims made by the City as to its right to the use of the streets in question a temporary agreement is entered into. In my judgment the entering into of such a temporary agreement does not impair the rights which the City has if the City proceeds to assert those rights.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Legality of Recommendation by Street Committee to Refund to Property Owners for Money Paid Under Private Street Contract.

April 20, 1916.

Gentlemen: I am in receipt of your communication of the 14th inst., as follows:

"The Finance Committee desires your opinion as to the legality of a recommendation by the Street Committee wherein it is proposed to refund $300 to property owners who have paid the Barber Asphalt Company for street work at the crossing of Randall and Whitney Streets; said property owners being liable for an assessment for work done by Church and Clark at said crossing of Randall and Whitney Streets.

"I am informed that the facts in this case are as follows:

"The Barber Asphalt Company collected from the property owners the $300 herein referred to, and as I understand, without proper authorization so to do. Subsequently the Board of Works created an assessment district and work was done and the property owners were again required to pay.

"The matter has been pending for some time before the Board of Supervisors, and Mr. Holcomb of the Engineering Department has all of the detailed facts should you desire to consult him.

"The former Street Committee, I understand, sought to persuade the Barber Asphalt people to repay the $300, but the company declined so to do.

"I am further informed that the Barber Asphalt people performed no work at the crossing in question."

Opinion.

I enclose for your information copy of an opinion rendered to the Board of Public Works on November 19, 1915, on this subject. The facts outlined in your communication agree with those found by me to exist in said opinion.

As no money was paid by these property owners to the City the question of a refund of $300 does not arise. The money was paid to the contracting firm under a misapprehension as to the liability and was paid for work for which, under the law, there was no liability.

I do not see how the City can reimburse these people for money which they paid under these circumstances. The Charter gives no power or authority to your Honorable Board to authorize the payment of a claim or demand of this character. Moreover, the Charter, Section 5, Chapter III, Article IV, provides, in part, as follows:

"The allowance or approval of the Auditor, or of the Supervisors, or of any department, board or officer, of any demand which is not authorized by law or this Charter, * * * shall afford no warrant to the Treasurer for paying the same."

It is my opinion that no action can be legally taken by the Street Committee in recommending to the Finance Committee the payment of the amount involved herein or any amount under the facts recited above.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Regulation of Jitney Buses by Police Department.

April 21, 1916.

Gentlemen: I am in receipt of your communication as follows:

"Some time ago the Board of Supervisors of the City and County of San Francisco was petitioned by a number of merchants and other interested parties, to regulate the operation of jitney buses in San Francisco to the extent of prohibiting them from using or operating their vehicles on Market Street between Sixth and East Streets.

"As a result of the hearing of the application it reached the conclusion that the control and regulation of jitney buses and their operation upon the public streets of San Francisco was a matter which by ordinances previously passed by it was exclusively within the jurisdiction of the Police Department. Accordingly, the petitions, together with all other documents and papers connected therewith, were transmitted by it to the Police Department for action by this Board.

"The ordinances upon which the Board of Supervisors evidently relied for the judgment which it reached, must have been the following:

"Ordinance No. 3212 (New Series), commonly known as the 'Jitney Ordinance,' and particularly Section 21 thereof, which is couched in the following language:

" 'Sec. 21. The Police Department is hereby empowered in cases of fires, accidents, parades, obstructions on, breaks in or repairs of streets, or any emergency, or to prevent accidents or congestion of traffic, or in case of public necessity, to divert and route jitney buses upon such streets as in its judgment is necessary.'

"Ordinance No. 1857 (New Series), commonly known as the Traffic Ordinance, and particularly paragraph 81 thereof.

"It is the opinion of the Board of Police Commissioners that the exclusive jurisdiction of regulating and controlling the permanent use of and traffic upon the public streets of the City and County of San Francisco, is by the provisions of its Charter by which it is governed, delegated to and conferred upon the

Board of Supervisors; that neither such jurisdiction nor authority can be delegated to any other board or branch of the municipal government; and that, while the Police Department has the right, in the exercise of its police power, to temporarily regulate, stop and divert traffic and control portions of the streets in San Francisco, nevertheless, it has no such permanent power or authority and is without right to direct how or in what manner the streets of San Francisco shall be used.

"Among the various provisions to be found in the charter declaratory of the powers of the Board of Supervisors, is found the following:

" 'Subdivision 2, Section 1, Chapter II, Article II.

" 'Except as otherwise provided in this Charter, to regulate and control, for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys and sidewalks of the City and County.'

"Under the provisions of this Charter the Board of Supervisors has also the exclusive right to grant franchises for the operation of railways upon the streets of this City. It occurred to the Commission that if the Police Department, under the ordinances referred to, would itself have the right to divert street cars and traffic from one street to another, or to control and regulate the use of streets, it could void franchises for the use of certain streets, conferred upon some corporation or individual by the legislative branch of the City and County's government.

"In view of the situation above disclosed, before taking action in the matter the Board would be obliged by your furnishing it with your opinion as to whether in your judgment it had the power and authority, if it saw fit to exercise it, to prevent the operation of jitney buses upon Market Street between Sixth and East Streets and to compel them to use some streets other than Market Street in traveling between the two streets referred to.

"On account of the necessity for immediate action by this Board, the importance to the public of the question involved, and the number of persons interested, we trust that you may see your way clear to furnishing us with the desired opinion at the earliest possible moment."

Opinion.

The Police Department, under Section 21 of Ordinance No. 3212 (New Series), is invested with the power to divert and route jitney buses upon the various streets in this City and County only in the cases and at the times mentioned therein, and not with the power to permanently divert or route jitney buses from one street to the other.

The intent to invest that department only with such temporary power is manifest from the language used in the section. The power to divert and route such traffic in cases of fire, accidents, parades, etc., as in the section provided, is opposed to the larger and greater power of permanent regulation of and specification of what streets should be used and traversed by jitney buses in the transaction of their business.

Section 21 was made a part of the ordinance as a police measure and it cannot be construed so as to remove it from a regulation which is purely police and place it in the category of powers which are to be exercised by other authority.

This ordinance is not of the same character as those upheld by our Supreme Court which provide for the issuance of permits by an official in order that a certain privilege be enjoyed. In the case of In re Flaherty, 105 Cal., p. 558, the Court enumerates certain ordinances delegating to officials discretionary power as to the issuance of permits.

My opinion, therefore, is that Section 21 of Ordinance No. 3212 (New Series), does not give to the Police Department power or authority to prevent the operation of jitney buses on Market Street between Sixth Street and the Embarcadero, or to compel them to use some street other than Market Street in traveling between the two streets referred to, except in the cases mentioned therein.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Police Commissioners..

Validity of Grades on Harrison Street.

May 5, 1916.

Gentlemen: I am in receipt of your communication of the 22nd ult., as follows:

"There is transmitted herewith copy of a letter addressed to you under date of December 31, 1915, by the City Engineer.

"Under date of April 17, 1916, the City Engineer reports that at this time there is activity on the part of a number of property owners on Harrison Street to have the street improved, some of these property owners desiring to erect large permanent buildings.

"The Board of Public Works respectfully requests that the City and County Attorney advise it whether or not the grades established by Ordinance 415 (New Series), of the Board of Supervisors, approved April 15, 1908, are the grades to recognize as the official grades on Harrison Street between Essex and Third Streets."

Opinion.

I have examined Ordinance No. 415 (New Series), passed by the Board of Supervisors April 6, 1908, and approved April 15, 1908. Said ordinance is entitled "Changing and Re-establishing the Official Grades on Harrison Street, between Third and Second Streets and from the Easterly Line of Second Street to a Point 412′ 6″ easterly therefrom; on Hawthorne Street between Folsom and Harrison Streets; on Vassar Place and on Stanley Place from the southerly line of Harrison Street to a point distant 110′ southerly from said southerly line of Harrison Street and ordering re-grading of said mentioned portions of said streets and certain street work to be done thereon."

Ordinance No. 415 was passed after the adoption by the Board of Supervisors of Resolution No. 1790 (New Series), declaring the intention of the Board of Supervisors to change and re-establish the grades on the streets mentioned in said ordinance.

Section 1, Chapter VI, Article VI of the Charter provides the method to be pursued by the Board of Supervisors in changing or modifying the grade of streets in San Francisco.

I find that Resolution No. 1790 (New Series), mentioned in Ordinance No. 415 (New Series), complied with all of the

requirements of said Section 1, and in my opinion, the grades established by Ordinance No. 415 (New Series), of the Board of Supervisors, approved April 15, 1908, are the grades to be recognized as the official grades of the streets mentioned in said ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Control of Funds by Various Departments.

May 15, 1916.

Gentlemen: I am in receipt of your communication of the 9th instant, as follows:

"The Building Committee and the Finance Committee of the Board of Supervisors desire an opinion as to the proper and legal control of the expenditure of bond moneys for school purposes.

"It appears that the Board of Education and the Board of Public Works and other departments are from time to time making recommendations for the construction of buildings and other purposes, and at the same time suggest what fund the particular work should be charged to.

"The Building and Finance Committee are of the opinion that the recommendations from these departments should be confined exclusively to the work desired to be done, and leave to the Board of Supervisors the designation of the fund from which payment should be made.

"If this is the legal power of the Board of Supervisors the two Committees desire to be so informed."

Opinion.

Section 1, Chapter V, Article VII of the Charter provides that the Board of Education shall, on or before the first Monday of April in each year, report to the Board of Supervisors, the amount which shall be required during the ensuing fiscal year for the purpose of meeting the current annual expenses of public instruction in the City and County, specifying the amount re-

quired, inter alia, "for leasing rooms or erecting buildings; for furnishing, fitting up, altering, enlarging and repairing buildings."

Section 2, same chapter, provides that the Supervisors at the time and in the manner of levying and collecting other City and County taxes shall levy and cause to be collected for the Common School fund a tax which added to the revenue derived from other sources shall produce the amount of money required.

Subdivision 9 of Section 1, of Chapter III of Article VII of the Charter provides that the Board of Education shall have power to establish regulations for the disbursements of all moneys belonging to the School Department, or to the Common School fund and to secure strict accountability in the expenditure thereof.

Section 1 of Chapter VI, of Article VII, provides generally, that when any locality in the City and County is unprovided with sufficient school accommodations, the Board of Education may, by resolution, make a requisition to the Board of Public Works for plans and specifications and estimates for a new school house, specifying the number of class rooms needed, the location of the proposed school house, the date on which it should be completed, the amount of money in the school fund available for the purpose, and such other information as will enable the Board of Public Works to prepare the necessary plans, specifications and estimates of cost for such school house; the Board of Education shall approve such plans, etc., and return the same to the Board of Public Works, which shall proceed without delay to have such school house constructed and completed in accordance therewith, and upon completion thereof, the Board of Public Works shall notify the Board of Education to examine the same, and if it has been built in accordance with the plans and specifications, and within the estimated cost thereof, the Board of Education shall accept and take possession of it.

Section 2 of Chapter VI, Article VII, provides that when any school house, building, fence, or other property belonging to, or connected with, or under the control of the Board of Education, needs repairing, altering or improving, the Board of Education shall notify the Board of Public Works, specifying in general terms the work to be done, which Board shall cause the same to be done, if the cost thereof shall not exceed $250, otherwise, said Board shall submit plans, specifications and estimates of cost to the Board of Education for its approval, and upon approval

thereof, the Board of Public Works shall cause the same to be done, and if done in accordance with the plans and specifications and within such estimate, the same shall be accepted and paid for out of the Common School fund.

Section 13, Chapter III, Article III provides in part as follows: "All demands payable out of the Common School fund must, before they can be allowed or paid, be previously approved by the Board of Education."

Franklin K. Lane in an opinion given to the Board of Supervisors on February 17, 1900, said:

"The Board of Supervisors at the beginning of each fiscal year must set aside appropriations for the departments named and at such time may, by the appropriation so made, limit and control the expenditure of such department for such fiscal year. But, after such appropriation has been made, responsibility for its expenditure rests entirely upon the department to which it is allowed. The Legislative Department provides the funds; the Administrative Department expends them. Each is to be held responsible within its own province. The legislative branch must see that funds sufficient for needs should not permit of extravagance; the administrative departments are made responsible for the manner in which moneys so appropriated are used. The duty imposed upon the Board of Supervisors of approving all demands upon the funds set aside for such departments is of a purely ministerial character, excepting in so far as it acts as a check upon such department against the expenditure of more than its appropriation permits, or protects the City and County against expenditures of an unlawful character."

From the foregoing I am of the opinion that the departments of the City Government, which have been given exclusive control over the expenditures of the appropriations made for such branches of the Municipal Government, may suggest what fund the particular work required to be done should be charged to and this especially applies to the Board of Education, which under Subdivision 9 of Section 1, Chapter III, Article VII is given the power to establish regulations for the disbursement of all moneys belonging to the School Department, or to the Common School fund.

While your Honorable Board has the power of appropriation, there is nothing in the Charter which prohibits the Board of Public Works or other department or Board from suggesting to your Board out of what fund the money requested by them should be taken.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Municipal Railroad Across Golden Gate Park.

May 16, 1916.

Dear Sir: I am in receipt of your communication of May 12, 1916, as follows:

"The Honorable Board of Supervisors on Monday, May 8, 1916, adopted Resolution No. 12,897 (New Series), as follows:

"'Whereas, The City Attorney has advised that in the construction of a public utility the Board of Supervisors may utilize rights of way across any property owned by the City and County, and

"'Whereas, The Board of Supervisors has committed itself to the project of constructing an extension of the Municipal Railway across Golden Gate Park, and has instructed the City Engineer to propose plans and specifications therefor; therefore

"'Resolved, That the Board of Public Works be directed to proceed with the work of construction of such extension, according to the plans prepared therefor by the City Engineer.'

"I enclose you herewith a copy of the book containing the views of the Park Commissioners on the question of an extension of the municipal railway through Golden Gate Park, addressed to 'Hon. Edward I. Wolfe, Chairman Public Utilities Committee of the Board of Supervisors, City Hall, San Francisco, Calif.,' dated May 4, 1916, in which Hon. Curtis H. Lindley, Acting President of the Board of Park Commissioners gives his opinion of the powers of the Board of Park Commissioners in relation to the proposed Municipal Railway through Golden Gate Park,

which appears to be in direct conflict to an opinion rendered by you and upon which said resolution of the Board of Supervisors was based.

"May I ask for your opinion, in writing, at the earliest possible moment, as to whether or not the Honorable Board of Supervisors have the power to order the construction of an extension of the Municipal Railway System through Golden Gate Park without the consent of the Honorable Board of Park Commissioners?"

Opinion.

In connection with the question I have read the printed views of the Park Commissioners, as presented by Hon. Curtis H. Lindley, a copy of which you enclosed with your communication. My opinion, of course, must be limited to the legal questions argued as it is not within my province to decide questions of fact discussed by Judge Lindley.

Two distinct propositions are involved in the question propounded. First. Is it within the power at all of the City to construct a municipal street railway across Golden Gate Park? Second. If the City has such power, can the power be exercised by the Board of Supervisors without consulting the wishes and views or obtaining the consent of the Park Commissioners?

First Proposition.

As far as the first question is concerned, fortunately we have a decision by the Supreme Court of this State directly bearing upon the point in the case of People vs. Park and Ocean R. R. Co., 76 Cal., page 156. That was an action brought to abate an alleged nuisance in Golden Gate Park and to procure an injunction against its continuance. The action was instituted by the Attorney General in the name of the People of the State of California on the relation of a tax payer of the City and County of San Francisco against the Park and Ocean Railroad Company. The alleged nuisance was the maintenance of a street railroad across Golden Gate Park near the Great Highway. A franchise had been granted to the defendants to build and operate the road. The Park Commissioners gave their consent to the construction of the road although the franchise was granted by the Board of Supervisors of this City and County.

The Supreme Court, after reviewing the history of the Park decided that the construction of a railroad in the Park would be a purpresture but further held that every purpresture does not amount to a nuisance. The Court on page 161 of the opinion says:

"In the case of a park, if it (the purpresture) *unlawfully obstructs the free passage or use in the customary manner* of such park by the public, it is a nuisance, and may be abated as such by a court of equity."

Whether or not an encroachment, says the Court, upon a public or private right is a nuisance is a question of fact to be determined by a jury or by a court sitting as such. The findings of the Court were in substance that "the construction, maintenance and operation of the railroad in no way affected or obstructed the free and comfortable use and enjoyment, in the customary manner, of the park or any portion thereof by all persons frequenting the same."

The trial court having found, therefore, that the railroad did not constitute a nuisance, the Supreme Court held that the City and County of San Francisco had the authority to permit the construction of the railroad in question across the lands of the Park. In consequence of this decision the Park and Ocean Railroad Company, and its successors in interest, ever since have been operating a street railroad across the westerly portion of Golden Gate Park.

While this case is not entirely controlling upon the question involved, it establishes, however, this proposition; the City and County of San Francisco has the power to permit the construction of a street railroad across the Park if the convenience of the public demands and the construction and operation of the railroad itself does not prevent the free and comfortable use and enjoyment in the customary manner of the Park by the general public. Whether or not the construction of the proposed municipal railroad across the Park will obstruct the free and comfortable use and enjoyment of the Park in its customary manner is not for me to decide. That is a question of fact which must be decided by the officials of the City government in whom is confided the power to construct the proposed railway, or by the Courts.

Assuming for the purposes of my opinion that the proposed railroad will not affect or obstruct the free and comfortable use and enjoyment in the customary manner of the Park and that therefore it does not constitute a nuisance, it is my opinion that the City and County of San Francisco unquestionably has the right to construct the proposed municipal railroad across the Park.

Second Proposition.

This brings us to the second proposition involved in the question, viz.: Has the Board of Supervisors the power to order the construction of this railroad without consulting the wishes and views or obtaining the consent of the Park Commissioners? The question is an important one involving as it does the relative powers and jurisdiction of the Board of Supervisors and the Park Commissioners. The present Park Commissioners are the successors in office of the Park Commissioners holding office at the time of the adoption of the Charter. The old Park Commission was created by an Act of the Legislature, approved April 4, 1870. Section 2 of the Act provided that the Park should be under "the *exclusive control and management* of a board of three commissioners." Section 4 of the Act provided that the Board should have "full and exclusive control, and power to govern, manage and direct the parks, avenues and squares" committed to its control. This Act was in force at the time the case of People vs. Park and Ocean Railroad Company arose. The present provisions of the Charter are substantially the same as those of the Act of the Legislature just referred to. Section 6 of Article XIV of the Charter in part provides that "The Commissioners shall have the complete and exclusive control, management and direction of the aforesaid parks, squares, avenues and grounds, and the exclusive right to erect and to superintend the erection of buildings and structures thereon."

The proposed Municipal Street Railroad is not a structure which is being constructed strictly for park purposes. Its construction is to afford proper and adequate transportation facilities for the section of the community through which it will run. It must be conceded that the Park Commissioners have no power or authority to construct a Municipal Street Railroad. It cannot provide the funds therefor nor has there been confided to the Park Commission the authority to determine the necessity for the

construction of a street railroad. That power is given to the Board of Supervisors and before a Municipal Street Railroad can be constructed the Board of Supervisors must determine *that the public necessity and convenience demands its construction.*

In Platt vs. City and County of San Francisco, 158 Cal., p. 81, the Supreme Court held that the "existence and proper conduct of such public utilities in cities clearly constitute a public affair, one relating very closely to the well-being, safety, health, advantage and convenience of all the inhabitants thereof and are well within the legitimate functions of government."

The declaration and findings of the Board of Supervisors that the public necessity and convenience requires the construction of a municipal railroad, if fairly made, is binding and conclusive, and it is for the Board of Supervisors alone to make this finding and determination. The Park Commissioners not having authority to make such a finding and determination it would seem to follow that the Commissioners do not have the power to set aside the finding and determination of the Board of Supervisors. Starting out with the proposition that the City and County of San Francisco has the power to construct a street railroad across the Park if its operation does not obstruct the free and comfortable use and enjoyment, in the customary manner, of the Park, it would seem to me to necessarily follow that the Supervisors alone have the power to determine the policy of the City government in such matters.

It is asserted that the provision of the Charter above quoted, found in Section 6 of Article XIV, confers on the Park Commissioners complete jurisdiction over all matters connected with the Park. I do not so construe the provisions of the article, although the language of the Charter is very broad. In my opinion, what is meant by the Charter when it is said that the Commission "shall have complete and exclusive control, management and direction of the parks and the exclusive right to erect and to superintend the erection of buildings and structures thereon," is that the Board has exclusive control and jurisdiction over those matters *which pertain to park purposes.* The construction of the proposed railroad is not for park purposes but it is for the purpose, as already stated, of affording transportation facilities to the inhabitants of that portion of the City served by the railroad. Incidentally, of course, the railroad will be a convenience

for persons desiring to go to the park and may better serve them, but the railroad is not being constructed for the purposes of the park. The road, therefore, must be treated in the nature of a purpresture such as was considered in the case of People vs. Park and Ocean Railroad, although, in a strict legal sense a purpresture exists when a *private person* makes several to himself that which ought to be common to many. Aside from other considerations the Park Commissioners themselves have not the authority to construct this railroad for the very reason that it is in the nature of a purpresture. Being such it is not such a structure over which they have control and management. Conceding, as I have done, that such a purpresture will not obstruct or interfere with the free and customary use of the park for the general public, I am of the opinion that the power lies within the Board of Supervisors to order its construction.

This view is practically the view adopted by the Court of Appeals of New York in the case of People vs. Coler, 83 N. E. Rep., page 18. That case involved the right of an electric light and power company to use the ocean parkway under the jurisdiction of the Department of Parks in the Burrough of Brooklyn, which department had "the exclusive government, management and control of all the squares and public places in the city and *full and exclusive power to govern and manage the ocean parkway and direct and regulate the use thereof.*" It was contended that this power gave the Park Commissioners jurisdiction to determine whether a franchise should be granted to an electric company to use the ocean parkway for laying down its conduits and mains by which the general public was to be furnished with light and power. The Court said on page 20:

"The statute relied upon is found in that portion of the Charter of Brooklyn which is entitled 'Department of Parks.' We at once recognize that such department naturally would be invested with general supervision, maintenance, care and control of parks and public places, and the regulation of the use thereof by the public, always having reference to the ordinary purposes for which they were designed. We would expect it to have the right, amongst other things, to decide questions relating to the care and beautifying of parks, the proper maintenance of roadways, the lighting thereof, and the location of structures properly placed therein. Such matters naturally would be placed

within the jurisdiction of authorities charged with special and limited powers of maintenance and supervision.

"When, with these ideas in mind, we study the statute conferring in different phrases upon the department the power of control, management and regulation of the Ocean parkway, we have no great difficulty in concluding that the powers thereby conferred are of the character suggested. Various subdivisions of the section, which it is not desirable to quote at length, with reference to the location of fountains, maintenance of fences and sidewalks and of railroad tracks, confirm our estimate of the nature of the powers which it was intended to confer. These powers would doubtless authorize the department to confer a limited franchise to use the parkway for purposes which were necessary for and incidental to the ordinary public enjoyment thereof. For instance, it was necessary that it should be lighted, and it would be entirely proper and necessary that the commissioner should have power to authorize some corporation to lay conduits therein for the purpose of supplying such lights. The same very likely might be said of water pipes and other structures. But the use of the parkway for appliances designed for supplying electricity to private consumers is in no sense connected with that ordinary and primary public enjoyment of it which naturally ought to be subjected to the control of the park authorities. Such use is for purposes lying beyond such enjoyment. It constitutes a privilege to use the parkway just as any other public street as a means of carrying on a general business, and as such it should be left subject to the jurisdiction of the municipal authorities ordinarily intrusted with the control of such matters. Nor will this conclusion interfere with the exercise of that class of powers which we judge to have been conferred upon the Park Commissioners, for, if the Board of Aldermen should grant to respondent or any similar corporation authority to lay conduits in the parkway, I think that the Commissioner would at least have the right to prescribe such reasonable regulations as to time, place and manner of the work as would least impair the public use and enjoyment committed to his care and regulation."

The last sentence just quoted needs to be noticed. In my opinion what the Court meant in that sentence was that the Park Commissioner, under the authority of the statute governing the parks of Brooklyn, had the power to make such reasonable

requirements as would best serve the uses and purposes of the park, while not preventing the use of the park for the purposes granted to the company. In other words, the Park Commissioner could exercise such police authority as is exercised by a municipality over private corporations using the streets by making certain regulations, such as the depth of mains, their location, care and maintenance.

The present case, however, is one of a municipality using its own property for its own purposes, and as pointed out by our Supreme Court in Platt vs. City and County of San Francisco, supra, this "constitutes a public affair." The municipality does not exercise its police power to regulate itself.

It is not necessary at this time, under your request, to decide whether one of the governmental agencies of the City has been vested under the Charter with the power to regulate the City in the conduct of this "public affair" in the manner that a city regulates private corporations using its streets since the Park Commissioners dispute the power at all of the Board of Supervisors to construct the proposed road across the Park without the consent of the Park Commissioners.

In my opinion the case of Spires vs. City of Los Angeles, 150 Cal., page 64, and the case of Mulvey vs. Wangenheim, 23 Cal. App., 268, do not oppose this view. In the Spires case the Court held that the erection of a building for a public library in a public park with rooms therein as a meeting place for the Board of Library Directors of the city is a legitimate use of a portion of the park which cannot be enjoined at suit of abutting tax payers, but the use of the Library building for municipal purposes, such as rooms for the Board of Public Works, or any other municipal body, may be enjoined. The use of the park by departments of the city government who exercised no authority or jurisdiction over the park or in park affairs is necessarily, of course, inconsistent with park purposes and obstructs the use and enjoyment of the park in the customary manner. Assuming that the operation of the proposed street railroad does not interfere with the free and comfortable use and enjoyment of the park in the customary manner, it is seen that the facts are quite different.

In the Mulvey case it was proposed to open up a street through the park, permission having been granted therefor by the Park Commissioners to private individuals. If the streets had been

opened up there would necessarily have been withdrawn from the park a certain area which had been dedicated forever to park purposes. This, the Court held, could not be done. In the present case it is not proposed to withdraw from the park any portion of the area of the park any more than was done in the case of the Park and Ocean Railroad Company when it constructed its railroad across the Park in accordance with its franchise. The free and comfortable use and enjoyment of the park will not be interfered with and it therefore comes within the rules stated in People vs. Park and Ocean Railroad Company, rather than in the rule stated in the Mulvey case.

I therefore advise you that in my opinion the Board of Supervisors has the power, without obtaining permission or authority from the Park Commissioners, to order the construction of the proposed Municipal Railroad across Golden Gate Park if the construction, maintenance and operation thereof does not affect or obstruct the free and comfortable use and enjoyment in the customary manner of the Park.

Respectfully,

PERCY V. LONG,

City Attorney.

The Mayor.

Appointment of Inspectors of Supplies.

May 22, 1916.

Gentlemen: I am in receipt of requests for an opinion touching the same matter from two committees of your Honorable Board—one from the Finance Committee, dated April 22, 1916, and one from the Civil Service Committee, dated April 24, 1916.

The communication from the Finance Committee is as follows:

"The Finance Committee has under consideration a resolution affecting the method of payment for services to the Supplies Committee.

"For four years past there has been an appropriation in the budget for 'Expenses of Supplies Committee.' During that period the Supplies Committee from time to time has employed

inspectors, and at the present time the inspectors are employed and paid out of this particular budget item.

"The Finance Committee desires to know if an appropriation made in this manner can be used in payment for services of inspectors and experts whose duties are defined by the Supplies Committee and who are under the direct control and jurisdiction of the Supplies Committee.

"The Committee desires to make a report on this matter to the Board of Supervisors next Monday, and therefore an immediate reply is respectfully requested."

The communication from the Civil Service Committee is as follows:

"The Civil Service Committee of the Board of Supervisors is desirous of securing your opinion relative to the employment of additional inspectors or clerks for the Supplies Committee of the Board of Supervisors.

"Recently, the Finance Committee requested the Civil Service Commission to provide proper designation for two proposed new positions of Inspectors of Supplies, one position to carry a salary of $1500 per annum, and the other, a salary of $1200 per annum. Under date of April 10, 1916, the Civil Service Commission stated that the designation of each of these positions should be 'general clerk.' The questions on which the Civil Service Committee desires to be advised are as follows:

"Does Subdivision 1 of Section 4, Chapter I of Article II of the Charter make it necessary for these positions to be created by ordinance?

"If an ordinance is necessary, are the positions thus created subject to the Civil Service provisions of the Charter?

"Should the names of the persons appointed to these positions appear on the regular payroll of the employees of the Clerk's office of the Board of Supervisors and be submitted to the Civil Service Commission for its approval before presentation to the Auditor as required by Section 19, Article XIII of the Charter?"

Opinion.

If the Inspectors of Supplies, mentioned in the foregoing communications, are permanent employees there can be no question

but that they would have to be appointed by the Board of Supervisors under Subdivision 1 of Section 4, Chapter I, Article II of the Charter, which provides that the Board of Supervisors shall "appoint a Clerk, Sergeant-at-Arms and, when authorized to do so by ordinance, such additional clerks and other assistants as may be deemed necessary." The inspectors so appointed would be governed by the provisions of Article XIII of the Charter, relating to Civil Service. In case, however, the Supplies Committee of the Board of Supervisors desires to employ inspectors from time to time, and not under any permanent employment, the appointment or employment of such inspectors would not be governed by Subdivision 1 of Section 4, Chapter I, Article II of the Charter. And, further, it is my opinion that the appropriation made in the budget for the "expenses of Supplies Committee" can be used in payment of services of inspectors and experts so employed from time to time, whose duties are defined by the Supplies Committee and who are under the direct control and jurisdiction of the Supplies Committee.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Liability of City for Accident Caused by Negligence of Ambulance Driver.

May 26, 1916.

Gentlemen: I am in receipt of your communication of May 22nd, in which you ask to be advised as to the proper mode of procedure to be followed by your Honorable Board in recommending the payment of a claim for damages to D. J. Hagen caused by his being knocked down by an ambulance of the Emergency Hospital.

In this behalf I must advise you that on April 23, 1913, in an opinion to the Board of Supervisors in a similar case, I advised them that there is no liability upon the City for accidents due to the negligence of ambulance drivers. It is uniformly held that a municipality is not liable for any damages caused by the exercise of governmental functions and it is equally clear that in

maintaining hospitals and caring for the public health the City is exercising a governmental function.

It has been expressly held in decided cases that a municipality is not liable for injuries caused by the driving of an ambulance.

> Maximilian vs. Mayor, 62 N. Y. 1260, 20 Am. Rep. 468;
> Matson vs. Atlanta, 71 S. E. 664.

In view of this fact I must advise you that there is no legal liability upon the City and County in this case.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Health.

Power of Civil Service Commission to Inquire into Qualifications of Druggist at County Jail.

June 3, 1916.

Gentlemen: I am in receipt of your communication of March 22, 1916, enclosing copies of communications received by your Commission from the California Drug Clerks' Association and the Sheriff, relative to the status of Doctor George F. Brackett, druggist at the County Jail.

It appears from these communications that the right of Dr. Brackett to hold the position of druggist in the County Jail is questioned, on the ground that he is not a licensed pharmacist. Dr. Brackett was brought under Civil Service as druggist in the jail under the amendment to Section 11 of Article XIII of the Charter which was ratified by the Legislature March 28, 1913.

Your Commission asks to be advised first whether you have the power to inquire into the right of Dr. Brackett to hold this position; and second, if you have this power, whether Dr. Brackett is legally qualified to hold the position.

Opinion.

Section 1 of an Act to regulate the practice of pharmacy in the State of California (Statutes 1905, p. 535, as amended in 1907, 1909 and 1915 provides as follows:

"From and after the passage of this Act it shall be unlawful for any person to manufacture, compound, sell or dispense any drug, poison, medicine or chemical, or to dispense or compound any prescription of a medical practitioner, unless such person be a registered pharmacist or a registered assistant pharmacist within the meaning of this Act, except as hereinafter provided."

None of the exceptions to this provision are material in this case, except the following, appearing in Section 12 of the Act:

"Nothing in this Act shall apply to or interfere with any practitioner of medicine who is duly registered as such by the State Board of Medical Examiners of this State with supplying his own patients, as their physician, and by them employed as such, with such remedies as he may desire, and who does not keep a pharmacy, open shop, or drug store, advertised or otherwise for the retailing of medicines or poisons."

It is undisputed that Dr. Brackett is not a registered pharmacist or a registered assistant pharmacist within the meaning of this Act. It is also true that he is a practitioner of medicine, duly registered as such by the State Board of Medical Examiners of the State.

It is claimed by those desiring Dr. Brackett's removal that his duties at the County Jail are solely those of a druggist; on the other hand, it is claimed by Dr. Brackett that his duties are those of a physician and surgeon to the inmates of the County Jail and that merely as an incident to these services, he dispenses such remedies as he may desire. This is a question of fact which I am, of course, unable to decide.

Assuming that Dr. Brackett's duties are those of a physician and surgeon and that he dispenses drugs simply to supply his own patients or to compound his own prescriptions, it is clear that under Section 12 of the Act above quoted, he is entirely within his rights in so doing.

On the other hand, if Dr. Brackett's duties at the County Jail are solely those of a druggist and dispensing pharmacist, under Section 1 of the Act, he would not be entitled to perform those duties, and his doing so would clearly be illegal.

I must, therefore, advise you that in case you should find that Dr. Brackett's duties are solely those of a druggist and dispens-

ing pharmacist, he is not legally qualified to hold the position. It is clear, of course, that the State law in this regard must control and that the City cannot legally employ one who does not comply with the State law in this regard. It is well settled that where it is attempted to appoint one to a position for which he is not legally qualified, he can acquire no rights thereby.

29 Cyc., page 1374;
23 Am. & E. Enc. of L., 2nd Edition, p. 338;
People vs. Lindblom, 74 N. E. 73;
City vs. Huegle, 112 N. W. 234;
Jemmess vs. Clark, 129 N. W. 357;
People vs. Galbraith, 127 N. W. 771.

The portion of the amendment to Section 11 of Article XIII under which Dr. Brackett claims to hold the position of druggist in the County Jail is as follows:

"Any person who has served in any position in the office of the Assessor, the Coroner, the Recorder, the County Clerk, the Sheriff, the office of the Justices' Clerk, the Board of Supervisors or the Treasurer for a period of one year continuously prior to the approval of this amendment and who shall be actually employed in any of said offices at such time is hereby declared to be appointed within the provisions of Article XIII of this Charter to the position to which he may be assigned and shall be entitled to all the benefits of said article thereafter."

Under the authorities above cited, Dr. Brackett is not entitled to the position of druggist at the County Jail unless his duties were those of a physician or surgeon as well as a druggist.

The question remains whether your Honorable Commission is empowered to investigate the character of Dr. Brackett's duties in order to determine whether he is entitled to hold this position.

Section 14 of Article XIII of the Charter provides as follows:

"The Commissioners shall investigate the enforcement of the provisions of this article, and of its rules, and the action of the examiners herein provided for, and the conduct and action of the appointees in the classified service in the City and County and may inquire as to the nature, tenure and compensation of all places in the public service thereof."

In addition to this, Section 19 of the same article requires the Civil Service Commission to pass upon all salary demands of persons appointed or employed in the departments of the City which are under Civil Service.

Under these provisions, it is made the duty of your Honorable Commission to investigate the enforcement of and to enforce the provisions of the Civil Service article, and as a part of these duties, you are bound to see that all the positions under the Civil Service are filled by legally qualified persons.

I therefore advise you:

1. That it is within your power to investigate the status of Dr. Brackett as druggist at the County Jail.

2. That if you find that his duties as druggist at the County Jail are those of a physician or surgeon who dispenses his own prescriptions, then he is legally entitled to hold the position; but that if you find that his duties are simply those of a druggist, he is not legally qualified to hold the position.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Grades on Harrison Street, Between Spear and Beale, and on Main Street Between Folsom and Bryant Streets.

June 3, 1916.

Dear Sir: I am in receipt of your communication inquiring as to whether or not the grades on Harrison Street between Spear and Beale and on Main between Folsom and Bryant Streets as established by Ordinance No. 2235 (New Series), approved March 25, 1913, are to be recognized by you as the official grades of said streets.

Opinion.

On the 5th ult., I rendered an opinion to the Board of Public Works, concerning the validity of grades on Harrison Street as established by Ordinance No. 415 (New Series), approved April

15, 1908. Therein I held that the grades as established by Ordinance No. 415 on the streets therein mentioned were to be recognized as the official grades of said streets.

In your communication you state that the Board of Supervisors passed Resolution No. 9896 (New Series), approved December 23, 1912, declaring its intention to change the grade on Harrison Street between Spear and Beale Streets and on Main Street, between Folsom and Bryant Streets, and in said resolution defined certain street work and describing a district benefited and to pay the cost of the regrading, etc. If said grading will damage abutting property, the resolution would also have to provide for the payment of said damages. If as a matter of fact, said Resolution No. 9896 does provide for the payment of damages and complies with the provisions of Section 1, Chapter VI, Article VI of the Charter, providing the method to be pursued by the Board of Supervisors in changing or modifying the grade of streets in San Francisco, it is my opinion that the grades of the streets mentioned in your communication as established by Ordinance No. 2235 (New Series), approved March 25, 1913, are the grades to be recognized as the official grades of said streets.

Respectfully,

PERCY V. LONG,

City Attorney.

City Engineer.

Purchaser at Void Tax Sale—Must Ask for Refund Within Three Years.

June 7, 1916.

Gentlemen: I am in receipt of your request for an opinion with regard to the claim of P. J. O'Reilly for refund of money paid for property sold for taxes.

It appears in the verified petition of Mr. O'Reilly accompanying your request that the tax sale took place on February 7, 1912. The petition is dated May 22, 1916.

Opinion.

This petition is made under Section 3804 of the Political Code, which provides for the refund of taxes erroneously collected, upon petition to the Board of Supervisors.

Section 3804 contains the following provision:

"No order for the refund of taxes, penalties or costs under this section shall be made except upon the verified claim therefor * * * which said claim must be filed within three years after the making of the payment sought to be refunded."

It appears upon the face of the petition that the payment here in question was made in February, 1912, and the petition was not verified until March, 1916, a period of over four years.

I therefore advise you that the petitioner does not bring himself within the provision of Section 3804, Political Code, and that his claim is barred because of the fact that the petition was not presented within three years after the payment.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Assessment of Money in Hands of Receiver of Western Pacific Railway.

June 15, 1916.

Dear Sir: I am in receipt of your request for an opinion under date of June 1, 1916, as follows:

"It has been called to my attention that the receivers of the Western Pacific Railway have on hand quite a sum of money. The Internal Revenue Collector made a demand on them for an income tax on the same, but the receivers contend the money is held in trust to pay interest on Mortgage Bonds and Notes outside of the state. The amount owing for that purpose being $4,694,238, and the amount on hand to pay on same, as stated in their petition of May 18, 1916, $1,408,034. Would the amount on hand as of the first Monday in March, 1916, available for that purpose be assessable?

"The receivers are F. G. Drumm and Warren Olney Jr., both residents of San Francisco."

Opinion.

Section 3647 of the Political Code provides:

"Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the Court."

The money to which you refer is held by the receivers in the suit of Equitable Trust Co. of N. Y. vs. The Western Pacific Railway, to foreclose a mortgage held by said Equitable Trust Company, which mortgage guarantees the payment of certain outstanding bonds. It is clearly money in litigation within the meaning of Section 3647 above quoted and by that section made assessable to the receivers.

In this connection I refer you to

Spring Valley W. Co. vs. San Francisco, 225 Fed., 728,

with which you are already familiar, and also to

Coy vs. Title etc. Co., 212 Fed., 520;
Same case affirmed in 220 Fed., 90.

The opinions in the latter case both in the District Court and in the Circuit Court of Appeals are carefully considered, and both Courts after a full citation and consideration of authorities announce the conclusion that property in the hands of a receiver in the Federal Courts is properly subject to taxation.

I therefore advise you that the amount in the hands of these receivers on the first Monday in March is properly assessable.

Respectfully,

PERCY V. LONG,

City Attorney.

Assessor.

Damage Through Management of Fire Apparatus—No Liability on City.

June 16, 1916.

Gentlemen: I am in receipt of your communication of June 12, 1916, as follows:

"By direction of the Finance Committee I transmit herewith for your consideration, claim filed June 6, 1916, by Kohler & Chase, No. 26 O'Farrell Street, for damage to glass window in store April 30, 1916, by apparatus of Fire Dept. Truck Co. No. 1."

It appears from the letter of the Secretary of the Fire Commission, which accompanies your communication, that the window referred to was broken while Truck Company No. 1 was exercising on April 30, 1916.

Opinion.

It is well settled that a municipality is not liable for any damages caused by the negligence of its employees or officers in the exercise of governmental functions. This doctrine has been recently reaffirmed in this State in an elaborate opinion in Chafor vs. Long Beach, 51 Cal. Dec. 618. It is equally well settled that a municipality in the conduct of its Fire Department is exercising a governmental function (5 McQuillin Mun. Corp., p. 5068, Sec. 2432), and that rule has been followed in this State in Howard vs. San Francisco, 51 Cal. 52.

I therefore advise you that there is no liability upon the City and County on account of the claim presented by Kohler & Chase.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Interpreting a Portion of Section 3897 of the Political Code.

June 16, 1916.

Dear Sir: I am in receipt of your communication under date of June 13, 1916, enclosing a circular numbered 113, issued by the State Controller's Department. This circular calls attention to the tax law amendments adopted by the Legislature in 1913 and 1915. You ask for an interpretation of a portion of Section 3897 Political Code, referred to in this circular.

Section 3897 deals with the subject of the disposition of property which has been sold to the State under the provisions of Section 3785, Political Code.

Opinion.

In order to discuss the provisions of Section 3897 intelligently it is necessary to consider briefly the change made in the manner of the disposition of property which has been sold to the State under Section 3771, Political Code, and which has remained unredeemed for a period of five years thereafter. Formerly, as you are of course aware, such property was deeded to the State under the provisions of Section 3785 upon the expiration of the five year period and it was not until after the making of such a deed that the property might be advertised and sold at public auction.

To show the change in this procedure I call your attention to a small portion of the circular issued by the Controller, as follows:

"The greatest departure from former procedure, and in fact the only radical change made, relates to the manner of disposing of property upon which taxes remain unpaid for five years after date of sale to the State. Instead of deeding to the State all such property and then waiting for a purchaser or for redemption, the plan now is to offer such property for sale direct to the highest bidder, who will become entitled to receive a deed to the property, provided that he bids at least the total of taxes, penalties and costs due at the date of the sale to the State and afterwards makes redemption of all other taxes and charges against such property. This portion of the new law is embodied in Sections 3764, 3771 and 3785b."

As to such property the method of sale at public auction is fully covered by the sections of the Political Code referred to in

the quotation. Section 3897, on the other hand, deals simply with such property as has been actually deeded to the State after the expiration of the five year period. It provides that the Controller may direct the Tax Collector by written authorization to sell such property in the manner provided in the section itself and among the provisions covering such sale is one in the following language:

"The expense of giving the notice herein required shall be a charge against the property so advertised, and shall be collected by the collector, and no redemption of such property before said sale may be had without payment of such cost of advertising; and to secure the payment of such advertising cost the collector shall demand in advance from the party or parties seeking to purchase, a deposit with said officer of a sum sufficient to defray such cost of advertising, which deposit shall be forfeited in the event said party or parties fail or refuse to purchase at such sale; provided, that if the party or parties so depositing fail to secure such property on their bid, such deposit shall be returned, and such advertising cost shall be collected from the successful purchaser."

The portion of the section of which you desire an interpretation follows immediately on the portion above quoted and reads as follows:

"provided, also, that if the board of supervisors of the county, or city and county, in which the property is situated shall by resolution entered upon the minutes, direct the tax collector to apply for an authorization of sale of any property which has been deeded to the State, and shall authorize him to order the necessary advertising to be done at county expense, the tax collector shall thereupon proceed as though a deposit had been made to cover advertising costs, and shall added a proportionate part of the total expense of advertising to the amount of taxes, penalties and interest chargeable against each tract or parcel sold. In any case in which no sale is made, the advertising shall be charged and paid as are other county charges."

It is clear that this portion of the section refers to the subject with which the entire section deals, to-wit, the sale of property which has already been deeded to the State, and its purport is to empower the Board of Supervisors, in any case in which they may deem it advisable, to direct the Tax Collector to apply to the Controller for the authorization to sell property which stands in

the name of the State because of the fact that a deed to the State has been made under Section 3785, Political Code. It likewise empowers them to authorize the Tax Collector to proceed to advertise the sale without requiring a deposit to cover the cost of advertising which he would otherwise be forbidden to do. It further provides that such cost of advertising shall be added to the amount of taxes, penalties and interest chargeable against the property when sold and that in any case where no sale is made such advertising shall be a charge upon the County. This section, as I have already pointed out, deals only with such property as has been deeded to the State and relates in no manner to property which has been sold to the State and unredeemed for five years, or to which the State has never received a deed under Section 3785 of the Political Code.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Sub-Contracts in Use by F. Rolandi in Constructing Hetch Hetchy Railroad Not Inimical to City's Interests.

June 23, 1916.

Gentlemen: I am in receipt of your communication requesting my opinion as to whether or not there is anything inimical to interests of the City in certain forms of sub-contracts in use by F. Rolandi in the construction of the Hetch Hetchy Railroad, which forms accompany your request.

Opinion.

The City entered into a contract with Mr. Rolandi for the construction of the Hetch Hetchy Railroad, which contract embodied within it all such provisions as were deemed necessary to safeguard the interests of the Municipality.

The sub-contracts submitted to this office for examination were prepared by Mr. Rolandi, and it is his duty to see to it that they are so drawn that the terms thereof do not conflict with his original contract with the City.

However, careful examination of the forms submitted fails to disclose any provisions adversely affecting the interests of the City.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim of Harrison Corporation for Damages by Overflow of Water on Property at No. 1 Eighteenth Avenue.

June 23, 1916.

Gentlemen: I am in receipt of your communication referring to me for my consideration, the claim of Harrison Corporation by M. C. Harrison, President, filed April 5, 1916, in the office of the Clerk of the Board of Supervisors in the sum of $3801.25, alleging that, by reason of the inadequacy of certain catch basins, drains and conduits to drain the area of which they were intended and constructed to drain, water overflowed from the street into and across the claimant's property at No. 1 Eighteenth Avenue and washed out large parts thereof and of the foundations and structures built thereon, etc.

Opinion.

My investigation of the law, pertaining to the liability of Municipal Corporations for damages of the nature alleged to have been sustained by Harrison Corporation, under the circumstances pertaining thereto, leads me to the conclusion that the City and County of San Francisco is not liable therefor. I return said claim herewith.

Very truly yours,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Application of Vacation Ordinance to Copyists in the Recorder's Office.

June 23, 1916.

Gentlemen: I am in receipt of your communication of June 19, 1916, in which you ask to be advised as to whether copyists in the office of the Recorder are entitled to vacation with pay under the so-called vacation ordinance.

Opinion.

The vacation ordinance (Ordinance No. 2297 (New Series) as amended by Ordinance No. 3426 (New Series)) provides for vacations in Section 1 thereof which reads as follows:

"Section 1. It is hereby declared that the public service will be promoted by granting annual vacations and emergency leaves of absence to deputies, clerks and employees of the City and County, and the time of such vacations and emergency leaves of absence shall be construed as constituting time spent in the service of the City and County during which such deputy, clerk and employee is engaged in the performance of the duties of his position."

The copyists in the office of the Recorder are employed in accordance with the provisions of Section 1 of Chapter VII, Article IV of the Charter which provides that the Recorder "may also appoint as many copyists as he may deem necessary, who shall receive not more than 6c for each 100 words actually written; but no copyist shall be paid a greater compensation at this rate than amounts in the aggregate to one hundred and twenty-five dollars a month."

You will observe that Section 1 of the Vacation Ordinance above quoted provides for vacations with pay by enacting that "the time of such vacations and emergency leaves of absence shall be construed as constituting time spent in the service of the City and County during which such deputy clerk and employee is engaged in the performance of the duties of his position." This is the only provision which entitles employees of the City to receive pay during the time that they are on vacation. It is evident that this provision can afford the copyists in the Recorder's office no right to receive pay while they are upon vacation, for the reason that they are paid upon the basis of work actually done and to

construe the time spent upon vacations as time spent in the service of the City and County does not and cannot afford any measure by which it may be determined what pay copyists should be entitled to, the only measure of their pay being the amount of work actually done.

For this reason, I must advise you that the vacation ordinance is not broad enough in its terms to include copyists in the Recorder's office.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Leroy Place a Public Street.

June 26, 1916.

Gentlemen: I am in receipt of your communication of the 3rd inst., as follows:

"There is enclosed herewith a copy of Resolution of Intention No. 45,663 (Second Series), providing for the improvement of Leroy Place from Sacramento Street to its northerly termination by the construction of granite curbs and a vitrified brick pavement on the roadway thereof.

"On May 12, 1916, Camille L. Lapachet filed a protest with this Board against the performance of this work on the plea that Leroy Place from Sacramento Street to its northerly termination, is not an open public street of the City and County of San Francisco.

"The Board of Public Works respectfully requests that you advise it whether Leroy Place from Sacramento Street northerly is an open public street of this city and county. We shall be pleased to have your advice on this matter before July 7, 1916, when action on this improvement is scheduled."

Opinion.

On the 17th of April, 1911, I rendered an opinion to your Honorable Board, which may be found at pages 295, et seq., of the Opinions of the City Attorney 1910-11-12. In said opinion I held

that Leroy Place for a distance of 137 feet 6 inches northerly from Sacramento Street was a public street under deed from Henry Carthwaite and Charlotta T. Carthwaite, his wife, to the City and County of San Francisco, dated May 2, 1863, recorded November 30, 1863, Vol. 221 of Deeds, page 297.

I also advised you that the title to the 23 feet 6 inches northerly from a point 137 feet 6 inches northerly from Sacramento Street was in the heirs of William Hollis, deceased, subject to the rights of way of abutting owners as per conveyance to them by William Hollis in deed recorded on November 30, 1877, in which deed Leroy Place is described as a public street.

In said opinion I stated that the City might at any time accept the offer of dedication made in the deed recorded November 30, 1877, as far as the 23 feet 6 inches is concerned. I find on further investigation at this time that the offer of dedication in said deed was accepted by the Board of Supervisors acting for the City and County, Section 26 of Order No. 1588, entitled "Relative to the Construction and Use of Streets and Sidewalks," passed by the Board of Supervisors on September 13, 1880, and approved by the Mayor on September 15, 1880.

Therefore you are advised that Leroy Place for a distance of 161 feet northerly from the northerly line of Sacramento Street is a public street of this City and County and that your Honorable Board has jurisdiction to proceed under Resolution of Intention No. 45,663 (Second Series), providing for the improvement of Leroy Place from Sacramento Street to its northerly termination, which I find and advise to be 161 feet northerly from Sacramento Street.

Respectfully,

PERCY V. LONG,

City Attorney.

Department of Public Works.

Vacation Pay for Per Diem Men, Board of Public Works, Is Legal.

June 29, 1916.

Gentlemen: I am in receipt of your request for an opinion under date of June 27, 1916, with reference to pay roll No. 159 of the Board of Public Works.

My understanding of the facts with reference to this pay roll from information given to me by your Commission, and also by the Board of Public Works is as follows:

By Ordinance No. 2297 (New Series), approved June 10, 1913, as amended by Ordinance No. 3426 (New Series), approved September 14, 1915, it is provided that "the public service will be promoted by granting annual vacations and emergency leaves of absence to deputies, clerks and employees of the City and County, and the time of such vacations and emergency leaves of absence shall be construed as constituting time spent in the service of the City and County during which such deputy, clerk and employee is engaged in the performance of the duties of his position."

It is further provided in this Ordinance that such deputies, clerks or employees shall first have been continuously employed for at least one year prior to such vacation and that such vacation shall not exceed twelve (12) working days in any calendar year.

Vacations were, in accordance with this ordinance, allowed employees of the Board of Public Works through the months of October, November and December of 1915.

Some question having arisen as to the validity of this Ordinance in connection with the November, 1915, pay rolls of the Board of Public Works, certain per diem employees brought an action in the Superior Court of the City and County to compel the payment to them of their wages during such vacation period. This action was not finally decided by our Superior Court until March 28, 1916, when Judge Crothers sustained the ordinance.

The Board of Public Works determined that, pending the final decision of the Court on this question, it would not grant any further vacations, although it had already, as above stated, granted vacations during the months of October, November and December of 1915. Then, upon the Ordinance being sustained by the Court, the per diem men who were entitled under the terms of the

Ordinance to a 1915 vacation but who had not been given the same privileges as had their fellow employees on account of the legal question raised, insisted that they be granted such a vacation. This demand was made following the decision of the Court, in the month of April, 1916. The Board of Public Works at that time took the position that all of these employees, who had served the City for a year previous, in accordance with the terms of the Ordinance, were entitled under the Ordinance to credit as for a vacation period during any twelve (12) days that they may have been away from work while the Ordinance was being tested in the Court.

Therefore, the Board of Public Works, by formal resolution, did on May 1, 1916, allow certain employees therein named, vacations, as is above described, and the pay roll No. 159, which is now in question is a pay roll giving the names of each of these employees and the number of days in each case so allowed as vacation time. On this pay roll, the months, during which time was so allowed, are indicated, and there is a notation thereon by the Board of Public Works as follows: "Pay for vacations granted under the provisions of Ordinance No. 2297 (New Series) as amended by Ordinance No. 3426 (New Series) and the Board of Public Works certifies that such employees have been employed continuously for a period of not less than one year and that the month or months indicated opposite each respective name on the demand represents the period in which the vacation days were granted."

The pay roll demand No. 159 was prepared and passed through the April account of the Board of Public Works, and your Commission questions the legality of this procedure on two grounds:

1st. That it in fact amounts to a gift of public moneys as it is based upon time lost because of inclemency of weather in the earlier months prior to any action by the Board of Public Works so granting such vacation time, and,

2nd. It does not comply with the provisions of Article III, Chapter IV, Section 1 of the Charter with reference to the presentation of demands.

As to the first objection, I am firmly of the opinion that such a construction of the vacation ordinance as is therein suggested would completely defeat the intent and spirit of that Ordinance.

We have here a case of men, who without a question of a doubt, were entitled to a vacation under the terms of the Ordinance during the early months which are referred to in the final resolution of the Board of Public Works. If that had been adopted during those same months, there can be no question that your Commission would have approved of the same, as I understand was done in the case of other vacations so granted in other months. However, the Ordinance was questioned in the Court and was finally held to be constitutional. It appears to me to be manifestly unfair to treat these men any differently than the others whose vacation time was granted without question. It is not a gift of public moneys. It is merely carrying out the public purpose declared in the Ordinance "that the public service will be promoted by granting annual vacations * * * to deputies, clerks and employees of the City and County, and the time of such vacations * * * shall be construed as constituting time spent in the service of the City and County during which such deputy, clerk and employee is engaged in the performance of the duties of his position."

You suggest in your communication that the Board of Public Works determined that the men should be given credit for the time that they were out during inclement weather rather than that they be given a vacation in, let us say, April or May when the weather was favorable to their working for the City. This would seem to be a wise exercise of discretion on the part of the Board of Public Works. In that way, the men would be accorded the same treatment that others had received under the terms of the Ordinance and at the same time, their vacations would date back to a time when it was impossible for them to work for the City anyhow. In this way, the rights of the men would be protected, and at the same time, the maximum work obtained from them for the benefit of the City by whom they are employed. Surely such an application of this Ordinance does no more than intelligently carry out its real purposes.

Referring to the second objection, the Charter section referred to provides that "any demand upon the treasury accruing under this Charter, shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such demand became due and payable."

In this case, the demand, as is the procedure of the Board of Public Works, is made by the Board itself, on behalf of the men, being signed by the heads of the Street Repair and Street Cleaning Department, approved by the Board of Public Works, and finally approved, as is the custom, by the Chairman of the Finance Committee of the Board of Supervisors, prior to being submitted to your Commission.

It is to be noted that the resolution of the Board of Public Works, allowing this vacation time, was adopted on May 1, 1916. It was finally handed to the Civil Service Commission on May 16, 1916.

The above Charter section was adopted to require the due and orderly presentation of demands against the City Treasury and to afford the City an opportunity to insist upon this procedure being followed. It is similar to provisions found in municipal charters generally throughout the State.

In my opinion, it would not be a reasonable interpretation of such a provision to construe it as against this demand made under the circumstances as above described.

Within sixteen (16) days of the action by the Board of Public Works in allowing this vacation time, the pay roll was submitted, duly approved by the Board of Public Works to the Civil Service Commission. Until this action was taken, the Board assumed that it was justified in awaiting the decision by the Court on the legality of the Ordinance. This would seem to be merely a conservative action of a precautionary nature, and I do not believe that an interpretation of the above Charter section, which would prejudice the rights of the men on whose behalf the pay roll was so prepared and presented by the Board of Public Works, would be proper.

I, therefore, respectfully advise that in my opinion, pay roll No. 159 of the Board of Public Works is in legal form and should be approved by your Commission.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Vacation for Park Employees.

August 2, 1916.

Gentlemen: I am in receipt of your communication of the 28th ult., as follows:

"Enclosed please find copy of petition submitted to the Park Commissioner by the Park employees and considered at the meeting held July 27th. I was instructed to forward the enclosed to you with the request that you give an opinion on same. The Park employees are not under Civil Service."

Accompanying your communication was a copy of a petition dated July 25, 1916, addressed to your Honorable Board from the employees in Golden Gate Park and all other parks and squares under the jurisdiction of your Honorable Board, petitioning that your Board grant them and all of the said employees an annual vacation of twelve days with pay, pursuant to the terms of Ordinance 3426 (New Series), approved September 14, 1915.

Opinion.

On October 26, 1915, I advised the Auditor in an opinion, a copy of which is herewith enclosed, that Ordinance 3426 was adopted by the Board of Supervisors for the purpose of affording per diem employees annual vacations as therein specified.

In said opinion I advised the Auditor that Ordinance 3426 (New Series) applied to deputies, clerks and employees without exception, and that, of course, includes per diem employees.

On March 30, 1916, in an action entitled: Daly vs. Boyle, Auditor, etc., in the Superior Court of this City and County, No. 71,882, Judge Crothers rendered a judgment upholding said ordinance, holding that the same applied to car men in the employ of the Municipal Railways of San Francisco who are per diem employees.

Section 1 of the so-called vacation ordinance provides:

"It is hereby declared that the public service will be promoted by granting annual vacations and emergency leaves of absence to deputies, clerks and employees of the City and County."

It will be observed that there is no distinction made between employees of the City and County who are appointed under the

provisions of Article XIII of the Charter, relating to Civil Service, and those who are not so appointed, and my opinion is that the employees in the parks under your jurisdiction are entitled to the benefits of vacation periods as provided for in Ordinance 3426 (New Series), and you are so advised.

Respectfully,

PERCY V LONG,

City Attorney.

Board of Park Commissioners.

Registration of Public Service Corporations Under Ordinance No. 2582.

August 5, 1916.

Dear Sir: I am in receipt of your communication of the 27th ult., as follows:

"Ever since I have been in the Department of Electricity, I have experienced great difficulty in making the public service corporations comply with the provisions of Ordinance No. 2582 relative to registering with the Department, reporting jobs for inspection and paying inspection fees where electrical installations are made by these companies on the premises of consumers.

"In your opinion of May 8, 1914, you clearly showed what our rights and limitations are in the matter. The power companies have refused to recognize our position and have adopted a policy either of open hostility or of delay and evasion. My patience is exhausted and it is my desire to take some decisive action that will prove the correctness of our position.

"Will you kindly advise me as to the proper course to take under the circumstances? Would it be advisable to arrest the superintendents, foremen or workmen or enjoin the companies concerned from doing further work of the character complained of?"

Opinion.

Ordinance No. 2582 (New Series), approved January 9, 1914, in force from and after March 1, 1914, is a penal ordinance, Section

3 thereof providing that any person, firm, company or corporation, violating, disobeying, omitting, neglecting or refusing to comply with or that resists or opposes the execution of any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished in accordance with said section.

Injunction is not the proper remedy in the cases that you refer to in your communication. The proper method to be pursued by you to enforce the provisions of the ordinance is to file a complaint in the Police Court charging a violation of the ordinance in the particulars referred to against the person or persons violating the same. It would seem to me that an arrest in one case would test the question you raise and that the outcome of the prosecution of such a case would determine the respective rights of your Department and the various public service corporations involved.

I cannot advise you whether it would be advisable to arrest the superintendent, foremen or workmen. That is a matter to be determined by the officials charged with the duty of issuing warrants in criminal cases.

Respectfully,

PERCY V. LONG,

City Attorney.

Department of Electricity.

Municipal Department Maintaining Office in Auditorium.

August 22, 1916.

Dear Sirs: I am in receipt of your communication dated August 15, 1916, which reads as follows:

"I have been directed by the Auditorium Committee of the Board of Supervisors to request that you advise it whether or not it may grant to any department of the municipal government permission to maintain its office or department for the transaction of public business in the Exposition Auditorium, pursuant to the conditions set forth in the agreement entered into by the City and County and the Exposition Company, June, 1913.

"(Signed) Jno. F. Ahern,
"Clerk, Auditorium Committee."

Opinion.

The Fifth clause of the agreement entered into between the Panama-Pacific International Exposition Company and the City and County of San Francisco in June, 1913, and recorded in Book 50 of Covenants at page 214, answers your question fully. That clause reads as follows:

"Upon the closing of said Exposition the party of the second part will accept said building in its then condition and will thereafter preserve and maintain the same in good order, making all necessary and proper repairs, protecting the same against vandalism and permitting the same to be used, and only to be used, by the people of the City and County of San Francisco and of the State of California for assemblages for purposes connected with the general welfare; provided, however, that upon reasonable conditions and regulations to be adopted by the Board of Supervisors and approved by the Mayor of the City and County of San Francisco, said building may be used for special and private assemblages, congresses or conventions of such societies, associations, organizations or groups of individuals brought together for their common good, or for any purpose connected with the public welfare; and provided, further, that when devoted to any such uses, the fact that any or all of the persons comprising any such group, organization, association or society may not be citizens of the City and County of San Francisco or of the State of California, shall not preclude the use of said building for any such purpose, notwithstanding anything herein contained."

This is the only clause of the agreement which pertains to the question and the language is so clear that no discussion is necessary.

I advise you that pursuant to the provisions of that clause of the agreement, the Board of Supervisors cannot grant to any department of the municipal government permission to maintain its office or department for the transaction of public business in the Exposition Auditorium.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditorium Committee,
Board of Supervisors.

Purchase of Uniforms for Elevator Operators.

August 31, 1916.

Sir: I am in receipt of your inquiry of the 17th inst., as follows:

"I have been informed by employees of the Supervisors' Office and asked whether I would approve demands that might reach me for the purchase of uniforms for the elevator men employed in the City Hall. There seems to be some question as to the validity of the City going to the expense of furnishing uniforms to the twelve elevator employees, and if uniforms were supplied these men at the City's expense who would be responsible for the maintenance and repair of same?

"Will thank you to advise me whether in your opinion the Supervisors have the legal right to make such purchases, and if demands reach me for approval whether I should allow same or not."

Opinion.

Section 1, Chapter III, Article II of the Charter, provides for the purchase, by the Supervisors, of all goods, merchandise, stores, supplies, etc., for the *City and County.*

The purchase of uniforms for the elevator men employed in the City Hall, cannot, by any process of reasoning, be denominated a purchase of goods or supplies for the City and County, and inasmuch as the members of the police and fire departments purchase the uniforms worn by them, the rule thereby established is applicable to the uniforms for the elevator men.

You are advised that such demands would not constitute valid demands against the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Validity of Ordinance Regulating the Labor of Minors.

August 31, 1916.

Gentlemen: I am in receipt of your communication of recent date, submitting the draft of a proposed ordinance. This ordinance provides for the issuance of certificates and badges to working minors under the age of sixteen years, and creates the office of Supervisor of Working Minors to enforce its provisions.

Your Board desires to know—

"1. Has the Board of Supervisors the power to pass an ordinance of this character?

"2. If so, could it be enforced, or does it conflict with the provisions of the State law relating to working minors?"

Opinion.

I.

Under the provisions of Article XI, Section 11 of the State Constitution, and Paragraph 1, Section 1, of Chapter II, Article II, of the Charter, your Board has the power to pass such an ordinance as that submitted.

II.

The question which next presents itself is whether this ordinance is in conflict with any existing State law.

Act 1611 of the General Laws of the State of California regulates the employment of children within the State, and provides for the issuance of permits, etc. The ordinance as proposed requires, in addition, the issuance of a working badge to such minors. That such additional requirements are not in conflict with general laws of the State has been held in Ex parte Hong Shen, 98 Cal. 681. The Court there ruled that:

"There are the very best of reasons why cities should be authorized to impose penalties in addition to those inflicted by the laws of the State. Particular acts may be far more injurious, while the temptation to commit them may be much greater in a crowded city than in the State generally. They consequently require more severe measures for prevention. State

laws are, of course, for the general good, and cannot always answer the peculiar wants of particular localities."

In the more recent case of In re Hoffman, 155 Cal. 114, the Supreme Court reaffirmed this principle in the following language:

"The State in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the State, urban and rural, but it may often, and does often happen that the requirements which the State sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to State regulations provisions adapted to their special requirements. Such is the nature of the legislation here questioned."

You are therefore advised that the ordinance proposed is not in conflict with the State law relating to working minors.

In the ordinance as submitted, however, there are several matters which appear to be merely a repetition of the State requirements.

These repetitions occur in Section 2, paragraphs 1, 2 and 3.

Section 5 also seems to place an additional burden on the employers of minors. I would suggest that a conference with the State officers entrusted with the enforcement of Act 1611 might make it possible to eliminate these objections.

I also beg to call to your attention the fact that Section 3 of the draft submitted makes no provision for the compensation of the Supervisor of Working Minors.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Automatic Stop Signal—Authority to Contract For.

September 15, 1916.

Gentlemen: I am in receipt of your communication of September 11, 1916, as follows:

"Enclosed please find copy of letter from Mr. Harris offering two propositions for his 'Automatic Stop Signal.' The Supplies Committee of the Board of Supervisors desires to know if there is any legal obstacle to the City's accepting either proposition."

Opinion.

It is stated in Mr. Harris' communication that he is the inventor and owner of a certain Traffic Signal known as "The Harris Automatic Stop Signal."

I presume from this that this is a patented article which can only be procured from Mr. Harris. It is generally held, that where a patented article is deemed best suited for the purposes of a municipality, it may be contracted for even though the Charter requirement for competitive bidding cannot be complied with.

The general rule is stated in McQuillin on Municipal Corporations, Vol. 3, Sec. 1197, page 2642, as follows:

"The prevailing and better opinion is that a provision of the Charter or statutes that municipal contracts be let on competitive bids, does not preclude the proper authorities from specifying a patented article or process, which practically precludes competitive bidding."

The reason for this rule is well stated in the same volume at page 2645 in the following language:

"The true reason, it is submitted, for the rule upholding municipal authorities in specifying patented material or articles is that to hold otherwise would defeat the very purpose of the legislative provisions requiring contracts to be let to the lowest responsible bidder after advertisement. The purpose of these provisions is to protect the public interests. They do this by requiring bids to be advertised for and the contract to be let to the lowest and best, or lowest responsible bidder. But this specific requirement is only incidental to the main purpose of

protecting the public interests by securing the best advantages in the way of material and supplies at the lowest practical price. The authorities may protect the interests of the municipality by refusing to contract for the thing patented if the price asked therefor is unreasonable or prohibitive, and if there is any fraud practiced it will vitiate the contract the same as it will a contract for an unpatented article. Consequently in promoting and protecting the best interests of the municipality, it is necessary that the corporate authorities be permitted to specify patented materials or articles when it is clearly to the interest of the municipality to do so, after carefully considering the serviceability and cost of the material or article for which the contract is made. Then, too, it cannot be presumed that a provision to secure competitive bidding was intended to apply where competitive bidding on the thing required is impossible."

Upon the same principle I advised the Fire Commissioners in an opinion rendered on January 10, 1912, that, if in their judgment a particular make of automobile was best suited to their purposes they might purchase it without competitive bidding.

I therefore advise you that, if in the judgment of your Honorable Board, "The Harris Automatic Stop Signal" is deemed best suited for use in the City and County of San Francisco, and the cost is reasonable, your Honorable Board may enter into a contract for its acquisition according to either of the propositions made by Mr. Harris.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Transfer of Money from Reserve Fund of the Municipal Railways to Stockton Street Tunnel Account.

September 18, 1916.

Gentlemen: I am in receipt of the following communication from the Clerk of your Board:

"I am directed by Supervisor Wolfe, Chairman of the Public Utilities Committee, to request you to furnish an opinion as to whether or not the money in the Municipal Railway Fund can be used in payment of balance due on the Stockton Street tunnel."

Opinion.

The balance due to the contractors for the construction of the Stockton Street tunnel is properly payable out of any fund available therefor. Either the City should levy a supplemental assessment on the district assessed for the construction of the tunnel or it should pay the balance out of its General Fund.

The Charter provides in Subdivision 2, Section 16, Article XII, that:

"Whenever the Reserve Fund shall exceed one-half of the payment for operating expenses in the preceding fiscal year, the Supervisors shall have the power to appropriate such excess to the General Fund."

If the Reserve Fund of the Municipal Railways exceeds one-half of the operating expenses of the previous fiscal year by more than $4,000 it is within the power of the Board of Supervisors to appropriate the $4,000 from the Reserve Fund into the General Fund and apply the same to the payment of the balance due on the Stockton Street Tunnel contract.

On May 15, 1914, I advised the Board of Supervisors that it could pay the assessment levied against City lands assessed to pay the City's proportion of the "cost of the construction of the Stockton Street Tunnel out of the earnings of the Union Street Line," and my present opinion is in line with the opinion I then rendered.

I understand from the resolution before the Board of Supervisors that the transfer is to be treated as a loan and the money paid back into the Railway Fund from any surplus that may occur in the Stockton Street Tunnel Fund. The Auditor and Treasurer should understand this so that if such a surplus occurs the $4,000, or as much as the surplus is, shall automatically revert to the Railway Fund.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Orders for Stationery in Cases of Great Necessity.

September 25, 1916.

Sir: I am in receipt of your communication of August 17, 1916, in which you refer to certain demands on file in your office for stationery furnished to the stationery department of the Board of Supervisors.

My understanding is that this stationery was urgently necessary because of the fact that the Board of Supervisors had not at the time it was ordered entered into the annual contract for stationery.

On September 26, 1914, I rendered you an opinion upon certain printing demands; that opinion was in part as follows:

"My understanding is that each of these demands is in an amount of not more than $200 and that the said printing was ordered by officers or heads of departments with the consent of the Mayor, that the demands were regularly approved by the Supervisors and that the furnishing of said printing was absolutely necessary in order to meet the requirements of law which imposes certain duties upon said officers and departments. That said departments and officers could not have performed the duties of their offices as required by the Charter and by law unless said printing had been ordered in the amounts specified.

"You inquire whether, under such circumstances, such demands are legal demands against the City and County, in view of the fact that there has not been awarded by the Board of Supervisors the annual contract for printing as required by the Charter.

"You are advised that in my opinion such demands are legal demands against the City and County in view of the language of Section 13, Chapter I, Article II of the Charter, which provides that 'in cases of great necessity the officers and heads of departments may, with the consent of the Mayor, expend such sums of money, not to exceed Two Hundred Dollars, as shall be necessary to meet the requirements of such necessity'."

My understanding is that these stationery demands fall in the same category as the printing demands referred to in that opinion. If they are identical, and if procedure pointed out in Section 13, Chapter I, Article II of the Charter has been fol-

lowed, I advise you that these demands are valid and should be approved.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Hospital Building Built Before Adoption of Present Building Law.

September 27, 1916.

Gentlemen: I am in receipt of your request for an opinion under date of September 25, 1916, as follows:

"The question has arisen regarding the occupancy of an existing building located at the northwesterly corner of Page Street and Masonic Avenue, it being the intent of the owners thereof to lease said building for hospital purposes.

"It is requested that you furnish this office with an opinion as to whether or not this building can be so used.

"For your further information there is herewith transmitted copy of a report of Chief Building Inspector John P. Horgan."

It appears from the communication of Mr. Horgan, which you enclosed, that the building in question was erected for use as a hospital and so used before the adoption of the present building law.

Opinion.

Section 81 of the Building Law provides with regard to hospitals as follows:

"Schools, hospitals, sanitariums and halls and other places of public assemblage, seating more than 1000 persons, other than theatres, built in any part of the City, shall be of Class 'A' or Class 'B' construction, with columns in outer walls supporting floor and roof loads."

Section 2 of the Building Law reads as follows:

"This Ordinance shall apply to all buildings hereafter to be erected, constructed, altered, repaired, raised, added to or built upon within the boundaries of the City and County of San

Francisco, except buildings and construction for which permits have been issued by the Board of Public Works prior to the passage of this Ordinance."

The application of the provisions of the Building Law is limited by Section 2 to buildings "hereafter to be erected, constructed, altered, repaired, raised, added to or built upon within the boundaries of the City and County."

It therefore has no application to buildings which were in existence at the time of its adoption.

I therefore advise you that, since the building here in question was erected before the adoption of the Building Law, Section 81 of the Building Law has no application thereto and the owner is entitled to lease it for hospital purposes.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Reinstatement of Conductor on Municipal Railway.

September 27, 1916.

Gentlemen: I am in receipt of your communication of September 20, 1916, as follows:

"On February 28, 1916, we received notice from the Board of Public Works that by its Resolution No. 44,027 (Second Series), passed February 23, 1916, James E. Peterson, Civil Service conductor No. 119 (2), was discharged for leaving the service of the Municipal Railway. On September 14, we were advised by the Board of Public Works that further investigation of Mr. Peterson's case was made by Superintendent Cashin of the Municipal Railway and as a result said Peterson was ordered reinstated by said Board. We enclose herewith copies of letters received by this Commission from the Board of Public Works relating to such reinstatement. Kindly advise us at your earliest convenience as to whether or not the Board of Public Works, under the circumstances surrounding this case, has the power to reinstate said Peterson, and as to whether or not we should, because of such

reinstatement, restore the name of said Peterson to the Civil Service list."

Opinion.

By the last sentence of Section 12 of Article XIII of the Charter, persons employed in the operating department of any public utility may be discharged at any time without a trial or hearing.

If Mr. Peterson was absolutely discharged from his position as a conductor on the Municipal Railway he ceased immediately to be an employee of the City and lost his rights and status as a municipal employee.

Having been so dismissed, he could not thereafter be reinstated or again receive a position on the Municipal Railway, except by following the procedure outlined in Article XIII of the Charter, that is, securing standing upon the proper eligible list in an examination and being certified and appointed in the usual way.

I therefore advise you that the Board of Works was without power to reinstate Mr. Peterson and that his name should not be restored to the Civil Service list.

Respectfully,

PERCY V. LONG,

City Attorney.

Civil Service Commission.

Sanitary Reduction Works—Proposition of Fred P. Smith—to Operate.

September 27, 1916.

Gentlemen: I am in receipt of your communication of September 1, 1916, as follows:

"Acting under the instructions of the Health Committee of the Board of Supervisors, I enclose you copy of a communication from Fred P. Smith, regarding offer, etc., to operate the Sanitary Reduction Works.

"The Committee respectfully requests you to furnish it with an opinion, as to whether the City could legally enter into an

agreement with Smith or any other person, to operate the Reduction Works (should the City decide to pay the remaining $50,000 of the purchase price and take over the plant) without first publishing a proposal calling for bids for lease of the property.

"Would it be necessary to call for bids and let the privilege to the bidder whose terms would be most satisfactory and profitable to the City?

"In view of the present litigation with the Destructor Company, would it be advisable for the City to pay the balance due on the Sanitary Reduction Works and take over the plant?"

Opinion.

As I understand the offer of Mr. Smith, to which your communication refers, it contemplates the granting of a privilege by the City and County, to-wit, the privilege of incinerating garbage in the City and County together with the granting of a lease to the property which is known as the Sanitary Reduction Works. Such a contract could only be entered into by publishing a proposition calling for bids as provided in Article II, Chapter II, Section 1, Subdivision 32 of the Charter.

With regard to your second inquiry, I will state that the taking over of the Sanitary Reduction Works could have no possible effect upon the result of the litigation with the Destructor Company. However, you should bear in mind that if that litigation is successful the City will acquire the Islais Creek plant. As a matter of policy, which this office cannot decide upon, it might for this reason be advisable to take no steps until that litigation is concluded.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Board of Works Must Have Authorization of Supervisors for Doing Public Work.

September 27, 1916.

Gentlemen: I am in receipt of your request for an opinion on the following facts:

By Ordinance No. 3776 (New Series), approved on June 21, 1916, the Board of Public Works was authorized and directed to enter into a contract for needed alterations to County Jail Buildings Nos. 2 and 3.

Following is a copy of said ordinance.

"Ordering the needed alterations and repairs to County Jail Buildings Nos. 2 and 3, authorizing and directing the Board of Public Works to enter into contract for said alterations and repairs and permitting progressive payments to be made during the progress of the work.

"Be it ordained by the People of the City and County of San Francisco as follows:

"Section 1. The Board of Public Works is hereby authorized, instructed and empowered to enter into contract for making needed alterations and repairs to County Jail Buildings Nos. 2 and 3 in accordance with the plans and specifications prepared therefor by the Board of Public Works.

"Section 2. The said Board of Public Works is hereby authorized and permitted to incorporate in the contract for the said work that progressive payments shall be made during progress of the work, as provided in Section 21, Chapter I, Article VI of the Charter.

"Section 3. This Ordinance shall take effect immediately."

Opinion.

You ask for my opinion as to whether the Board of Public Works has the right to proceed to do this work upon its own initiative without entering into contracts for the same.

You are advised that the Board of Public Works is not authorized to do this work unless the work is first ordered by the Board of Supervisors, and the only authorization in this case is that contained in the ordinance above referred to. This author-

ization in terms directs that the work be done by contract. The Board of Public Works may so enter into contract under such an authorization, but there is nothing contained in this ordinance which can be construed as a direction that the work be performed by the Board of Public Works.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Supervisors Cannot Force Board of Works to Do Public Work by Contract.

September 30, 1916.

Gentlemen: I am in receipt of your request of September 29, 1916, as follows:

"Referring to Section 14, Chapter I of Article VI of the Charter, this Board desires to be advised whether the Board of Supervisors has power, in view of the provisions of said section, to incorporate in an authorization, either by ordinance or resolution, for the doing of public work under the supervision of the Board of Public Works, a requirement or direction that such work be done under contract only, which requirement or direction would be obligatory upon the Board of Public Works, and which it could not officially disregard, notwithstanding the provision of said section that public work authorized by the Supervisors to be done under the supervision of the Board of Public Works shall, *unless otherwise determined by the Board of Public Works*, be done under contract in the manner therein prescribed."

On September 27, 1916, I advised the Board of Supervisors with reference to an ordinance adopted by that Board, authorizing and directing the Board of Public Works to enter into a contract for the making of certain repairs and improvements to the County Jail. I advised, first, that this authorization was necessary, and second, that under such an authorization the Board of Public Works had no power to do this work by its own employees.

I understand that your request for an opinion is made for the purpose of proceeding a step further, and have determined the question of the power of the Board of Supervisors to compel the Board of Public Works to so enter into contracts for the performance of this work.

It seems clear to me that the purpose of the governing Charter sections is to first vest in the Board of Supervisors a general control so as to require an authorization from that Board before public work is performed. Such a discretion being vested in the legislative body, that body can exercise this discretion so as to make its consent to the performance of public work conditional upon that work being performed by contract.

On the other hand, Section 14 of Chapter I of Article VI of the Charter, while recognizing that such work must be "authorized by the Board of Supervisors," goes on to state that, after such authorization, it shall, "unless otherwise determined by the Board of Public Works, be done under written contract," etc., etc.

Here then we see a positive statement of a discretion vested in the Board of Public Works as to whether or not the work shall be done under such written contract. With such a discretion so expressly given by the Charter to the Board of Works it does not seem possible that the Supervisors can control the action of the Board of Works to the extent of compelling compliance with the wishes of the legislative body that the work be done under written contract.

In the absence of a statement in the authorization that the work should be so done by written contract there would be no question of the power of the Board of Works to itself determine whether the work should be performed by written contract or by the Department itself.

The Supervisors have chosen to exercise a prerogative which in effect is that they will withhold authorization unless the work is done under written contract. This, however, does not mean that the Supervisors can force the Board of Works to do the work in the manner desired by the Board of Supervisors, in other words, if the Board of Public Works desires to exercise its privilege under the ordinance which has been adopted, it may do so and let the work out by written contract. But if in its opinion

the work should be done by the Department itself, there is no power given the Supervisors to force the Board of Public Works to do otherwise.

We have reached the point where joint action is necessary by the two Boards, and only by such joint action and agreement between the two Boards can this public work be accomplished.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Appeal from Street Assessment.

October 6, 1916.

Gentlemen: I am in receipt of your communication relative to a certain appeal of Thomas D. Quigley from a street improvement assessment as follows:

"I am directed by the Board of Supervisors to refer to you the appeal of Thos. D. Quigley, 1599 Eighth avenue from the assessment for the improvement of Moraga Street between Eighth and Ninth and Tenth and Eleventh Avenues.

"Request is made for an opinion as to whether or not the assessment should be set aside in accordance with the appeal."

Opinion.

While the appeal is very general in its language I am advised that it is chiefly based upon the claim that the amount of the assessment involved is over fifty per cent of the assessed valuation of the property against which the assessment was made.

Section 15 of the Street Improvement Ordinance provides:

"No assessment shall be levied upon any property, which together with all assessments for street improvement that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed, exclusive of improvements thereon, upon the assessment book of the City and

County current at the date of the passage of the resolution of intention; except, however, as in this Ordinance hereinafter provided."

Section 28 of the same Ordinance provides:

"Any assessment imposed under the provisions of this Ordinance may be paid in annual installments, not exceeding ten in number, whenever the Board of Public Works shall so determine and declare in the resolution of intention or whenever the Board of Supervisors shall so determine and declare in the Ordinance ordering the work, and it shall be mandatory for the Board of Public Works to so determine and declare in every case when the amount of the assessment imposed will exceed one-half of the assessed value of the lot or parcel of land against which such assessment is imposed. Such resolution or ordinance shall state the number of installments in which the assessment may be paid, and the rate of interest to be charged on all deferred payments, which rate of interest shall not exceed seven per centum per annum."

As the result of these sections it is necessary in every case where an assessment will exceed fifty per cent of the assessed valuation of the property to provide, as required by Section 28, for the payment of the assessment in annual installments. If, as a matter of fact, your Honorable Board determines that the assessment here in question together with any other assessments for street improvements levied on the same property during the year next preceding, if there were any such, will amount to more than fifty per cent of the assessed valuation of this property, then Mr. Quigley's appeal is well taken.

The procedure to be followed in the case of an appeal is set out in Section 21 of the Ordinance. In an opinion rendered to your Honorable Board on November 8, 1915, the powers of your Honorable Board in case of such an appeal were fully defined. If you find that this assessment is in excess of fifty per cent of the assessed valuation of the property your Honorable Board may, under the powers granted you by Section 21, amend the assessment so as to make it come within the fifty per cent limit.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Uniform Accounting System for Municipal Departments.

October 13, 1916.

Dear Sir: You have submitted to me Resolution No. 13,423 (New Series), adopted by the Board of Supervisors, October 2, 1916, relating to the employment of the firm of Klink, Bean Company for the sum of $10,000, for the work necessary preliminary to the installation of a uniform accounting system for the various offices and departments of the municipality.

Accompanying such resolution so submitted by you was the protest of Lester N. Bryte, dated October 4, 1916. Mr. Bryte in his letter to you, in his first objection states that the contemplated expenditure is without authority of law, for the reason that no bids were obtained; that there are no specifications as to what work is to be done; that no rates per day are fixed; that there is absolutely no stipulation of record to show what the City and County of San Francisco is to receive.

The answer to that objection is that the Board of Supervisors is authorized by Subdivision 40, Section 1, Chapter II, Article II of the Charter to prescribe a uniform system of accounting for the various offices and departments of the City, said subdivision having been added by amendment to the Charter December 10, 1912; that the nature of the work to be performed preliminary to the installation of a uniform accounting system for the various offices and departments is such that it would be impracticable, if not impossible, to obtain bids thereon, and such being the case, it was perfectly proper for the Board of Supervisors to proceed as it has in this instance.

By the terms of the resolution, the work required of said firm is to be performed under the supervision of the Finance Committee of the Board of Supervisors. It must be assumed that said Committee will see that everything necessary to be done by said firm is performed by it. It is not necessary, therefore, for the resolution to fix any rates per day.

The second objection made by Mr. Bryte is that the proposed expenditure of $10,000 may be absolutely wasted by reason of the fact, as he claims, that the total cost of a new system of accounting, if installed by any firm of accountants, is very likely to be over $50,000, and that it is quite probable that future

Boards of Supervisors may not agree to employ this particular firm to carry the actual installation of work to completion.

This objection refers to a matter of policy for the Board of Supervisors and the Mayor to decide and presents no question of law for determination.

The third, fourth and fifth objections put forth by Mr. Bryte concern the powers of the State Board of Control in the matter of installing systems of accounting in City and County governments.

Section 687 of the Political Code referred to by Mr. Bryte is as follows:

"The Board of Control, through the Department of Public Accounting, shall devise, install and supervise a uniform system of accounting and reporting for any and all officers or persons in this State permitted or charged by law with the keeping of public accounts and records, and the custody, control and handling of public money or its equivalent, to the end that there shall be obtained similar and comparable data for every public office and every public account of the same class, and that there shall be a general, systematic and uniform check upon the receipt and disbursement of all public revenue."

As far as these objections relate to offices in this City and County, other than strictly city offices, they appear to me to be well taken. Under the section quoted, the State Board of Control, through its department of public accounting, has jurisdiction and power to install systems of accounting in State and County offices. The offices thus under the jurisdiction of the State Board of Control are those which have been held by the Supreme Court in the case of Kahn vs. Sutro, reported in 114 Cal., p. 316 et seq. to be county offices, namely, the District Attorney, Sheriff, County Clerk, County Recorder, Coroner and Public Administrator.

What has just been said relating to the powers of the State Board of Control over county offices does not invalidate the resolution or detract from the power of the Board of Supervisors to pass or adopt the same. The resolution is a valid resolution, well within the power of the Board of Supervisors to adopt under the section of the Charter hereinabove quoted. It will, if approved by you, apply to the offices and departments of

the municipality other than those mentioned by the Supreme Court in the case of Kahn vs. Sutro, supra. As to these latter offices the firm mentioned may proceed to carry out the provisions of the resolution, but there is no certainty that the State Board of Control would or could, under the provisions of Section 687 of the Political Code, approve or adopt the system of accounting installed by said firm because said Board of Control is authorized by said section to "through the Department of Public Accounting, devise, install and supervise a uniform system of accounting," etc. The question might arise, whether the Board of Control is authorized to adopt the system of accounting installed by a private firm of accountants, in view of the fact that Section 687 of the Political Code provides that said Board of Control shall devise and install any such system through the Department of Public Accounting.

The question of the approval of the resolution, under the conditions above set forth, is, therefore, one of policy, which is not within my province to pass upon.

Respectfully,

PERCY V. LONG,

City Attorney.

Mayor.

Demands on School Funds Must Be Approved by Board of Education.

October 18, 1916.

Sir: I am in receipt of your communication of October 17, 1916, as follows:

"I am in receipt of a demand from Superintendent of Schools Roncovieri drawn in favor of a printing firm for copies of circulars used in the high schools of San Francisco. This demand has reached me without approval of the Board of Education, the Superintendent claiming that it is not necessary to have the approval of the Board of Education for the reason that it was drawn under the provisions of Section 1548 of the Political Code. I have refused my approval, explaining that the Charter provisions took precedence over this section of the Code.

"Will thank you to advise me whether I am right or is the claim a valid one and should I approve same without it first being approved and passed by the Board of Education?"

Opinion.

The only language contained in Section 1548 of the Political Code which can refer at all to such a demand as you inquire about is to the effect that the County Superintendent of Schools "may draw his requisition upon the County Auditor, * * * for such other incidental expenses as may be authorized by law."

I know of no authorization in law for the incurring of such an expense without the approval of the Board of Education. The Charter of this City and County, Article III, Chapter III, Section 13, provides that:

"All demands payable out of the Common School Fund must, before they can be allowed or paid, be previously approved by the Board of Education."

Article VII, Chapter III, Section 1, Subdivision 10, also provides for the approval of all such demands by the Board of Education.

You are therefore advised that in my opinion you are correct in your position that this demand should not be approved by you without being first approved and passed by the Board of Education.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Legality of Position of Confidential Secretary to Chief of Police.

October 24, 1916.

Dear Sir: I am in receipt of your request for an opinion dated October 14, 1916, as follows:

"Several months ago I received a protest from Attorney Walter Cook, protesting against paying the salary of Joseph A. Murphy, Confidential Secretary to Chief of Police. The point raised in

said protest was the claim that Mr. Murphy was not legally appointed. To satisfy myself regarding the matter I communicated with the Board of Police Commissioners and was informed that Joseph A. Murphy was appointed Confidential Secretary to Chief of Police on November 25, 1913, at a monthly salary of $200 in accordance with provisions of Section 2, Article XIII of the Charter, and Bill No. 2758 of the Board of Supervisors. In my investigation I learned that every precaution recommended by the Charter had been complied with, which included the recommendation from the Mayor and the passage of an ordinance by the Board of Supervisors. Now I am in receipt of a new protest dated October 10, 1916, signed by Attorneys George Appell and A. S. Newburgh in which they claim that Ordinance No. 2509, Bill No. 2758, of the Board of Supervisors, which was approved on November 25, 1913, and also the new Ordinance No. 3535, approved December 14, 1915, did not comply with the Charter requirements for the reason that it did not state that this was an additional position to be created."

Opinion.

The protest of Messrs. Appell and Newburgh is based upon the claim that the Charter does not authorize the creation of the position here in question.

Section 35, Article XVI of the Charter provides:

"When any officer, board or department shall require additional deputies, clerks or employees, application shall be made to the Mayor therefor, and upon such application the Mayor shall make investigation as to the necessity for such additional assistance; and if he find the same necessary he may recommend to the Supervisors to authorize the appointment of such additional deputies, clerks or employees; and thereupon the Supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointment and provide for the compensation of such appointees, subject to the limitations contained in this Charter, and subject to the provisions of Article XIII thereof."

It is not claimed that the provisions of this section were not strictly followed in the creation of the position of confidential secretary to the Chief of Police. But the claim is made that the position as created is illegal for two reasons:

1. The protestants contend that the word "additional" in Section 35, Article XVI means an office or position in addition to an office or position already in existence, and of the same grade or class, as contra-distinguished from a new office or position, or one of a different grade or class from those already in existence. In speaking of "additional deputies, clerks or employees" the Charter clearly implies the creation of positions in addition to those already in existence. But I can see no possible reason for limiting these additional positions to the same classes or grades as those created by the Charter. The patent purpose of Section 35, Article XVI is to enable the heads of departments to suggest and the Mayor and Board of Supervisors to allow whatever assistants may be necessary in addition to those created by the Charter; and the creation of additional positions with new duties may be just as necessary as the creation of additional positions of the same character as those already existing. The protestants cite in support of their claim Harrison vs. Horton, 5 Cal. App. 416; McCurdy vs. Smith, 60 S. E. 78; and Butler vs. Andrews, 90 Pac. 785.

In Harrison vs. Horton, the meaning of the word "additional" in Section 35, Article XVI was not considered or discussed. In the Butler case the Court held that the power to create "an additional municipal indebtedness" necessarily presupposed an existing indebtedness to which the new indebtedness would be "additional." This is undoubtedly correct, but falls short of supporting the protestants' position. There are positions in existence in the Police Department and the position of confidential secretary to the Chief is clearly "additional" to them.

McCurdy vs. Smith construed a section of the Constitution of Virginia, providing for the creation by the Legislature of additional courts and held that the courts authorized by the Constitution must be similar in grade, dignity and jurisdiction to existing courts. But the Court did not arrive at this conclusion from a construction of the word "additional" but from a consideration of the Constitutional provision as a whole.

I have, therefore, reached the conclusion that Section 35, Article XVI, authorizing the creation of additional positions is broad enough to cover the position here in question.

2. Article VIII, Chapter IV, Section 5, authorizes the Chief of Police to detail at his pleasure a member of the Department to act

as his Chief Clerk. It is claimed that since the ordinance does not define the duties of the confidential secretary, it is clear that they are the same as those of the Chief Clerk provided for by the Charter. But no such presumption can be indulged.

On July 27, 1915, I rendered an opinion advising you as to the legality of certain extra positions created in the Assessor's office. In that opinion, I said:

"We must assume that His Honor the Mayor and the Board of Supervisors in the lawful exercise of their judgment concluded that it was necessary to create these extra positions for the proper performance of the duties of the office of the Assessor.

"In my opinion, the mere fact that the appointing officer does not take advantage of his powers of appointment under the Charter cannot deprive the Board of Supervisors and the Mayor of their powers to determine the necessity for the creation of any positions in the department of said appointing officer. The question of whether, under all the circumstances, it was necessary for such positions to be created and the propriety of requiring the head of the department to fill vacant positions before creating new ones were questions to be determined in the sound discretion and judgment of the Mayor and the Board of Supervisors. The legal presumption is that they were so considered and that it was finally determined that it was necessary to create these extra positions."

The reasoning of this opinion is equally applicable here. The question of the necessity of the creation of the position of confidential secretary to the Chief of Police was one to be determined in the sound discretion and judgment of the Mayor and the Supervisors, and the legal presumption is that every consideration bearing upon that question was considered in reaching the conclusion that such position was necessary.

I, therefore, advise you that the salary of the confidential secretary to the Chief of Police is a proper legal claim against the City and County.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Moving Picture Houses Not Required to Get Permit from Police Commissioners.

November 4, 1916.

Sir: I am in receipt of your communication of October 24, 1916, in which you request advise as to the proper construction of Ordinance No. 3893 (New Series), adopted by the Board of Supervisors on September 18, 1916. This Ordinance is entitled "Regulating Motion Picture Exhibitions and Entertainments, and Repealing Ordinance No. 761 (New Series), approved May 3, 1909."

Section 1 thereof provides generally that a certain character of moving picture exhibitions shall be unlawful.

Section 2 requires the Chief of Police to detail a police officer to see that the provisions of the Ordinance are complied with.

Section 3 fixes the penalty for the violation of the Ordinance, and Section 4 reads, "Ordinance No. 761 (New Series), approved May 3, 1909, is hereby repealed."

The ordinance so repealed was approved May 13, 1909, and it required any person or corporation conducting a moving picture exhibition to first receive a permit from the Board of Police Commissioners. It further prescribed certain classes of pictures which were held to be unlawful; fixed a penalty for the violation of the ordinance, and gave the Police Commissioners, after a hearing, power to revoke the permit upon such violation.

The ordinance also created an advisory committee, whose duty it was to inspect all moving pictures being displayed or exhibited, and enforce the terms of the ordinance.

It is obvious from an examination of these two ordinances that one of the main purposes of the later ordinance, No. 3893, was to do away with the necessity for receiving a permit from the Police Commissioners, and also, to abolish the advisory committee.

You state, however, that the Police Department still insist that the power rests with them to exact permits for kinetoscope houses because of certain language contained in Section 28 of the general license ordinance, No. 3361 (New Series), approved July 21, 1915. This section exacts a license fee of $25 per quarter

from "every person, firm or corporation maintaining or conducting * * * any kinetoscope *or* phonograph parlor." It further states that "the Tax Collector shall not issue a license to any person, firm or corporation to conduct a * * * kinetoscope *and* phonograph parlor"—unless the applicant first receives a permit from the Police Commissioners, and that such permit shall be issued annually and may be revoked at any time by the Board of Police Commissioners. It is claimed that since this language has not been expressly repealed by the later Ordinance No. 3893 that it is still in effect.

You also state that certain kinetoscope houses contend that even though this language is still effective, it does not apply to them since the language is in the conjunctive, that is, "kinetoscope *and* phonograph parlor" which must mean a business having both moving pictures and a phonograph parlor.

Opinion.

The provisions of any earlier ordinances which are inconsistent with a later enactment are repealed by the later enactment even though not referred to. The last ordinance expressly repealed an earlier ordinance requiring a permit, and it is manifestly inconsistent with such a repeal to consider the provisions referred to in the license ordinance as still being in force.

Taking up your questions in the order asked and answering the same:

(a) Does the repeal of the subject matter "Permits" in Ordinance No. 761 also carry with it the repeal of a like subject matter in Ordinance No. 3361, Section 28? This question is answered in the affirmative.

(b) Does the joining of the words "kinetoscope *and* phonograph parlors," sustain the contention of the kinetoscope men as to what constitutes a "kinetoscope *and* phonograph parlor?"

Since I am of the opinion that the requirement for any permit at all is done away with by the latest ordinance, it is not necessary to consider this contention. I am, however, inclined to the belief that this language should properly be considered in the disjunctive rather than the conjunctive, particularly in view of the fact that in the paragraph immediately preceding in the same Section 28, where the license fee is fixed, the disjunctive

form is used, that is, "any kinetoscope *or* phonograph parlor" is required to pay a license of $25 per quarter.

(c) If a permit is still required for a "kinetoscope *and* phonograph parlor" under Section 28 of Ordinance No. 3361, can this rule be extended to cover kinetoscope houses without any phonograph parlor attached which have a seating capacity, so as to compel them to obtain quarterly permits or renewals of permits from the Police Commission? This question is answered by what has been stated above.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Legality of Proposed Ordinance Forbidding Hauling of Certain Substances in a Designated District.

November 13, 1916.

Gentlemen: I am in receipt of your communication, dated November 8, 1916, as follows:

"The Board of Supervisors refers to you herewith draft of an ordinance prohibiting the receiving and delivering of coal, lime, cement, etc., in the district bounded by Market, Eleventh, Harrison and Thirteenth Streets.

"The Board requests your opinion as to the legality of this ordinance, and further requests that you submit this opinion by next Monday, at which time the Board desires to act upon the subject matter."

Opinion.

It is well settled that the conduct of businesses which are of such a nature that they may under certain conditions become nuisances to the public may be forbidden in certain districts. I am of the opinion that the hauling of manure, stable refuse, ashes, etc., and of coal, lime, cement, and of other substances named in the ordinance which are apt to give off dust, falls under the class of businesses which may be so prohibited.

However, you should bear in mind that in forbidding the transportation of these substances to or from a certain district of the City and County your Honorable Board must act reasonably and without unfair discrimination, and it is a question of fact to be settled in the first instance by your Honorable Board whether the conditions in the district described in the ordinance are so peculiar that the ordinance should be aimed at that particular district in the City and County and no other. In determining this question you should remember that while every presumption is in favor of the determination of your Honorable Board in this matter still the ordinance should be founded upon reason and necessity and should be equally applicable to every district in which the conditions are the same. If your Honorable Board should find that the condition in this particular district requires the application of this ordinance solely to that district and that a similar condition does not elsewhere exist then the ordinance will be reasonable and valid, but if on the other hand your Honorable Board should find that there are other districts in this City where a similar condition exists the ordinance in its present form is unreasonably discriminatory and would be illegal unless made applicable to all such districts alike.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Itinerant Vendors.

November 23, 1916.

Dear Sir: I am in receipt of your letter of November 16, 1916, as follows:

"Will you kindly enlighten me as to what constitutes an Itinerant Vendor, within the meaning of Section 42 of Ordinance No. 3361 (New Series)?

"If a person rents a room in a local hotel and there lives and displays and sells his goods for a period covering a month or more, is such a person an Itinerant Vendor within the meaning of the law?

"The Retail Merchants Association has called upon me to prosecute an individual selling goods under these conditions at the St. Francis Hotel in this City, without a license.

"Please advise me as to whether or not I can legally prosecute him under this section of the License Ordinance."

Opinion.

Section 42 of Ordinance No. 3361 (New Series) reads:

"Every person, firm or corporation engaged in the business or trade of an itinerant vendor shall pay a license to the City and County of San Francisco in the sum of fifty (50) dollars per day, which license shall be issued daily.

"The words 'itinerant vendor' shall be construed to mean and include all persons, both principal and agent, who engage in a temporary and transient business in the City and County of San Francisco, selling goods, wares, merchandise, and who, for the purpose of carrying on such business, hires, leases or occupies any room, building or structure for the exhibition or sale of such goods, wares or merchandise, and the person or firm so engaged shall not be relieved from the provisions of this ordinance by reason of association temporarily with any local dealer, trader, merchant or auctioneer, or by conducting such temporary or transient business in connection with, or as a part of, or in the name of any local dealer, trader, merchant or auctioneer.

"The provisions of this ordinance shall not apply to commercial travelers or selling agents selling their goods to dealers, whether selling for present or future delivery, by sample or otherwise, nor to hawkers on the streets, nor peddlers from vehicles, nor to persons selling fruit, vegetables, butter, eggs or other farm or ranch products."

It will be seen that an "itinerant vendor" is defined in the section itself as one who engages "in a temporary and transient business in the City and County." This is in accord with the general interpretation of the courts.

Levy vs. State, 68 N. E. 172;
Com. vs. Crowell, 30 N. E. 1015;
State vs. Foster, 46 Atl. 833;
Carrollton vs. Bazette, 42 N. E. 837.

All of these cases lay down as the test for an "itinerant vendor" that his business must be temporary and transient in contra-distinction to fixed and permanent. This would include any merchant who came to San Francisco intending to stay for a limited period only and not to engage in business here permanently.

If the person to whom you refer intends to stay in San Francisco and sell goods in a hotel room for only a limited period, whether it be one or several months, and has no intention to make that a fixed and permanent place of business, then he must obtain a license as provided in Section 42 of Ordinance No. 3361 (New Series), or is liable to prosecution under the ordinance.

Respectfully,

PERCY V. LONG,

City Attorney.

Tax Collector.

Klink, Bean & Co., Employment by Supervisors, Is Valid.

December 2, 1916.

Dear Sir: I am in receipt of your communication of November 27, 1916, as follows:

"Resolution No. 13,595 of the Board of Supervisors has become operative without the signature of His Honor the Mayor. This resolution notifies Klink, Bean & Co. to proceed at once with the work mentioned and contemplated by Resolution 13,423 of the Board of Supervisors. Under this last mentioned resolution passed by the Board on October 2, 1916, the firm of Klink, Bean & Co. is 'engaged to proceed with the work necessary preliminary to the installation of a uniform accounting system for the various offices and departments of the municipality for the sum of $10,000.'

"As warrants for payments for Klink, Bean & Co. for work done under both these resolutions will be presented to me undoubtedly within a very short time, I would be pleased, if, in contemplation of the receipt by me of such demands, you would advise me whether the employment of Klink, Bean & Co. by the

City, under these resolutions, is warranted by law. In this connection I would like to be advised as follows:

I.

"Are Klink, Bean & Co., under the resolutions, employees of the City and County, or are they contractors?

"If they are employees, is it not necessary to create their positions of employment in accordance with the provisions of Section 35, Article XVI of the Charter?

"If they are contractors, was it necessary for the Board of Supervisors to invite bids upon the work to be performed by them?

"If it be conceded that Klink, Bean & Co., or the employees thereof, are exempt from the provisions of Article XIII of the Charter under the provisions of Section 11, Subdivision A thereof as 'persons employed by the Board of Supervisors for temporary services in positions requiring high technical skill' is it not necessary nevertheless that their positions be created by ordinance?"

Opinion.

Resolution No. 13,423 (New Series) above referred to reads as follows:

"Resolved, That the firm of Klink, Bean & Co. be and are hereby engaged to proceed with the work necessary preliminary to the installation of a uniform accounting system for the various offices and departments of the municipality for the sum of $10,000.00; and be it further

"Resolved, That said work shall be done under the supervision of the Finance Committee of the Board of Supervisors, who shall call into consultation the Auditor of the City and County, and such other County officials and heads of departments as they deem necessary, the State Board of Control and such bookkeepers and auditors of the various departments that are necessary in connection with the preliminary work of installing said system."

Resolution No. 13,595 (New Series), above referred to, reads as follows:

"Whereas, the Board of Supervisors heretofore adopted Reso-

lution No. 13,423 (New Series), which said resolution is in words and figures as follows:

"'Resolved, That the firm of Klink, Bean & Co. be and are hereby engaged to proceed with the work necessary preliminary to the installation of a uniform account system for the various offices and departments of the municipality for the sum of $10,000.00; and be it

"'Resolved, That said work shall be done under the supervision of the Finance Committee of the Board of Supervisors who shall call into consultation the Auditor of the City and County, such other County officials and heads of departments as they deem necessary, the State Board of Control and such bookkeepers and auditors of the various departments that are necessary in connection with the preliminary work of installing said system. Now, therefore, be it

"'Resolved, That Klink, Bean & Co. be and they are hereby notified to proceed at once with the work mentioned and contemplated by said Resolution No. 13,423 (New Series); and be it further

"'Resolved, That the Clerk of this Board be directed to advise Messrs. Klink, Bean & Co. of the action of the Board of Supervisors in adopting said resolution and of this action of the Finance Committee of said Board. Be it further

"'Resolved, That the Clerk be and he is hereby directed to send a copy of this report of this committee to the Board of Supervisors, which said report bears date August 21, 1916; and a copy of said Resolution No. 13,423 (New Series); and a copy of this resolution of the Finance Committee to the Auditor of the City and County of San Francisco.'"

Answering your inquiries, I advise as follows:

I.

Klink, Bean & Company under these resolutions are employees of the City in the sense of rendering a particular service of a professional nature for a specified sum of money. There is no regular monthly salary nor any definite term of employment.

II.

It is not necessary to create their positions of employment in accordance with the provisions of Section 35, Article XVI of

the Charter requiring a recommendation by the Mayor and the creation of the position by a vote of fourteen members of the Board of Supervisors and the fixing of the salary by the Supervisors. This Charter provision is only intended to apply when regular employees of the City receiving a regular salary are added to the different City departments. The work for which Klink, Bean & Co. are employed is of an entirely different character. In a sense they are contracted with to render services of an expert character to the City for the accomplishment of a given piece of work.

III.

They are not contractors in the sense that bids must be called for in the work to be performed by them. The provisions of the Charter requiring such bids are in the matter of furnishing supplies, the construction of buildings, and public improvements generally, etc. The reasons for the adoption of such a Charter rule do not at all apply to the situation which we here have where the Supervisors are exercising the authority vested in them to "prescribe a uniform system of accounting for the various offices and departments." (Charter, Art. II, Chap. II, Sec. 1, Subd. 40.)

IV.

In my opinion Klink, Bean & Co. are exempt from the provisions of Article XIII of the Charter under Section 11, Subdivision A thereof, as "persons employed by the Board of Supervisors for temporary service in positions requiring high technical skill."

You ask whether it is not necessary that their positions be created by ordinance. If it be granted that the creation of these positions is an act legislative in character, I am still of the opinion that the passage to print and approval by the Mayor of the first of the above ordinances, which is the controlling ordinance, meets the requirements in the law for the proper action by the City in matters of such a character. See Opinions of City Attorney Long, 1910-11-12, p. 509 to 512, and the opinions of City Attorney Lane, 1899-1902, pages 214 to 216.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor.

Legality of Proposed Garbage Contract.

December 11, 1916.

Gentlemen: I am in receipt of your communication of December 5th, as follows:

"By direction of the Board of Supervisors I hand you herewith resolution directing the Clerk to advertise for bids for the disposal of garbage, and the advertisement which was published for ten days; also copies of two bids submitted in response to this resolution and advertisement.

"The intention of this resolution was to solicit from bidders proposals for the disposal of garbage, and after it being determined which was the better plan, to have the City Attorney prepare contracts which would be awarded by proper resolution in the Board of Supervisors.

"The question has been raised as to the legality of this form of soliciting a bid.

"Will you please advise the Board by next Monday whether a contract can be legally entered into under the proposal herein referred to, said contract to be drawn by the City Attorney and submitted to the Board for ratification as to conditions and guarantees."

Opinion.

There is nothing in the Charter covering the making of a contract of this character. In the absence of any provision in the Charter, or in the General Laws covering such a contract, a contract entered into in this manner would be legal.

I have examined the General Laws on the subject and the only question that has suggested itself is whether or not this contract constitutes the granting of a franchise so as to bring it under an Act of the Legislature, enacted on March 22, 1905, and entitled: "An Act Providing for the Sale of Street Railroad and Other Franchises," etc.

The question of whether such a contract as this constitutes the granting of a franchise was raised in the litigation between the Sanitary Reduction Works and the California Reduction Company. In that case the Supreme Court of the United States in Volume 199, U. S. Rep., p. 306, declined to pass upon the

question whether, under a similar contract, the Sanitary Reduction Works held a franchise. In the absence of an express adjudication on the subject, it is my opinion that no franchise is involved in a contract of this character.

I therefore advise you that, under the police power, the City and County of San Francisco may enter into such a contract as is here proposed for the disposal of its garbage and that the manner in which the City has proceeded is perfectly legal and valid. I would caution you, however, to consider carefully the advisability of entering into a contract of this character for a long term of years. It is a matter of policy, for your Honorable Board to decide, whether you consider it advisable to bind the City for a considerable period to a certain method of garbage disposal which might later prove unsatisfactory.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Supervisors.

Claim for Compensation of Burritt N. Dow Under Compensation Act.

December 12, 1916.

Gentlemen: I am in receipt of your communication of December 2, 1916, in which you ask to be advised whether the bill of Burritt N. Dow, an oculist, for treatment of J. W. O'Donnell, a street sweeper in your employ, should be paid.

From the accompanying reports it appears that the question whether the injury to Mr. O'Donnell's eyes arose out of his employment as a street sweeper is in dispute. Unless your Honorable Board should determine that his injury did arise out of his employment, of course there is no liability upon the City to pay the oculist's bill.

I would also call to your attention the fact that under Section 20 of the Workmen's Compensation Act no liability is imposed upon the employer, unless he has notice or knowledge of the injury. I am unable to determine from the data which you have furnished me whether there was notice or knowledge of the

alleged injury in this case. Of course, if the City and County had no opportunity to furnish medical attention, then in that case also the City and County cannot be held liable.

It is also true that if medical services are offered by the employer and refused by the employee for the reason that he prefers to engage treatment for himself, then the employer cannot be held liable for such treatment.

I therefore advise you that this claim should be paid only in case you find the following facts to be true.

1. That the injury complained of arose out of and in the course of Mr. O'Donnell's employment as a street sweeper.

2. That the City and County through its officers or agents had notice or knowledge of the alleged injury to Mr. O'Donnell in time to furnish treatment.

3. That such treatment was not offered or furnished.

Unless you find all of these facts to be true, the claim should not be paid.

Respectfully,

PERCY V. LONG,

City Attorney.

Board of Public Works.

Liability of Contractor to Furnish Barley to Board of Public Works Under Contract.

December 13, 1916.

Gentlemen: I am in receipt of your communication as follows:

"Herewith we beg to hand you the proposal and contract of Scott, Magner & Miller for furnishing to the City and County, as it may require during the fiscal year 1916-17, a certain article of merchandise described in said proposals as follows, viz.:

Class 4—Forage—Item No. 4002

"All articles listed hereunder to be 'strictly No. 1, best in the Market.' Deliveries for Fire Department are made to its stables, foot of Tenth Street.

"Barley, rolled; rolled from No. 1 bright feed barley, S. F. Chamber of Commerce Standard; for delivery to any municipal institution except Relief Home.

Estimated quantity required	75 tons
Price per unit	$28.94 (ton)

"A. W. Scott, Jr., representing said firm, has orally requested the Supplies Committee of the Board of Supervisors to cancel a purchase order duly issued for furnishing 25 tons of said barley, for the reason that it is to be used on the Hetch Hetchy project, and said Scott claims that his contract does not cover any municipal uses outside of the territorial limits of the City and County; he also alleges as a further equitable consideration that he would sustain a loss of $500 upon said barley.

"Your opinion is requested as to whether said firm is obliged to furnish said article under its contract even though it is intended for use in the Hetch Hetchy project."

Opinion.

The proposal or bid signed by the firm of Scott, Magner and Miller upon which said firm was awarded the contract for furnishing rolled barley, Item No. 4002 as indicated in your communication, is as follows:

"In compliance with the advertisement of April 12, 1916, calling for proposals for the furnishing of goods, merchandise, stores, supplies, drugs and other necessary articles to the various officers, offices, departments and public institutions of the City and County of San Francisco from July 1, 1916, to June 30, 1917, which was published pursuant to a resolution of the Board of Supervisors in the official newspaper in the manner and form and for the time provided by law, the undersigned *hereby proposes and agrees to furnish and deliver* such goods, merchandise, stores, supplies, drugs and other necessary articles at the prices herein stated and in accordance with the Specifications and General Conditions therefor hereto attached, to any officer, office, department or public institution of the City and County of San Francisco authorized by Charter or otherwise to purchase goods, merchandise, stores, supplies, drugs, and other necessary articles; and this offer and proposal is made to every officer, office, department and public institution of the City and County of San Francisco."

Special attention is to be paid and consideration given to the last clause of the above proposal wherein it is stated "and this offer and proposal is made to every officer, office, department and public institution of the City and County of San Francisco." The term "specifications" in my opinion simply refers to that portion of Item 4002 as follows: "rolled from No. 1 bright feed barley, San Francisco Chamber of Commerce Standard" and the words "for delivery to any municipal institution except relief home" in said Item No. 4002 is no part of the specifications. Therefore, the contractor in said proposal agrees to furnish to any board, etc., any of the articles bid upon by him in accordance with the specifications, which in my opinion, only include so much of the matter contained in each item as indicates the quality or quantity of the article to be delivered; further, that the bidder proposes and agrees to furnish and deliver such goods "in accordance with the general conditions therefor, hereto attached, to any officer, board, etc." Now when we turn to the General Conditions under which all contracts for furnishing supplies to the City and County of San Francisco for the fiscal year 1916-17 are made, we find that paragraph 7 is as follows:

"All articles in this schedule shall be furnished when required, at the contract price, for the use of any officer, office, bureau, commission, department, board, *or public institution of the City and County of San Francisco.*"

Paragraph 7 is further strengthened by paragraph 8, which is as follows:

"All articles in this schedule must be delivered without charge to the City for such delivery, except as hereinafter provided, to the officers, offices, bureaus, commissions, departments, boards or *public institutions*, to such places, at such times, in such quantities, and in such manner as the officers, offices, bureaus, commissions, departments, boards or *public institutions* or their representatives may designate upon purchase order signed by the duly qualified officers thereof, during the contract term."

It is to be remarked here that paragraph 7 quoted above does not limit the supplying of articles for the use of any officer or board "in" the City and County of San Francisco, but the term used is "of" the City and County of San Francisco, the meaning of which is "belonging to" so that therefore the construction

sought to be placed upon the contract by the firm of Scott, Magner and Miller is at variance with the express and explicit terms of the contract itself.

Messrs. Wright, Wright & Stetson, attorneys for the firm of Scott, Magner & Miller, addressed a communication to me in which they set forth the position of said firm. Said firm of attorneys contend that the bidder should be permitted, as against the general language of the proposal, to rely upon the terms of the specific schedule under which he became bound.

In my opinion, the general language of the proposal is applicable to each and every bid received by the Board of Supervisors for supplies of any character for the fiscal year ensuing and that the proposal and the General Conditions following said proposal contained in the general schedule of supplies are part and parcel of every contract entered into between the City and County and the various bidders to whom contracts are awarded.

As far as the quantity to be delivered to the City and County of San Francisco is concerned, that is covered by paragraph 5 of the General Conditions wherein it is stated:

"The 'Estimated Quantities Required' given in this schedule are the estimated requirements for the fiscal year ending June 30, 1917, but it is distinctly understood that these estimates are approximate and given for information only, and that no obligation is imposed thereby upon the City to purchase these amounts, the right being reserved to the City to purchase under this proposal any greater or less quantity, as the interests of the City may require."

Therefore, the City and County has the option to purchase any greater amount than that indicated in the estimated quantity required under Item 4002 as the necessities and interest of the City may require.

Therefore, you are advised that it is my opinion that the firm of Scott, Magner & Miller is obliged to furnish rolled barley to the Board of Public Works for use in the Hetch Hetchy under its contract to furnish rolled barley under Item 4002.

Respectfully,

PERCY V. LONG,
City Attorney.

Board of Supervisors.

Common School Fund—$1200 Item for Superintendent's Traveling Expenses and Incidentals, Is a Part Of.

December 15, 1916.

Gentlemen: I am in receipt of a request for an opinion from the Auditor and the Board of Education covering the same subject matter, and shall therefore address this reply to the Auditor and the Board of Education jointly.

The budget for the year 1916-17, under the general heading "Common School Fund" includes the following items:

751—Common School Fund	$2,250,000
752—Dental Clinic	3,000
753—Superintendent's Traveling Expenses and Incidentals	1,200

These are all of the items under the heading "Common School Fund." Immediately above the said items is a general summarization of items aggregating $9,621,037, which is designated "Total General Fund." The question has arisen as to whether demands of the Superintendent of Schools for traveling expenses must be approved by the Board of Education before being paid by the City.

The answer to this question depends upon whether said demands are drawn upon and payable out of the "Common School Fund." I have already advised the Auditor that any demand on the Common School Fund must first be approved by the Board of Education. By Resolution No. 13,644 (New Series), approved November 28, 1916, it is

"Resolved, That the allowance covered by said Budget Item No. 753 is hereby declared to be a part of the General Fund for the fiscal year 1916-1917, this having been the intention of the Finance Committee when the Budget Ordinance was submitted to the Board of Supervisors for approval and passage."

The said resolution in full reads as follows:

"Whereas, There is some apparent misunderstanding as to the control of the amount covered by Budget Item No. 753, Ordinance No. 3765 (New Series) designed to provide for the traveling expenses of the Superintendent of Schools; therefore be it

"Resolved, That the allowance covered by said Budget Item

No. 753 is hereby declared to be a part of the General Fund for the fiscal year 1916-1917, this having been the intention of the Finance Committee when the Budget Ordinance was submitted to the Board of Supervisors for approval and passage.

"Further Resolved, That the attention of the Auditor and Treasurer is hereby called to this resolution."

I am asked by the Auditor whether this declaration by the Board of Supervisors is not within the power of the Board so that those demands may in the future be considered as drawn on the General Fund.

I am asked by the Board of Education whether there is any authority in the Auditor and Treasurer on the basis of the aforesaid resolution of the Board of Supervisors to transfer the sum of $1200, or any sum, from the Common School Fund to the General Fund.

Opinion.

You are respectfully advised:

First: That if this $1200 is in fact a portion of the Common School Fund there is no authority in the Board of Supervisors to transfer the same to the General Fund.

Second: The recital by the Board of Supervisors at this time in the aforesaid resolution that said amount of $1200 is a portion of the General Fund is not determinative of the question. The sources of the Common School Fund are clearly prescribed by the law to be the amount received from the State apportionment, the amount received from the City tax levy of twenty-seven cents on one hundred dollars, and from certain other sources. If this $1200 reaches the Treasury from such sources it cannot be transferred to any other fund.

An examination of the books of the Board of Supervisors shows that in fixing the tax levy for the year 1916-17, the following items and figures served as the basis for this levy:

Tax Levy—1916-1917

	Expenditure	Receipts From Other Sources	Taxes	Rate on 542 Million
General Fund	$9,621,037	$1,980,000	$7,641,037	$1.41
Firemen's Relief and Pension Fund	107,500		107,500	.02
Common School Fund	2,254,200	804,000	1,450,200	.27
Library Fund	112,000		112,000	.02
	$12,094,737	$2,784,000	$9,310,737	$1.72
Park Fund	$ 378,000		$ 378,000	$ .07
Interest & Redemptions.				
City and County on 542 Millions	1,944,781		1,944,781	.36
State and City and County on 692 Millions	1,250,592		1,250,592	.18
	$15,668,110	$2,784,000	$12,884,110	$2.33

We see from the above that the twenty-seven cent school tax, along with the $804,000 as receipts from other sources, made up the total of $2,254,200 as the entire Common School Fund. This then being the actual calculation as shown by the books of the Board of Supervisors, and this last named amount in the Common School Fund being the aggregate of three different items, one of which is the amount of $1200 for the traveling expenses of the Superintendent of Schools, it seems manifest that whatever the intention of the Finance Committee of the Board of Supervisors, or of the Board itself, may have been, they did in fact fix their tax levy with the $1200 included as a portion of the Common School Fund.

You are therefore advised that this sum of $1200 is a part of the Common School Fund and cannot be drawn upon except by approval of the Board of Education.

Respectfully,

PERCY V. LONG,

City Attorney.

Auditor,
Board of Education.

INDEX

A

ABANDONMENT— PAGE.
Acts construed from 421
Cable franchise by United Railroads 421
Cemeteries 395-98, 475, 476
Children, maintenance 400, 401
Employee of position 165, 222
Intent 421
Ocean Avenue, street railway franchise 906-909
Ocean Shore Railway Co., tracks 229, 230
Property 33, 34
Residence in city 12, 252
Twenty-fifth Street tracks 229, 230
Tracks, a nuisance 386

ABATEMENT OF NUISANCES 40, 184, 185, 386, 417, 433, 448-50, 513

ABDICATING CONTROL 507

ABROGATING POWERS 4

ABSENCE—
Employee without leave 44, 45, 296, 346
From city of party on eligible list 251-53
Leaves of 288-90
Legislative authority 248, 711
Written contract, city not liable 735, 736

ABUTTING OWNERS—
Area walls 265
Damages, Main Street, change of grade 543
Emmet Place 783, 784
Excavation, adjoining lot 315
Free and unobstructed passage to property 506
Geary Street widening 836
King Street, paving 335, 336
Leroy Place 979
Obstructions inconveniencing 480
Sewer construction at expense of 501-503

ACCEPTANCE— PAGE.

Benefits by deceased in lifetime....444
Bid, lowest regular 321, 622
Burdens under franchise 651
Cars, Municipal Railway 157-59
Certifications, civil service 332, 333
Deed to land for widening Juno Street....322
Deed to land for opening Nineteenth Street....326
Deed to land for opening Seward Street....326
Definition 159
Franchise 89, 90, 234
Hetch Hetchy grant 494, 495
Resignation 809
School houses 952

ACCEPTANCE OF STREETS—

Brannan Street 94
Bryant Street 94
City only liable for surface of part it accepts....265
Consolidation Act 177
Crossings 177
Entire street 264
Fairmount Tract....174
Folsom Street 94
Grant Avenue 269
Howard Street 94
Legislative acts sufficient 405
Locust Avenue 661
Method prior to October, 1871....264, 269
Mission Street 94
Montgomery Street 177, 264
Ninth Street 94
No portion less than entire width of roadway....177
Pipes to be laid first....918
"Public Streets of San Francisco"....269
Redwood Street 661
Rule followed by Supervisors 177
Street Improvement Ordinance 917

ACCESS—

Abutting owners to property....506
Emmet Place 480
Moving picture shows, Exposition....793
Ocean front 466, 467

ACCIDENTS—

Ambulance, emergency hospital....314, 964
Amendment, Workmen's Compensation Act....904

ACCIDENTS—(Continued) PAGE

Asphalting plant frightening horse....670-72
Asphyxiation, deaths from 422, 423

Automobiles damaged—
Collision with steam roller....689-91
Passing playground 439
Unguarded hole in street 791

Barnett, Benjamin 787, 788
Bill boards 141
Board of Public Works employees....626, 627, 645, 646, 687, 688, 787, 788, 1021, 1022
Cahill, John, park employee 742, 743
City's liability 424
Conlon, James 422-26
Culvert, falling into 691
Death benefits 820, 821
Defective condition of public work....424
Discharge of duty 255
Disease, contracting 664, 905
Dow, Burritt N., compensation, treatment, street sweeper 1021, 1022
Drivers of teams, owners insuring 797, 818, 819
Dunn, James H. 670-72
Emergency Hospital, treatment at....615, 626, 645, 646, 687
Employee having own physician....526
Employees, negligence of 315
Employers' liability 526, 616
Excavation, falling into 690
Exposition, firemen at 780-83
Eyes, street sweeper, injured 1021, 1022
Failure to report injury 742, 743
Fence 60
Firemen 129-32, 780-83
Fireworks 705
Glanders, contracting 905
Grant, Harry E., motorman 877-79
Hagen, D. J. 964, 965
Hannon, John, street sweeper....687, 688
Hole in street....690, 691, 791
Horse runaway, frightened by paving plant....670-72
Hospital treatment 626, 645, 646, 687
Hospital maintained by city....585
Industrial Accident Commission 585, 627, 645, 646, 787, 820-22
Ingham, Richard L. 255
Kohler and Chase, glass window, damaged by fire truck..972
Lewiston, damage suit 671
Lichtig, A. J., automobile, hole in street....791
Lump sum settlement 821

ACCIDENTS—(Continued) PAGE

Lynch, Patrick 422-26
Massachusetts Workmen's Compensation Act....905
Medical treatment 626, 627, 646, 687
Municipality not answerable for negligence of officers....314, 315
Negligence of officers 315
Norton, Patrick 626, 627, 645, 646
Notice to employer....688, 742, 743, 1021, 1022
O Donnell, J. W., street sweeper....1021, 1022
O'Donnell, Patrick, street sweeper....615-17
Officers, negligence of 315
Panama-Pacific Exposition, firemen at....780-83
Park employees 742, 743

Playgrounds—

Damage to passers-by 439
Visitor to 611, 612

Police officers 255
Probationers 131
Runaway horse striking street sweeper....687
Russell, J. E., foot injured by steam roller....805
San Francisco Hospital, treatment at....877-79
Sewer Department employees, asphyxiated....422, 423
Stack, Edward J., asphalt worker, death....819-22

Steam roller—

Automobile colliding with 689
Foot injured 805

Street repairing machines....670, 671
Street sweepers 615-17, 687, 688, 1020, 1021
Susskind, S. H., automobile collision 689-91
Teams 787, 788, 797, 818, 819
Unguarded hole in street 791
Visitor to playground 611, 612
Vrooman Act 689, 690
Wisconsin Workmen's Compensation Act....906
Workmen's Compensation Act....424, 526, 616, 626, 627, 646, 687, 688, 742, 782, 783, 787, 797, 820-22
Wyatt & Co.'s automobile hit street sweeper....615-17

ACCOUNTING SYSTEM—

Board of Control 1005, 1017, 1018
Bryte, Lester N., protest....1004, 1005
Klink, Bean & Co., employment on....1004-1006, 1016-19

ACKNOWLEDGMENTS—Recording 369, 519, 621

ACQUIESCENCE—Without protest 405

ACQUISITION— PAGE.
Integral part, existing utility....779, 780
Lands for tunnels....311, 312
Private ownership in street....707
Public utility....49, 77, 373
Randall Street, private interests....727
Vested rights....273, 274

ACTIONS—
Abatement of nuisance....450
Bonds, action to restrain issuance....377
Commencing, time given for....766

ACTS—
Abandonment of franchise....421
Board or official outside authority, municipality not liable for....735, 736
Contrary to charter....285
Employees....220, 221
Forfeiture of franchise....230, 231
Relinquishment of office....297
Voluntary....366, 368
(See Laws; Legislature; State.)

ACTS OF CONGRESS—
Franchise, Western Union Telegraph Co....239
Hetch Hetchy....494, 495
Pueblo lands....117, 466
Rights in streets under....239, 242
Seal Rocks....467
Telegraph lines....239

ACTS OF PROVIDENCE—Delaying contracts....153

ACTUAL—
Employment....831
Residence....15, 24
Time employed....29

ADDITION TO BUILDING....429

ADDITIONAL—
County officers, creation by Legislature....455
Courts....1009
Defined....1009
Employees....608, 609, 822-24, 898, 1008-1010
Police officers....812
Positions....1008-10

ADMINISTRATIVE— PAGE.
Board of Public Works 203

ADMINISTRATOR, estate 610

ADMISSION, State of California 327

ADOPTION—
Building Law 512
Humphreys Map 404, 662
Official Map 404

ADVERTISING—
Alameda street cars 639
Bids 777-79
Bids for supplies, Fire Department 80
Bills 179, 339, 340, 744
Building contracts 540
Cars, Municipal Railway 290, 543-45
Cemetery removal ordinance 397
Charter provisions 179, 339, 340, 777, 778, 743, 744
Civil Service examinations, notice of 491, 492
Consolidation Act 540
Contracts for, letting 743
Delinquent assessments 168
Delinquent tax list 744
Duke, Robert D., on waste cans 505-07
Election days 314
Electricity, public buildings and streets 622-24
Extensions of time to contractors 179
Fire Department, contracts 80
Garbage cans, on 505-507
Gas, streets and public buildings, bids 622
Heating public buildings, bids 622
Indecent 140
Lands, sale of, ordinance 339-41
Leases 340
License 639
Lighting public buildings and streets, bids 622
Misleading 932
Municipal election days 314
Municipal Railway cars 290-92, 543-46
"Municipal Record" 777
Napa Charter 745
Notices, sealed proposals 181-83
Official, bids 777-79
Official newspaper 491, 492, 744
Ordinances 179, 339-41, 743-46
Passage to print 178, 179, 340, 341

ADVERTISING—(Continued) PAGE

Primary election days 314
Printing contracts 540, 777-79
Prisons, supplies for 539-41
Publication, period of 339-41
Public buildings, lighting, etc., bids 622
Refuse cans, on 505-507
Resolution of intention 181-83
Resolutions 178, 179, 340, 743-46
Sale of lands, ordinance 339-341
Sale of property on execution 167
San Francisco, publicity campaign 591, 592
Scott, R. C., Advertising Co., bid 544, 545
St. Louis, refuse cans 505
Street lighting, bids 622
Street work 181-83
Summons at law 397
Supplies for prisons, proposals 539-41
Tax sales 167, 974, 975
Tourists' Association, literature 591
Tunnel delinquent assessments 168
Waste cans, on 505-07

ADVISORY COMMITTEE—Moving pictures 932 1011

AESTHETIC OBJECTS—Taxation for 144

AFFIDAVITS—Exemption from taxation 472, 473

AGE—Retiring 579

AGENTS—

Negligence of 689
Real estate 528

AGGREGATE—

Bids 80
Budget appropriations and expenditures 1, 2, 4, 5, 8
Checks accompanying bids 623
Deposits, street openings 559, 560
Salaries 121

AGREEMENTS—

Acceptance of franchise equivalent to 89, 90
Auditorium 987

AGREEMENTS—(Continued) PAGE
Lighting 431, 432
Mission Viaduct 324
Pacific Gas and Electric Co. 431, 432
Recording 621
Santa Rosa Avenue, extension 99
Southern Pacific Co. 99
United Railroads 324, 923
United States and City and County 299
Water Front Realty Co. 429

AGRICULTURE—Department of, meat inspection 299-303

AIR—Lodging houses 785

AISLES—Theatres, obstructing 331, 332

AITKEN, FRANK W.—Refund, illegal tax sale 658

ALAMEDA, CITY OF—
Advertising in street cars, license 639
Butchers, license 639

ALAMEDA COUNTY—Registration in 11-16

ALAMEDA STREET—
Franchise rights, Southern Pacific Co. 211
Power poles 134

ALARMS—
Bells 336, 337
Fire and police alarm station 548, 549

ALEMANY AVENUE—Sewer right of way 600

ALFERITZ, SUZANNE—Refund, penalty, delinquent taxes 630-32

ALIENS—
Barred from employment on public work 902, 925
Madsen, C. W., motorman 836, 837
Minor children of 702
Workmen's Compensation Act 584

ALLEYS— PAGE.
Closing of 565
Comerford Street 308, 318
Consolidation Act 404
Gates opening on 308, 319
Open public streets 499
Owner must leave open 308, 319, 320
Use by purchasers of lots on either side 308, 319

ALLIED PRINTING TRADES COUNCIL—Label 926

ALLOWANCE—Transportation, employees 445, 487

ALTERATIONS—
Amusement places 511-15
Apartment house, frame building converted into 271, 272
Bids 795
Board of Public Works, supervision 272, 392-94, 652, 666
Building Law 272, 511-15, 649, 652
County jail buildings 999, 1000
Decisions 552
Fire Wardens, supervision 511, 515, 552
Globe Theatre 509-16
Moving picture houses 511-15
Permits 272, 392-94, 652, 666
Stable building 392-94
Theatres 511-15
Wooden buildings 552

ALUM ROCK PARK 841

AMATEUR BOXING EXHIBITIONS 757

AMBIGUITY—
Franchise, terms of 26, 87, 229
Resolved to uphold law making power 638

AMBULANCES—
Emergency hospital, accidents 314, 964
Motor Vehicle Act, exempted under 489, 493

AMENDMENTS—
Bills 744
Charter (see Charter Amendments)
Code of Civil Procedure 9
Consolidation Act 246, 404
Constitutions (see Constitutions, Amendments)

AMENDMENTS—(Continued) PAGE
Moving picture ordinance 931, 932
Ordinances 251, 318, 456, 459
Penal Code 757
Political Code 280, 400, 416, 973
Senate constitutional 20, 21
Stable ordinance 251
Workmen's Compensation Act 904
(See Charter Amendments, Constitutional Amendments.)

AMERICAN DISTRICT TELEGRAPH CO.—Bond for opening streets 258, 259

AMERICAN RUBBER MANUFACTURING CO.—Bid, fire hose..79-82

AMUSEMENT PLACES—
Alterations 514, 515
Building Law 331, 332, 511-15
Cabarets 532, 533
Concessions 647, 648
Construction 331, 512, 649
"Fighting the Flames" 646-49, 665-67
Games of chance 647, 648
Globe Theatre 509-16
Laurelle vs. Bush 482
License 532, 533
Obstructing aisles, etc 331, 322
Ordinances regulating 331, 332, 511-15
Outdoor park 646-49, 665-67
Panama-Pacific Exposition 793
Permits 482
Pier, Ocean Beach 464-70
Seating capacity 331, 332, 511, 512
Tickets 930
Unlawful construction 512
Van Ness and Hayes 647, 665

ANATOMICAL MUSEUMS—Regulating 593, 594

ANGLO AMERICAN LAND CO.—Deed, opening of Nineteenth Street 326

ANIMALS—
Destruction 42
Dogs 434-37
Nuisances 435, 436
Ordinance No. 115 42
Police power over 435, 436
Roaming at large over city 39, 42

PAGE.

ANNOYANCE—Restraining of aggressive 60

ANZA STREET—Curbing and paving 180

APARTMENT HOUSES—
- Common right to halls, etc. 537, 538
- Conversion of building into 271, 272
- Dogs kept in 434-37
- Garage in forbidden 529
- License tax 522
- Ordinance No. 1677 537
- Romeo Flats 538, 539
- Yard space 784, 785

APPARATUS—Cars, Municipal Railway 442

APPEALS—
- Assessments 313, 1002, 1003
- Bemis Street, assessment 868-70
- Civil Service Commission 682-85, 694
- Code of Civil Procedure 480
- Contractors, temporary deposits 316
- Dismissals 682-85
- Emmet Place litigation 479, 784
- Firemen 682-85
- Jackson Building and Realty Co., assessment 868
- Moraga Street, assessment 1002, 1003
- Not operating as a stay 480
- Policemen 682-85
- Quigley, Thomas D., street assessment 1002, 1003
- Randall and Whitney Streets, assessment 865-68
- Santa Marina Street, assessment 864, 865
- Suspensions 677
- Weights and Measures Bureau, salary demands 728, 729

APPELL, GEORGE—Protest, salary, secretary to Chief of Police 1008, 1009

APPLICATIONS—
- Appointment 283
- Building permits 394
- Hetch Hetchy project 495, 496
- Relief, mothers' pensions 400
- Service 292
- Stable reconstruction 392
- Street openings 203

APPOINTMENTS— PAGE.

Additional employees 62, 608, 609, 822-24, 1008-10
Aliens prohibited 902
Approval 83
Assessor 390, 391, 822, 823
Assistant Gas and Water Inspector 771-75
Auditorium manager 883-90, 923
Board of Education, members of 21, 22
Bureau of Efficiency 63
Byrne, Stephen A. 773
Carpenter, Department of Elections 486
Certifications, refusal to accept 332, 333
Charter amendments 390, 391
Charter provisions 62, 63, 405, 1008
Chief Engineer, Fire Department 747
Chief of Police, secretary to 1008-10
Chief's operator, Fire Department 347-49

Civil Service Commission—

Approving 83, 673
Rules 83, 405
Without examination 282, 285

Constitutional amendment, 1911 ..... 21, 22
Copyists 977
Decisions 823, 824
Delay in making application for 284
Director, Bureau of Efficiency 63
Dismissed employee, certification 332
District Attorney 823
Elections department 29, 43-45, 486, 724
Eligible, preference for 148
Eligibles to vacancies 130
Ellison, Edward 771-75
Examinations 76
Examiners, civil service 920, 921
Experts 1019
Extra clerks 3
Fire Department 75, 76, 83, 84, 130, 267, 268, 282-84, 346-49, 558, 936
Former railway employees, preference 463
Gas and Water Inspectors 771-75
Hampton, Robert W. 771-75

Head of Department—

Making 83, 391
Not appointing all help authorized 823

Health Department 3, 332, 333
Health Inspectress of Schools 451, 452
Hoseman as lieutenant 282-85
Inspectors of Supplies 963

APPOINTMENTS—(Continued) PAGE

Irregular 814, 924
Isolation Hospital 332
Janitors 885
Legislative body 455
Levy, Louis, Manager, Auditorium....883-90, 923, 924
Lieutenant, hoseman appointed as....282-85
Mayor recommending 62, 608, 609, 1008
Mechanics 486
Mothers' Pension Bureau 400
Murphy, Joseph A., secretary to Chief of Police....1008
Nesfield, Margaret 400
Officers, personal liability 503, 504
O'Leary, Frank 772
Ordinance, unauthorized appointments 503, 504
Personal appointments 678
Personal liability of officers 503, 504
Playground Commission 7
Police Department 131, 147, 1008-10
Preference, former railway employees....463
Probationers 83, 130, 147, 148
Refusal to approve 83
Residence qualification 14, 267
School directors 21, 22
School Health Inspectress 451, 452
Sealer, Weights and Measures....455
Secretary to Chief of Police....1008-10
Supervisors authorizing....62, 1008
Supplies Bureau 922, 963
Temporary appointments....29, 83, 84, 771, 936, 938, 1019
Tupper, C. M. 772
Unauthorized appointments 503, 504
Vote, Supervisors, necessary 63, 1008
Widows' Pension Bureau 400

APPRENTICES—Wages 304

APPROPRIATIONS—

Additional 388
Aggregate amounts 1, 2, 4, 5
Auditor furnishing statements of unexpended balances.... 57
Budget 1-5, 388
Contracts, to meet 56, 57
Daniel Webster School 891
Departments limited to 388, 741
Election expenses 723
Extensions of mains....595, 596
Fire Department 267
Hayes Street regrade 831
Itemizing 2, 4, 5

APPROPRIATIONS—(Continued) PAGE

Lane, Franklin K., opinion....741, 811
Lincoln Way, improvement....197, 198
Minors, maintenance of....400, 401
Organizations other than municipal....591, 592
Passage to print....179
Playgrounds....635
Resolution making....64
Resolution, advertising....179
Schools....951
Summarizing of....2, 4, 5
Supervisors, not mandatory on to make additional....388
Supplies Committee expenses....962, 964
Surplus to General Fund....606
Test wells, sinking....595
Tourists' Association, printing literature....591, 592
Unexpended balances....57
Urgent Necessities Fund....388
Weights and Measures Bureau, salaries and expenses....729

APPROVAL—

Appointments....83
Bonds by Mayor....497, 704, 705
Charter....71
Charter amendments....549, 618, 693, 694
Civil Service Commission....83, 381, 672-74

Demands—

Auditor....3, 121, 122, 621
Board of Education....953, 1006, 1007, 1026-28
Civil Service Commission....672-74, 968
Grand Jury....407
Playground Commission....740, 741
Supervisors....621, 740, 741

Department of Electricity, of overhead construction....245, 586, 588
Maps, by Board of Public Works....70-73
Official bonds by Mayor....189
Official map....357, 460
Pay rolls....672-74
Street improvements....700
Subdivision maps....70-73
Temporary appointments....938
Underground conduit construction....586, 588
Wire installations....586, 588

AQUATIC PARK—Exchange of lots....851-55

ARATA, GUISEPPE, AND ROSA—Pension, deceased fireman....351-56

ARBITRARY— PAGE.
Deprivation of rights....34, 36, 147
Discrimination....427
Interference with business....36
Regulations not allowed to be enforced....279

ARCATA—Railroad litigation....364-67

ARCH STREET—Opening....845

ARCHITECTS—
Competition, plans, public buildings....338
Howard, John Galen....46, 47
Non-resident, demands for services....46, 47
Six per cent, fee fixed by ordinance....338
Tuberculosis Building, San Francisco Hospital....338

ARCHITECTURE BUREAU—Sale of old buildings....734

AREA WALLS—Reconstruction....264, 265

AREAS—(See Zones, Districts).

ARGUELLO BOULEVARD—Street work....179, 180, 827-29

ARMY STREET—
Cronin, Ann, title....732
Encroachment....732
Fay Improvement Co., contract....732
Ocean Shore Railway Co., franchise and tracks....25, 26, 227, 228
Resolution No. 4009 (New Series)....227
Straightening out....733
Street improvement....731, 732

ARMY VETERANS—Exemption from taxation....472

ARREARAGE—
Street opening deposits....641-44
Unpaid portion of salaries....936-39

ARRESTS—Corporation employees....415, 985, 986

ASHES—Forbidding hauling in certain district....1013

ASPHALT—Paving with....629

ASPHALT PLANT— PAGE.
Employee sick 582
Light and power 762-65
Spur tracks 550

ASPHYXIATION—Deaths from 422-26

ASSESSMENT DISTRICTS—
Change of grade 65, 541-43
Charter provisions 441
Decisions 869, 870
Harrison Street 969
King Street, paving 335
Legislature 870
Los Angeles 516, 517
Main Street 541-43, 969
Market Street extension 311-313
Power of Supervisors to define 441
Resolution of intention defining 65
Sewer construction 502, 503
Street work 441
Twin Peaks Tunnel 311-313
Water mains 516, 517

ASSESSMENTS—
Appeals from 313, 864-70, 1002, 1003
Arguello Boulevard 827-29
Army Street 732
Bemis Street 868-70
Board of Public Works 917
Boulevards 502
Cemetery property exempted 827
Charter limitation, value 503
Chestnut Street lot 786
City Land Association, streets opened 845
Clover Street 628, 629
Consolidation Act 245
Correction of 611
Decisions 256, 828, 829, 869, 870
Delinquent assessments 256, 257, 845
Erroneous 174, 472, 658
Escaping, double following year 610, 611, 615
Estates 610, 611
Exemptions 472, 473, 827
Fairmount Street 866-68
Fairmount Tract map 175
Fifty per cent of assessed value 868, 1002, 1003
Geary Street 794, 835
Grade change 542
Heirs, doubling assessment 610, 611
Humphreys Map as official map 175

ASSESSMENTS—(Continued) PAGE
Illinois statute 502
Impounded moneys 614, 615
Ingleside Terraces, streets opened 845
Installment payments 441, 869, 1003
Installment plan sales contracts 594
Irregular 174
Jackson Building and Realty Co., appeal 868
Kansas Street 732
Lease contract 594
Lien on railroad property 89, 917
Los Angeles 516, 517
Los Angeles charter 750
Main Street change of grade 541-43
Market Street extension 311-313
Method of levying 628
Mission and Thirtieth Streets Homestead Union 171, 175
Mission Political Improvement Association 916
Money in litigation 971
Moraga Street 1002, 1003
Musical instruments, installment contract 594
Ordinances 441
Park Commission 502
Political Code sections 174, 610, 611, 614, 615, 658
Property in litigation 971
Property owner resisting 313
Quigley, Thomas D., appeal 1002, 1003
Railroad, lien on 89, 90
Randall Street 727, 865-68, 945
Receiver, property in hands of 971
Roll, preparation of 472
Sale of property, delinquent 166-68
San Bruno Avenue 732
San Jose street railway 89
Santa Marina Street 864
Sewers 502
Solvent credits 594
State Board of Equalization 472, 473
Stockton Street Tunnel 256, 257, 603-607
Streets—
Extensions 845
Improvements 67, 89, 90, 441, 541-43, 628, 629, 727, 732, 750, 794, 827-29, 864-70, 917, 1002, 1003
Separate for each character of work 628, 629
Tunnels 166-68, 311
Twin Peaks Tunnel 311-13
Validity of 257
Warrant 917
Water mains 502, 516-18
Whitney Street 865-67, 945
(See also Assessor.)

ASSESSOR— PAGE.

Additional employees 822-24
Alleyway in center of block, private ownership 308
Appointments, making of 390, 391
Assessment roll, correction of 175, 610, 611
Attachment of wages 304
Banks, impounded moneys 614
Basis of assessments 175
Cancellation of assessments 175
Cashier 389-91
Charter amendment, positions brought under Civil Service 389-392, 771, 803
Chief Deputy 389-91
Comerford Street, title 307-309
Correction of assessments 175, 611
Crosky, R. V., civil service standing 389-91
Doubling assessed value when taxes escape 610, 611, 615
Employees—
Brought under Civil Service by charter amendment 389-92, 771, 803
Charter and ordinances 822, 823
Entering uncollected taxes on next roll 174
Erroneous assessments 472, 611
Escaping assessment 610, 611, 615
Estates 610, 611
Exemption from taxation 472, 473
Fairmount Tract 171-75
Heirs, doubling assessment following year 610, 611
Impounded moneys 614, 615
Installment plan sales 594
Instruments, installment contracts 594
Islais Creek lands 106
Lease contract 594
Limitations, statute of 472
Litigated money or property 614, 971
Malloy, Mary, line of lot 171, 173
McDevitt, E. J., civil service standing 391, 392
Mission and Thirtieth Street Homestead Union 171, 173-75
Money in litigation 614
Noe Street, line of 173, 175
Pianos, installment contracts 594
Poll tax from seamen 304
Property in litigation 614
Rate litigation 614, 615
Receiver, property in hands of 971
Seamen, poll tax from 304
Sherman Clay & Co., installment contracts 594
Solvent credits 594
Spring Valley Water Co., impounded moneys 614, 615
Taxation, exemption from 472, 473

ASSESSOR—(Continued) PAGE

Tax rate, fixing 472
Veterans, exemption from taxation 472, 473
Water rate litigation 614, 615
Western Pacific Railway Co., receiver 970
Whelan, John J., appointment 830

ASSIGNMENTS—

Civil service examination, without 282, 285
Employees to duties 390-92
Fire Department 285, 347, 348, 813
Franchises 88
Mile Rock Tunnel contract 857
Murasky, Judge, decision 706
Obligations of original holder rest upon assignee 88
Patent rights 453, 454
Pensions 706
Probationers 801, 813
Superintendent, Municipal Railway 464
Sutter Street Railroad Co. 88, 95
United Railroads 88, 95
Wages 304

ASSISTANTS—

Chief, Fire Department 74, 83, 936-39
District Attorney 823
Gas and Water Inspector 771-75
Supervisors, Clerks 898
Surveyors' field assistants 403

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.—

Bridge over Islais Creek 316-18, 798-800
Franchise 212
Predecessor in interest 317

ATTACHMENTS—

Bail money 508
Lane, Franklin K., opinion 509
Murasky, Judge, decision 706
Pensions 706
Wages 304

ATTORNEY GENERAL, STATE—

Day of rest 132, 133
Forfeiture of franchise 230, 231, 908
Motor Vehicle Act 488, 489, 911

AUDIENCE—Limiting to seating capacity 331, 332

AUDITOR— PAGE.

Accounting system, uniform municipal....1016-19
Additional employees 822-24, 1008-10
Appointments, unauthorized 504
Appropriations, statements of unexpended balances.... 57
Approval of demands....122, 673, 740, 741, 939, 1006, 1007
Architect, consulting, demands for service....46, 47
Assessor, extra employees 822-24
Assistant chief engineer, Fire Department....936-39
Attachments 508, 706
Auditorium Manager 883-90
Automobiles rented by employees to city....445-47
Back salaries, demands 937

Bail money—
Attachment 508, 509, 536, 537
Return of 674

Baker's Beach Outfall Sewer contract....856
Board of Education reducing salaries....703, 704

Board of Public Works employees, bonds....189

Bonds—
Municipal Railway employees 189, 497, 498
Official 189, 497

Budget—
Estimates 5
Limitation on salary 120, 121

Bureau of Supplies, expenses....922
Caggiari, A., return of bail money....674
Chief of Police, confidential secretary to....1007-10
City Engineer O'Shaughnessy, demand....120, 121
City renting automobiles from employees....445-47
Civil Service Commission approving demands....939
Common School Fund 1007, 1026-28
Conductors, Municipal Railway, bonds....189, 497, 498

Contracts—
Money in treasury to meet....56, 57
Officials interested in 445-47

Daniel Webster School, purchase of land....891-94

Demands—
Approval....122, 673, 740, 741, 939, 1006, 1007
Legally due 621, 729
Playground Commission....740, 741
Rejection 621

Dental clinic, schools 1026

Departments—
Expenditures 741
Insuring property against fire....304, 306

AUDITOR—(Continued) PAGE

Disability, fireman 620
Dolan, M. J., fireman's pension 128, 129
Dougherty, Susan E., pension 620, 621
Elective officers, bonds 497
Elevator operators, City Hall, uniforms 988

Employees—
- Assessor 822-24
- Bonds 189
- Interested in contracts 445-47
- Renting automobiles to city 445-47

Estimates of expenditures 5
Examiners, civil service 920

Expenditures—
- Departmental 675, 741
- Differing from budget 891-94
- Estimates 5
- In cases of great necessity 675
- Under two hundred dollars 675, 994

Experts—
- Employment of 1018, 1019
- Residence qualification 47

Extra—
- Clerks 29, 822-824, 1008-10
- Positions, creation of 823, 824

Filing, surety bonds 189, 190
Fire Department, Assistant Chief Engineers 936
Firemen, pay day twice a month 714, 715

Fire pensions—
- Dolan, M. J. 128, 129
- Dougherty, Susan E. 620, 621
- During lifetime 621

Forfeited bail money, refund 674

Funds—
- Authorized by charter 811, 892
- Responsibility for 741

Garnishment 536
Golden Gate Park employees, pay day twice a month 755, 756
Golden, William, civil service examiner 920
Great necessity, expenditures in cases of 994
Howard, John Galen, services as consulting architect 46, 47
Insurance premiums, public library 304-306
Klink, Bean & Co., uniform municipal accounting system 1016-19
Layden, James F., salary 936-39
Levy, Louis, Manager, Auditorium 883-90

AUDITOR—(Continued) PAGE

Libraries, insurance premiums 304-306
Lloyd & Spengler, premiums on bonds 497
Maxwell, John R., salary 936-39
McEvers, J. W., deputy sealer, salary demands 728-731
Mile Rock Tunnel contract 856
Money in custody of court 536
Motormen, Municipal Railway, bonds 189, 497, 498
Municipal accounting system, uniform 1016-19
Municipal Railway employees, bonds 189, 497, 498
Murphy, Joseph A., secretary to Chief of Police 1007-10
Non-contract orders 675, 994
Official bonds 189, 497, 498
Officials interested in contracts 445-447
O'Shaughnessy, M. M., demand 120, 121
Park employees, pay day twice a month 755, 756
Pay checks 121, 122
Pay day twice a month 714, 715, 755, 805-807
Pay rolls, approval of 673, 939

Pensions—
Dolan, M. J 128, 129
Dougherty, Susan E 620, 621
During lifetime 621
Exempted from assignment 706

Per diem employees 807, 862, 984
Playground demands, approval by Supervisors 740, 741
Police patrol boat, salaries and maintenance 811, 812
Positions, creation of 823, 824, 1008, 1010, 1018, 1019

Premiums—
Insurance, Public Library 304-306
On bonds 189, 497, 498

Printing—
Circulars, demands 1006, 1007
Non-contract orders, demands 675

Reduction in salaries of teachers 703, 704
Renting automobiles by employees 445-447
Residence qualification, experts 47

Salaries—
Budget limitation on 120, 121
Fixing 121
Payable monthly 714
Teachers 703, 704
Twice a month 714, 755, 756, 807

Saturday full pay for teamsters 805-807
School land purchases, payment out of school reconstruction fund 810
Scott, M. P., deputy sealer, salary demands 729, 730
Secretary, Chief of Police 1007-10

AUDITOR—(Continued) PAGE

Stationery, non-contract, great necessity 994
Storrie, R. C. & Co., contract 856
Street opening deposits 561
Superintendent, Municipal Railway, bond 189
Superintendent of Schools, traveling expense 1026-28
Supervisors, approval of demands 740, 741
Supplies Bureau 922, 988
Surety bonds 189
Surplus fund 730, 731, 892
Tax levy 1028
Teachers' salaries 703, 704
Teamsters' separate Saturday pay rolls 805-807
Temporary appointments 29, 938
Transportation allowance 445
Traveling expenses, Superintendent of Schools 1026-28
Twice a month salaries 714, 755, 756, 807
Unauthorized appointments 504
Unexpended balances 57
Uniforms, elevator operators 988
Vacations 862
Weights and Measures Bureau, salary demands 728-31
Widow, fireman, pension 620, 621

AUDITORIUM—

Jurisdiction, Board of Supervisors 924
Levy, Louis, manager 883-90, 923, 924
Municipal department maintaining office in 986, 987
Rentals 885, 889

AUSTRALIA—Meat shipment from 299-303

AUTHORITIES—(See Cases Cited, front of volume; Decisions).

AUTOMOBILE—Supply stations 633-35, 788-91

AUTOMOBILES—

Ambulance, emergency hospital, collision 314
Apartment houses, storing in 529
Blowing horn near hospital 307
Chauffeurs' license 489, 490
Collision with steam roller 689-91
Competitive bidding 992
Employees renting to city 445-47, 487
Exemptions in Motor Vehicle Act 489, 493
Fire Department 488-90, 910
Garages 634
Gasoline supply stations 633-35, 788-91
Health Department employees 487

AUTOMOBILE—(Continued) PAGE
Hole in street, automobile damaged....791
Hotels, storage in....529
License fees....488-90, 493
Lichtig, A. J., automobile damaged, hole in street....791
Motor Vehicle Act....488-90, 493, 910
Operator as distinguished from chauffeur....489, 490
Operator's license....489, 490
Parking stations....633-35
Playground Commission....635, 636
Playground, damaged passing....439
Registration of....488-90, 493
Repairs, reporting to Police Department....928, 929
State highway tax....940
Steam roller, automobile colliding with....689
Supply stations....633-35, 788-91
Susskind, S. H., collision with steam roller....689-91

AUXILIARY HIGH PRESSURE SYSTEM....781

AVENUES—
Closing of....565
Railroads, use by....227, 358, 359

AVOIDABLE DELAYS....193, 194

AWARD—
Consolidation Act....540
Contracts....80
Lowest bid....622
Supplies for prisons, contracts....539-41

B

BACK SALARIES—Demands for....937

BACON, EDWARD R. CO.—Bid....688-70

BADGES—
Firemen....267
Relinquishment of....165, 166
Working minors....989

BAIL—
Attachment....508, 509
Barlow, Thomas, return of forfeited....588, 589

BAIL—(Continued) PAGE.
Caggiari, A., refund 674
Discharge of forfeiture 589
Forfeited 562, 563, 588, 589, 674
Garnishment 536, 537
Lane, Franklin K., opinion 509, 536, 537
Penal Code sections 562, 589
Return of 588, 589, 674
Sweeney, James P. 562, 563

BAKER'S BEACH OUTFALL SEWER 856-61

BALBOA STREET—Paving 180

BALLROOM—License 508

BALL THROWING GAMES—License 648

BAND—Municipal, leader 8

BANKRUPTCY—Claims 442

BANKS—Assessment, impounded moneys 614

BANKS OF STREAMS 113

BAR—
Aliens from employment on public work 902, 925
Demands, delay in presenting 982
To reinstatement 766, 767, 809

BARBER ASPHALT PAVING CO.—Private street contract 866, 945

BARBERS—Working Sundays 572

BARLEY—For Hetch Hetchy 1022-25

BARLOW, THOMAS—Return of bail 588, 589

BARNETT, BENJAMIN—Teamster, injured 787, 788

BARNEVELD AVENUE—Tracks, Ocean Shore Railway Co. 226

BARRY, DAVID A.—Change in position 896-901

BARRY, JOHN F.—Services as expert 406, 407

BARTLETT STREET—Franchise rights, Southern Pacific Co. 216

BASALT BLOCKS—Paving with 629

PAGE.

BASEBALL PEOPLE—Ordinance re noises adjoining hospital.... 306, 307

BATTAINI WINDOW CLEANING CO.—Claim, cleaning school windows.... 902, 903

BATTALION CHIEFS—Fire Department.... 74-76, 936

BAY—Tide lands.... 327

BAY STREET—Power lines.... 524

BAY VIEW—Cattle grazing.... 30, 42

BEACH STREET—
- Dore v. Truett.... 274, 275
- Private interests in.... 275
- Status of.... 274-76

BEACON STREET—
- Blasting by Gray Bros.... 478, 803, 804
- Dedication.... 478
- Open public street.... 478

BEALE STREET—
- Approach to.... 235-38
- Cut.... 236, 237

BEDS OF STREAMS—
- Freeman v. Belgarde.... 112

BEIDEMAN TRACT—Map.... 661

BELT LINE RAILROAD—Transportation of passengers.... 279-81

BEMIS STREET—
- Appeal from assessment.... 868-70
- Damages, landslide.... 736-39

BENEFITS—
- Civil service employees.... 390, 803, 898-900
- Death benefits.... 820, 821
- Pension during lifetime.... 443, 444
- Schools, public.... 23
- Street assessment.... 869, 870
- Teachers' pension fund.... 566, 567
- Workmen's Compensation Act.... 820

PAGE.

BENJAMIN, L. M.—Patent rights....333, 334

BEQUESTS....371

BERKELEY—Telephone merger....196

BERMINGHAM, SAMUEL—Residence qualification....10-16

BERNAL, CARMEN SIBRIAN DE—Lands, Islais Creek....106-108

BERNAL, JOSE CORNELIO—
Grant, Rancho Rincon de las Salinas y Potrero Viejo....106-108, 118
Sewer right of way....600, 601

BERNAL, JOSE JESUS—Lands, Islais Creek....106-108, 118

BERNAL RANCHO—
Boundaries....108, 109
Grant....106, 107, 118
Surveys....106, 109, 110, 111

BERRY STREET—
Franchise rights, Southern Pacific Co....211, 218
Spur track privileges....211

BETWEEN TRACKS—Railroads doing street work....50, 86, 91, 335, 336, 681, 682, 832, 833

BEVERLY STREET—Opening....845

BICYCLE RACKS ON SIDEWALKS....85

BIDS—
Acceptance, contract virtually made....656
Advertising—
Municipal Railway cars....543-45
Official....777-79
Aggregate price prevailing....80
Alterations....795
Arguello Boulevard, street work....180
Bacon, Edward R. Co., concrete mixers....668-70
Barley....1023
Boilers, Relief Home....321
Calling for....80
Certified check accompanying....80, 622, 623, 668, 669, 777
Charter requirements....80, 622, 1019
City Electric Co....764
City Street Improvement Co....180-84, 198

BIDS—(Continued) PAGE

Competition destroyed, if bid for less work than in notices accepted 183
Competitive 545, 926, 991
Concrete mixers 668-70
Consolidation Act 540
Decisions 81, 181-83
Deterred by unlawful restrictions in proposed contract 125
Electricity, public buildings and streets 622-24, 764
Employee bidding on public work 344, 345
Error in 80-82
Fire boats 795, 796
Fire Department 79-82
Flushers, street 333
Form, failure to comply with 81
Franchise let without calling for 365
Franchises 138, 411
Garbage disposal 1020, 1021
Gas, public buildings and streets 622
Heating public buildings 622
Hose, fire 79-82
Interpretation 79-82
Invalid 180-84
Irregular 80-82, 180-84, 199, 795
Lands, sale of 340
Lighting streets and public buildings 622-24
Lincoln Way paving 198
Long term contract, effect on 292
Lowest accepted even if irregular 81
Lowest regular bid to be accepted 321, 622, 777, 991
"McQuillin on Municipal Corporations" 991
Moore & Scott Iron Works, fire boats 795, 796
New, calling for 543
Not obligatory, sale of advertising privileges 545
Official advertising 777-79
Omission of portion of work advertised 180, 182, 183
Pacific Fire Extinguisher Co 321
Patented articles 991, 992
Playground Commission 636
Public buildings, heat, light and power 622-24
Rejection 543, 796
Relief Home boilers 321
Relief Home lands, sale 341, 343
Sale of lands 340
San Bruno Avenue, paving 655
Sanitary Reduction Works plant, operation of 997, 998
Scott, Magner & Miller 1023
Scott, R. C. Advertising Co 544, 545
Separate for each article 622
Steam heat, public buildings 622-24
Street improvements 180-84, 656

BIDS—(Continued) PAGE
Supplies 539, 926, 1023
Typewritten signature 668-70
United Engineering Works 795, 796
Withdrawal of 545
Wittman, Lyman & Co. 321

BIEDEMAN TRACT—Map 372

BIG TREES—Grant 855

BILLBOARDS—
Buffalo ordinance 142
Decisions 140-42
Height 139-43
Insecure 141
Kansas City ordinance 142
License tax on 146
Missouri Supreme Court 142
New York Appellate Court 142
Police power to make limitations 140-42
Removal 141
Rochester, regulation 141
Varney & Green v. Williams 140

BILLINGS, FREDERICK—Mortgage 107

BILLS—
Advertising 744
Cemetery removals 395
Mothers' Pension Bill 400
Passage to print 179
Publication, period of 340
Sale of public property 340
Senate, State 388

BIRTH CERTIFICATES—Registration of 330

BITULITHIC PAVEMENT—Use on streets 453, 454

BITURINE CO.—Maintenance bonds 124

BIXBY STREET—Opening 845

BLACKSMITHS—Fire Department 557

BLACKWOOD STREET—
Open public street 872
Portion sold for delinquent taxes 658

BLANKETING EMPLOYEES UNDER CIVIL SERVICE .....
..... 268, 284, 287, 389, 390, 771, 802, 803, 830, 831, 897, 898

BLASTING— PAGE.
Gray Brothers 477, 478, 803, 804
Murasky, Judge, decision 478
Ordinance requiring permits 804
Thirtieth and Castro Streets....477, 478, 803, 804

BLOOM, J. W.—Opening streets.... 19

BLUXOME STREET—
Encroachments 459, 460
Franchise rights, Southern Pacific Co....213
Laying out of 460
Open public street 459, 460
Spur track privileges 213

BOARD—Under heading of "Supplies".... 17

BOARDING HOUSES—License tax 522

BOARDS—
Advisory Board on Moving Pictures....932, 1011
Board of Education (See Education, Board of)
Board of Health (See Health Department)
Board of Land Commissioners....116
Board of Public Works (See Public Works, Board of)
Board of State Tide Land Commissioners....565
Board of Supervisors (See Supervisors)
Certification, Civil Service Commission, no power to refuse 333
Civil Service Commission (See Civil Service)
Delegating discretion to 553
Dismissals 684
Duties 383
Election Commissioners (See Election Commission)
Employees, additional 1008
Fire Commissioners (See Fire Department)
Fire Pension Fund Commissioners (See Fire Pensions)
Municipality not liable for acts of boards outside scope of their authority 735, 736
Park Commission (See Parks)
Playground Commission (See Playgrounds)
Police Commissioners (See Police Department)
Police Relief and Pension Fund Commissioners (See Police Pensions).
Powers 383
Public Library Trustees (See Libraries)
State Board of Control....1005, 1006
State Board of Health....330

BOARDS—(Continued) PAGE.

State Harbor Commissioners (See State Harbor Commissioners)

State Highway Commission....68, 69
Supplies for....1023, 1024
Temporary appointment, power to make....83
Unauthorized appointments, liability....503, 504

BOATS—

Fire boats....795, 796
Police patrol boat....811, 812

BODIES—Removal of....395-97, 475, 476

BOILERS—Relief Home....321

BONDS—

Act of 1889....374
Action to restrain issuance....377
American District Telegraph Co., opening streets....258
Approval by Mayor....497, 704, 705
Benjamin, L. M....334
Blasting....704, 705, 804

Board of Public Works—

Commissioners....697
Employees....189

Builder's, filing fee....9, 10
Building Law....596
Car contractors....719-21
Change in proceedings....374-79
Changing denominations....373-80
Charter amendment necessary to sell below par....58
Charter provision for calling election....49
City Electric Co....474
Conductors, Municipal Railway....189, 497, 498
Constitutional provision on incurring bonded indebtedness 58
Continuing bond, street openings....259
Contractor, maintenance of street....124-126
Contractors, electric installations....596
Contracts....80, 81
Crocker National Bank....186, 187, 331
Decisions....374-79, 780
Defect in proceedings....374
Denominations, changing....373-80
Depository bond....186
"Dillon on Municipal Corporations"....59
Elections....48-50, 58, 373
Elective officers....497
Electricians....596

BONDS—(Continued) PAGE.

Enjoining bond issue 374, 376
Estimates, cost of construction 49, 51
Extensions of mains 595, 596
Failure to follow ordinance 374
Filing in Auditor's office, official bonds 189, 190
Fiscal agent 186, 331, 375
Form of 373
Gas rate litigation 474
Geary Street Railway 48, 49
Hetch Hetchy 494, 495, 595, 596, 779, 780
Highway Bonds, State 67-69
Hospital bonds 629
Integral part, existing utility, purchase with 779, 780
Interest on 52, 58, 186, 373-79
Jewett Car Co 719-21
Law v. San Francisco, 144 Cal. 384 ..... 377, 378
Library Bonds 56, 57-59
Lloyd & Spengler, premiums 497
Lower Market Street, Municipal Railway 48, 49
Mains, laying of 518
Maintenance of street work 124-126
Massachusetts Bonding and Insurance Co 597
Mayor, conditions, official bonds 219-21
Mission Park 840
Modesto, bond issue 374
Money, kind of, payable in 375, 377
Motormen, Municipal Railway 189, 497, 498
Municipal bonded indebtedness not incurred until actual sale and delivery 59
Municipal Railway 48, 49, 603, 604
Municipal Railway employees 189, 497, 498
New York fiscal agency 331, 375
Not invalidated by change in denomination 379
Notice, bond election 373-79
Number and character 373, 374, 378, 379
Number, change in 378, 379
Official bonds, condition in 219-21
Officials 189, 497, 498
Openings in streets 258, 259
Pacific Gas and Electric Co 474, 596, 597
Par, sale below 56, 58, 59
Payment of, statute 375-79
Premiums on 497, 498
Proceedings, defect in 374

Proceeds—

Applying of 603
Crediting to proper fund 51
Exclusively for objects stated in proceedings 604, 780
Surplus 603

BONDS—(Continued) PAGE.
Public utilities 49, 373
Rate of interest 373-79
Redemption 52, 58, 59, 375-79
Resolution No. 2752 (New Series), payment of interest 186
San Francisco Electric Protective Co., street openings 258
Santa Barbara 378, 379
Santa Rosa 374-77
Semi-annual interest payment 375, 376
Special elections 373
State Highway Bonds 67-69
Statutes 374-79
Street flusher contract 334
Street openings 258, 259
Street work, maintenance of 124-26
Superintendent, Municipal Railway 189
Surplus, proceeds 603
Taxes to meet interest and redemption 52, 373, 374, 377, 380
Use for purposes authorized 780
Water bonds 77, 495, 595, 596
Water mains, laying of 518
Water rate litigation 474
Water supply bonds 494, 495
Wiring buildings 596

BONUS—Contract, Municipal Railway 150, 153, 156

BOOKS—
Official to surrender upon expiration of term 220, 221
Under heading of "Supplies" 17

BOOTHS, ELECTION—
Contract 253, 254
Erection and maintenance 723
Maintenance 486, 487

BOSTON—Height of buildings 143

BOULEVARDS—
Assessments for improving 502
Control, Park Commission 501, 502
Great Highway 941
Municipal Railway on, not prohibited 191
Street railway not to be constructed over 190, 191
Van Ness Avenue 190

BOUNDARIES—
"Angell on Watercourses" 113
Bernal Rancho 108, 109
Freeman v. Belgarde, 108 Cal. 179 ..... 112, 115

BOUNDARIES—(Continued) PAGE.
Golden Gate Park 261, 468
Great Highway 261, 468
Islais Creek 108-115
Line of high or low water mark 114
Map, Committee on Outside Lands 261
Political Code section 466
Rancho Rincon de las Salinas y Potrero Viejo 108
San Francisco, patent 117
Stream as 112

BOWERS RUBBER WORKS—Bid, fire hose 79-82

BOXES—Street litter 505-507

BOXING EXHIBITIONS 757

BRACKETT, DR. GEORGE F.—Druggist, County Jail 965-68

BRANDS—Meat shipments 301, 302

BRANNAN STREET—Acceptance, crossing of Ninth Street 94

BRANNAN TRACT 726

BRICKYARDS—Prohibited certain districts 531

BRIDGES—
Act of Legislature 800
Atchison, Topeka & Santa Fe Railway Co 316, 317
Beale Street 235-38
Islais Creek 316-18, 798-800
Kentucky Street 316-18, 798-800
Mandamus to compel construction 650
Municipalities authorized to construct 800
Ocean Avenue 650
Ocean Shore Railway Co 25, 650
Seal Rocks 261
Southern Pacific Co 316, 317

BRIGHT STREET—Opening 845

BROKER—License 613, 614

BROOKLYN, N. Y.—
Cattle driven in streets 39
Ocean parkway 959, 960

BROPHY, JOSEPHINE—Pension 266

BROUGHTON ACT 413

BROWN, HARVEY S.—Mortgage 106-108

BRYANT STREET— PAGE.
Acceptance, crossing of Ninth Street 94
Playground land, exchange or sale 370-72

BRYTE, LESTER N.—Protest, uniform municipal accounting system 1004, 1005

BUBONIC PLAGUE CASES—Removal of 848

BUCHANAN STREET—
Dore v. Truett 275, 276, 328
Extension, northerly 328
Open public street northerly from Lewis Street 328
Rights, Sierra and San Francisco Power Co 524
Street reserve 328

BUCK, JUDGE G. H.—Judgment, Emmet Place 479, 784

BUDGET—
1915-16 891-94
Adoption of 4, 5, 609
Aggregate sums 1, 2, 4, 5
Basis for tax rate 5
Cannot create new positions 608
Charter provisions 1, 4, 5, 388
Daniel Webster School 891, 893
Definition in Charter 6
Department limited to 388
Estimates from departments 5
Expenditures differing from 891-94
Health Department 1-5, 388
Item in specially designated for bookkeeping and convenience 810
Lane, Franklin K., opinion 811
Limiting expenditures 3, 4, 6, 8
Lincoln Way, improvement 197, 198
Powers, Board of Supervisors 1, 4, 5
Publicity literature, appropriation 591, 592
Preparation of 1, 4, 5, 388
Salaries 1, 2, 4, 8, 120, 121
Schools 951, 952
Specific itemization not limiting departments 811
Supplies Committee 962

BUENA VISTA PARK—Management 467

BUFFALO—Bill boards 141, 142

BUGGIES—
Coming under "Supplies" 18, 935
Hiring 934, 935

BUILDING LAW— PAGE.

Alterations to buildings....102, 103, 272, 511-15, 649, 652
Amusement places, seating capacity....331, 332
Apartment houses....537
Bonds, electric installations....596
Classes of buildings....251
Construction....652
Destruction of buildings....449, 649
Electricians, bonds....596
Enlargement....652
Exposition buildings....666
Height of buildings....271
Hiatus in....667
Hospitals....349, 350, 995
Police law, essentially....512
Protection for public....350
Reconstruction....102, 103
Regulates buildings constructed after adoption only....512
Removal of buildings....102
Repairs to buildings....272, 649, 652
Invalid sections....393, 394, 552, 556
Lodging houses....785
Moving picture houses....511-15
Nuisances....449
Operates prospectively and not retrospectively....272

Permits—

Board of Public Works....649
Space below sidewalks....265

Stable....393
Sanitariums....349, 350, 995
Schools....995
Seating capacity....511
Service wires....596
Stables....392-94, 552, 553
Supervisors, power to enact....711
Tearing down buildings....448, 449
Tenement houses....537
Theatres....511-15
Violation constitutes a misdemeanor....512
Wiring of buildings....596

BUILDING PERMITS—

Addition to building....429

Board of Public Works—

Duty purely ministerial....510
Issuing....652-54
No discretion....394

Building Law....649, 652, 995, 996

BUILDING PERMITS—(Continued) PAGE.
Columbia Realty Co. 708, 709
Compliances with Building Law only requisite 394
Hospitals 350
Lodging houses 708-12
Outdoor park 666
Reconstruction 392-94
Stable 392-94
Water Front Realty Co. 429

BUILDINGS—
Addition to 429
Alterations 102, 103, 271, 272, 392-94, 511-15, 649, 652
Amusement places 511-15
Apartment house, conversion of frame building into 271, 272
Board of Public Works—
Powers 184-86, 394
Supervision of construction 448, 511, 649, 710, 711
Boston 143
Building Law 102, 103, 251, 265, 271, 272, 331, 332, 349, 350, 392-94, 461-63, 511-15, 649, 666, 995, 996
Car barn, Seventeenth Street, sale of old buildings 734
Cartage, portion of cost of materials in construction 17, 18
Charter framers, intent 103
Charter provisions 448
Columbia Realty Co., lodging house 708, 709
Common right to halls, stairs, etc 537, 538
Condemnation 448
Construction—
Cartage portion of cost of materials 17, 18
Contrary to law 512
Legislative authority 710, 711
Supervision, Board of Public Works 448, 511, 652
Contracts, money in treasury to meet 56, 57
Conversion of frame building into apartment house 271, 272
Damages, recovery of 449
Debris from razed buildings 168, 169
Decisions 143, 144, 185, 393-94, 449, 552
Demolition 168, 169, 184-86, 417, 418, 448-50, 649
Districts, varying heights 143
Dogs kept in 434-37
Electrical installations 596
Embarcadero, encroaching on 429
Entrances 538, 539
Expositions 666
"Fighting the Flames," amusement enterprise 647, 649
Fire Limits 161

BUILDINGS—(Continued) PAGE.

Fire Wardens, consent, alterations....552
Flooring....433, 434
Foundations weakened....736, 737
Frame buildings....271, 272
Garages....529-31, 634
Garretti, Angelo, removal....102
Globe Theatre....509-16
Golden Gate Park....468, 469
Great Highway....499, 612
Halls....537, 538
Health Department building....590, 591
Height....143, 144, 271, 272
Hospitals....349, 350
Hotel and Lodging House Act....708-10
Land values, relation to height....143
Landlord, repairs at expense of....590
Laundries....552
Law, Building....102, 103, 251, 265, 271, 272, 331, 332, 349, 350, 392-94, 461-63, 511-15, 649, 666
Legislature no power to legislate on construction....710
Library, Public....56
Light, lack of....418
Limiting height....271, 272
Lodging houses—
Condemnation, certain rooms....417, 418
Permits for construction....708-12
Market and Steuart Streets....433
Massachusetts Legislature....143
Materials of razed buildings, disposition....168, 169
Michellari & Longo, permit to alter....392-94
Moving picture houses....511-15
New Haven, Conn., tearing down....185
Nuisances....512, 513
Occupancy....513
Ordinances....102, 103, 184, 185, 251, 265, 271, 272, 417, 433, 434, 448, 449
Owner, recovery of damages....449
Parks....468, 469, 499-502
Permits....350, 392-94, 429, 510, 649, 652, 708-12
Portion of structure, condemnation....417, 418
Power of Municipality to tear down buildings erected in violation of ordinance....184
Property owner's right to erect....140
Public Library....56
Razed buildings, disposition of materials....168, 169
Reconstruction....102, 160-62, 392-94, 652
Removal of....102, 103, 649
Repairs....272, 486, 511-15, 649, 652

BUILDINGS—(Continued) PAGE.

Romeo Flats 538, 539
Rooms, lodging house, unfit for occupancy 417, 418
Sanitariums 349, 350
Service wires 596
Seventeenth Street car barn, sale of old buildings 734
Shacks (See Shacks)
St. Joseph, Mo. 185
Stables 251, 392-94, 461-63
Stairways 537, 538
State Hotel and Lodging House Act 708-10
State Tenement House Act 537-39, 712
Steuart and Market Streets 433, 434
Supervision, Board of Public Works 448, 649, 710, 711
Tearing down 184-86
Tenant, obligation to repair 590
Tenement House Act 537-39, 712
Theatres 511-15
Unlawful construction 512
Unsafe 513
Use contrary to law 512
Ventilation, lack of 418
Violation of ordinance 185
Water Front Realty Co., permit to erect 429, 430
Width of street, relation to height 144
Wiring of 596
Wooden buildings 146, 271, 272
Yards 437, 537, 538, 784, 785

BULKHEADS—

Embarcadero 381, 382
Great Highway 259

BUNKERS—E. B. & A. L. Stone Co., Otis Street 25

BURDENS—

Change in denominations of bonds 378
Class legislation 36
Enjoyer of privileges suffers 88
Franchise, under 651
Imposed on title by former owner 308, 309, 319
Individual, upon the 563
Interest on bonds 377
Proof of 395
Property owner, increased cost of street work 124, 125
Street railway franchise 88, 90
Taxpayer, additional 377, 378
Teachers' pension fund 566, 567

BUREAUS— PAGE.
Bureau of Animal Industry....300, 302
Bureau of Efficiency....62-64
Bureau of Food and Drugs Inspection....302
Bureau of Pure Foods and Drugs....299-303
Bureau of Supplies....922, 962-64
Bureau of Vital Statistics....330
Bureau of Weights and Measures....454-56
Widows' Pension Bureau....400

BURIALS—
Filing notices....397
Interdiction by law....40
Refusal to permit violation of constitution....33
Regulation by law....33

BURKE, WILLIAM J.—Opinion, saloon near church or school....399

BUSES—Motor, permit....520, 521

BUSH STREET CITY LOT—Excavation adjoining....315

BUSINESS—
Arbitrary deprivation....34, 35
Classes, dividing into....638
Closing hours....570-72
Common carrier....33, 34
Confining within certain limits....34, 145, 530, 531, 554
Estate acquired in....34
Females, discrimination against....427, 428
Interdiction by law....40
Interference with private rights....33
Lawful, right to pursue....31, 37, 554
Legislature, regulation by....33, 36, 712
License taxes....638-40, 797
Municipality, right to determine conduct....145
No fixed place of, higher tax....638
Police power, exercise of....36, 570
Privileges, granting of special....34, 36
Prohibiting carrying on at certain hours....570
Prohibiting of....34
Reconstruction of premises....161, 162
Regulation....32-41, 481-83, 530, 531
Right to follow lawful....31-37
Slaughtering....471
Supervisors, power to restrict....36
Undertaking....33
Unwholesome trades....40

BUTCHERS— PAGE.
Alameda license tax 639
Brooklyn ordinance 39
Inspection of meat 470, 471, 492, 493
Legislative regulation 41
Market, engaging in business in 39
Police power of cities 41

BUTTE PLACE—Franchise rights, Southern Pacific Co. 211

BYRNE, JAMES W.—Fireman 814

BYRNE, STEPHEN A.—Gas and water inspector 773

C

CABANISS, JUDGE—Ordinance, undertaking establishments, invalid 31

CABARETS—License 532, 533

CABLE RAILWAYS—
Abandonment of franchise 421
Electrification of 421

CAFES—Amusement license 532, 533

CAFETERIAS—License 556, 557

CAGGIARI, A.—Return of bail money 674

CAHILL, JOHN—Park employee, thumb injured 742, 743

CALIFORNIA—(See Constitutions; States)

CALIFORNIA ACADEMY OF SCIENCES—
Museum Golden Gate Park 841
Pueblo lands 686

CALIFORNIA ELECTRIC LIGHT CO.—Franchises 244

CALIFORNIA REDUCTION CO.—Litigation 1020

CALIFORNIA STREET—
Municipal Railway bonds 604
United Railroads franchise 422

CAMPAIGN—Publicity, literature 591-93

CANCELLATION— PAGE.
Assessments 175
Certification, civil service 147
Contracts 777, 778
Pension 266, 267
Tax deed 172

CANS—Refuse, advertising on 505-507

CANTY, MARY—Pension 443, 444

CAPACITY—Seating, amusement places....331, 332

CAPP STREET—Encroachments 357

CAPTAINS—
Collins, Jeremiah L....346-49
Discharging duties of chief's operator....347-49
Fire Department 74-76, 346-49
Promotion 74-76

CAR BARN—Seventeenth Street, removal of buildings....734-36

CAROLINE STREET—Illegal taxes 632

CARPENTER—Department of Elections, employment....486, 567

CARRELL, J. W.—Reinstatement 380, 381

CARRIAGES—Hackney 520

CARRIE STREET—Extension of Chenery Street.... 55

CARRIER—Common 33, 34

CARS—
Acceptance of 157-59
Advertising, Municipal Railway cars....290, 639
Alameda street cars, advertising....639
Charter regulation 234
Completing at car barn 157-60
Delivery 158-60
Haulage, Municipal Railway cars, by United Railroads....
....159, 160
Holman, W. L. contract....157-60, 442
Jewett Car Co....718-21
Municipal Corporation Act 1883....361, 363, 365
Municipal Railway 157-60, 442, 543-45, 718-21
Ocean Shore Railway Co., hauling other companies' cars..105
Operating, franchise condition 368
Partially completed cars, delivery of....157-60

CARS—(Continued) PAGE.
Patent royalties 718-21
Prepayment Sales Car Co., royalties....719, 720
Ross & McDonald, royalties....718
Routing of 170, 421
Running of 361, 363, 365, 368
Speed, limiting 233, 234
Steam to propel 40
Supervisors, sole power to permit running of.... 28
United Railroads 421

CARTAGE—Portion of cost of materials....17, 18

CARTHWAITE, H. & C. T.—Deed, Leroy Place....979

CASES—(See Citations, front of volume, Decisions).

CASSERLY, CAPTAIN JOHN—Reduction in rank....767, 768

CASSERLY, EUGENE—Deed 215

CASSERLY, THOMAS—Plumbing inspector, suspension....861, 862

CASTRO STREET—Blasting by Gray Brothers....478, 803, 804

CASTRO STREET LAND CO.—Dedication....478

CATERERS—License tax 522

CATTLE—
Bay View District 30, 42
Brooklyn ordinance 39
Built-up portions of city, driving and yarding....39, 40
Grazing on hills 30, 39, 42
Hours for driving in streets.... 39
Moving of 30, 39-42

CAUSE—Dismissals for 766

CEMENT—
Dust, employee incapacitated 664
Ordinance forbidding hauling in certain district....1013, 1014

CEMETERIES—
Act of 1911....396, 475
Assessment for street improvement....827-29
Associations (See Cemetery Associations)
Decisions 395, 396
Expense of removals 397
Laurel Hill Cemetery 36, 395, 475
Lots exempt from execution or lien....397
Minnesota statute 828

CEMETERIES—(Continued) PAGE
Notices to lot owners 397
Nuisance, whether 395
Outdoor Art League 475, 476
Parking 475, 476
Police power 395, 396
Procedure for removals 395-98
Removal of 395-97, 475, 476
Resolution of intention 396
Sale of lands 397
Title of lots 396-98
Transfer of bodies 397

CEMETERY ASSOCIATIONS—
Assessment for street improvement 827-29
Consent to removal of bodies 475
Expense of removals 396, 397
Fee of the land 398
Funds of 396
Incorporations 396
Notice of removal 397
Title to lots 396-98

CENSOR BOARD—Moving pictures 793, 932, 1011

CENTER, JOHN—Deeds 210, 214-16

CENTER PLACE—Franchise rights, Southern Pacific Co 211

CENTRAL PACIFIC RAILROAD CO.—
Charter, date of 209
Existence, term of 209
Franchises 208, 211, 213, 214, 217, 335
King Street, paving 335
Orders granting franchises 211, 213, 214
Ordinances granting franchises 335
Repair of street, obligation on 335

CENTRAL STATION—Fire alarm 548, 549

CERTIFICATES, CERTIFICATION—
Birth, Chinese 330
Canceling of 147
Chimney builders, registration 653, 654
Civil Service 223, 224, 252, 253, 267, 405
Contracts, Auditor's certificate 56
Cornwall, Bruce, grading 825-27
Departments, no power to refuse certifications 333
Dismissed employee certified for appointment 332
Findings of Civil Service Commission 223, 224

CERTIFICATES, CERTIFICATION—(Continued) PAGE.
Finn, John, grading 825-27
Fire Department, number of names 267-69
Grading credits 825-27
Health Department 332, 333
Isolation Hospital 332
Laundries 161
Lodging house and hotel, plans 709
Marriage certificates 581, 582
Medicine, practice of 932
Ordinance, recording certified copy 340, 341
Sale of property 166
Street work completion 917
Tax sales 256
Tunnel assessment, sale of delinquent property 166

CERTIFIED CHECK—
Accompanying bid 80, 668, 669, 777
Taxes 631

CHANCE—Games of 647, 648

CHAMBER OF COMMERCE—Great Highway 940

CHANGE—
Bond issue proceedings 374-79
Denominations of bonds 373-79
Franchises 316-18
Grades (See Grades).
Interest on bonds, place of payment and rate 375, 377
Location, Tuberculosis Hospital 625, 629, 630
Lots, surface of 738
Names of streets 565, 692
Overhead wires to underground 523-25
Steam mains, location 618
Supervisors' Clerks, positions 896-901
Tax levy 377
Use of park 549

CHANNEL STREET—Franchise rights Southern Pacific Co. 211

CHARGES—
Against employees 223-25
Board of Public Works hearing 693, 694
Civil Service Commission investigating 676, 683
Conduct unbecoming an officer 815, 816
Constitutional amendment 409
Failure to answer charges 224
Fire Department 747, 752, 766
Leuterdt, C. F., hoseman 766

CHARGES—(Continued) PAGE

Macphee, Arthur F., police officer....815-18
Neglect of duty....815, 816
Regulation by Supervisors....525
Service connections....863
Taylor, Charles H., police officer....815-18
Use of streets....240, 643
Written copy for employed charged....766

CHARTER—

Abatement of nuisances....448, 513
Absence from work of employees....43-45
Accounting system, uniform municipal....1004, 1019

Acquisition—

Lands for tunnels....311, 312
Public utility....49

Acts contrary to....285
Actual service, pay for....583
Additional employees....62, 608, 609, 1008, 1009
Adoption of....71, 267, 284, 285
Advertising....73, 179, 339, 340, 491, 492, 743, 744, 777, 778
Alleys....499
Alterations, bids....795
Amendments (See Charter Amendments)
Appeals from dismissals....682-85

Appointments—

Civil service....130, 405
Election Commission....486
Recommending....62
Subject to residence....14
Supervisors....964
Temporary....83
Void if irregular....901
Vote of Supervisors....63

Appropriations, advertising....179

Approval—

By Legislature....71, 359, 367, 618
Demands....121, 673

Assessments—

Change of grade....542, 543
Delinquent....845, 846
Limitation according to value....503, 868, 869
Sewers....502, 503
Street improvements....628, 750

Assessor—

Employees brought under civil service....389, 390, 803
Extra employees....822

CHARTER—(Continued) PAGE

Assistant Chief Engineers, Fire Department....937, 938
Auditor approving demands....673
Automobiles, employees using their own....487
Awarding of contracts....80
Bequests....371

Bids—

Alterations in....795
Calling for....669, 998, 1019
Competitive....545, 927
Lowest regular to be accepted....321, 622
Separate for each article....624
Supplies....80

Bills—

Passage to print....179
Publication of....339, 340

Blanketing employees into civil service....268, 284, 287, 389-91, 771, 802, 803

Board of Education—

Appointing teachers....703
Budget....951
Fixing salaries....704
Tax levy....951, 952

Board of Public Works—

Building construction, supervision....448, 486, 511, 649, 710
Contracts, making....325
Control of streets....262
Employees....807
Employees' bonds....189, 497
Poles, erection of....717
Powers....448, 486
Public utilities, charge of....545
Public work by contract....1001
Street improvements....695, 700

Bonds—

Board of Public Works, employees....189, 497
Elections....373
Municipal Railway employees....497
Officials....189, 220
Proceeds of sale of....51, 603, 780
Public utilities....49, 373
Sale of....58

Boulevards, street railways not to be constructed on....190
Brooklyn charter....959

CHARTER—(Continued) PAGE

Budget—
Adoption of....4, 5
Definition of....6
Estimates....5
Making....388
Preparation of....1, 4, 5

Buena Vista Park, control....467

Buildings—
Construction, supervision....448, 486, 511, 649, 710
Parks, supervision....468, 469

Business, restrictions on....36

California Academy of Sciences, Museum, Golden Gate Park....841

Cars—
Regulation....234
Running of....28

Certified check accompanying bid....80, 669, 777
Changes of grade....65, 542, 543
Charges, hearing of....223, 224, 298, 766
Chief Clerk, Chief of Police....1009, 1010
Chief Engineer, Fire Department....747, 937
Chief of department assigning employee....391
Chief of Police....683, 1008-10
Chief's operator, Fire Department....347
Citations (See front of volume)
City and County Hospital, visiting physicians....126
City's liability, defective public work....424

City property—
Exchange....609
Sale....58, 273, 371, 372

Civic Center property, exchange....609

Civil service—
Appeals....682-85
Classifications....452, 455
Commission....223, 224, 405, 672-74
Employees brought under....268, 284, 287, 389, 390, 771, 802, 803
Examinations....491
Examiners....921

Claims for damages....805

Classification—
Civil Service....451, 452
Fire Department....75, 76

Cleaning streets....410, 618

CHARTER—(Continued) PAGE

Clerks—

Additional....62, 608, 609, 1008, 1009
Department of Elections....29, 44
Discharge of....223

Closing of streets....310, 565
Common School Fund....811, 1007

Compensation to employees for use of their own property, forbidding....487

Competitive bids....545, 927

Condemnation—

Lands for tunnels....311, 312
Unsafe structures....448

Conductors, Municipal Railway, bonds....497
Conduits, laying of....410

Constitution—

Amendment, Senate Bill....20, 21
Charter organic law of city....72
Superior to charter....101, 413

Construction, supervision....448, 486, 511, 649, 710

Contracts—

Entering into....325
Eight-hour day....133, 834
Extensions of time....859
Fire Department....80, 795
Letting of....18
Money in treasury to meet....56, 57
Official advertising....743, 777, 778
Personal interest of employees in....344, 345, 445
Provisions, non-compliance with....325
Public work....1000, 1001
Safeguards around execution of....199
Street improvements....696-99
Supplies....80, 539, 777, 935
Violation of....253

Control of streets....262
Conveyance of lands....371
Copyists, Recorder....977
Coroner's employees, Civil Service....389, 390, 803
County Clerk's employees, civil service....803
Courts....499
Creation of positions....1008, 1009
Death from injuries....351, 352, 355

Damages—

City's liability for....542
Claims....805

CHARTER—(Continued) PAGE

Day labor....696
Dedication of street....309, 320
Deed, delinquent assessment....845, 846
Defeating purpose of....1, 6
Defective condition, public work, City's liability....424
Delinquent assessments....845, 846
Demands....3, 121, 672-74, 729, 939, 982
Denominations of bonds....373
Department of Elections....29, 43-45, 486, 567, 724

Departments—
Brought under civil service....389, 390
Transfer of vacant lots....371, 372

Deputies—
Additional....62, 608, 609, 1008, 1009
Discharge....223

Disability—
Fireman....129
Police officers....579, 580, 584, 585

Dismissal—
Employees....223, 682-85
Firemen....747, 766
Litigation....425, 426
Police officers....580

Donations....371
Duties of officers....504
Easements for tunnels....311, 312
Eight-hour day....133, 834
Elections....101, 314, 373, 722, 724
Elections Department....29, 43-45, 486, 567, 724
Elective officers, bonds....497
Electric light service and poles....717
Electric power....525
Eligible list, removal from....223, 224

Employees—
Absence from work....43-45
Additional....62, 608, 609, 1008, 1009
Appeals from dismissals....682-85
Auditor....29
Automobiles, using their own....487
Blanketing into civil service....
268, 284, 287, 389, 390, 771, 802, 803, 830, 831, 897, 898
Bonds....189, 497
Department of Elections....29, 44
Discharge of....223, 682-85

CHARTER—(Continued) PAGE
Interest in public contracts....344-346, 445-47
Municipal Railway, preference....463
Pay for actual service only....583
Permanency of tenure....104
Relationship with city, severance of....345
Residence....20-24
Suspensions....676
Time actually engaged....43, 583

Erection of poles....410, 411
Estimates, Budget....5
Examinations, civil service....405, 491
Examiners, civil service....920, 921
Exchange, city real estate....609
Exclusive privileges....358, 410, 414, 525

Expenditures—
Advertising....179
Departmental....5, 6
Under two hundred dollars....675, 994
Under five hundred dollars....695-98, 701

Experts....1019
Exposition....793, 841
Extensions of time to contractors....859
Extensions to public service systems....98, 135, 195, 410, 411
Extra clerks....29
Family of deceased, pension to....352, 444, 584
Fares, regulating....520
Final passage....73, 339, 340
Finance Committee, duties and powers....884
Fire alarm station....548, 549
Fire Department....75, 76, 80, 267, 268, 282, 284, 288, 347, 558, 714, 747, 795, 801, 813, 814, 837, 838, 937, 938
Fire houses....486
Firemen....14, 104, 129, 267, 268, 351, 352, 355, 387, 747, 766
Firemen's Relief and Pension Fund....128, 811
Fire pensions....128, 129, 355, 443, 444, 620, 621
Fixing of rates....410, 411, 618
Flushing sewers....410
Forfeiture of office....345
Framers, intent of....6, 103, 104, 131, 312, 411, 412, 540, 585, 683, 888, 938
Franchises....98, 135-37, 139, 179, 190, 195, 310, 317, 345, 410, 411, 525
Frick v. Los Angeles, 115 Cal., 515....71
Funds....51, 605, 811, 891, 892
Gas rates and service....410, 618

CHARTER—(Continued) PAGE

Geary Street, Park and Ocean Railroad Co.'s employees, preference on Municipal Railway....463
General Fund....811
Gifts....371
Golden Gate Park....467, 468, 841
Grade changes....65, 542, 543, 969
Grading....440, 441, 826
Great Highway....260, 467, 499, 612
Guide in all municipal matters....71
Hackney carriages....520
Head of department assigning employees....391
Health Department....1, 3, 4, 5
Health officers, policemen acting as....808
Heat rates and service....410, 618, 717
Hours of labor....133, 724, 834
Improvements....499, 518
Initiative provisions....569
Injuries....129, 351, 352, 355, 584, 585
Interest and sinking fund....811
Interest in public contract of employee....344, 345
Intoxicants, sale of....481-84
Invalid, erection of poles....134
Jails, maintaining....625
Jefferson Square, fire alarm station....548, 549
Justices' clerks, civil service....389, 390, 803
Laborers' hours....133
Laborers' wages....834

Lands—
- Conveyance of....371
- Relief Home, sale....342
- Sale of....58, 339, 340
- Tunnels....311, 312

Lanes....499

Laws, making and enforcing....59, 98, 139, 191, 278, 289, 426, 427, 564, 710

Laying of pipes....410

Lease—
- City property....853
- Parks....841
- Personal interest of employee....344

Leaves of absence....387
Legislature, approval of....71, 359, 367, 618
Levying taxes....5

Liability—
- City, defective sewer....424
- Officers....504

CHARTER—(Continued) PAGE

Libraries—
Buildings, erection on any city property....58
Fund....811
Tax levy....305
Trustees, powers....305

Licenses....146, 484, 520, 522, 797

Lighting—
Companies....410, 411
Franchises....525
Rates and service....410, 411, 618, 717

Liquor, sale of....481-84
Litigation, dismissal of....425, 426
Lobos Square....841

Local laws, making....59, 98, 139, 191, 278, 289, 426, 427, 564, 710

Los Angeles charter....413, 516, 517, 750
Lowest regular bid to be accepted....321, 622
Maintenance, public buildings....486
Manufacture of goods....484
Maps of subdivisions....71
Millville charter....305
Minimum wage....724, 832-35
Mission Creek lands, sale....58, 854
Modification of grade....65
Monopoly forbidding....358, 410, 414
Motormen, Municipal Railway, bonds....497
Mountain Lake Park....467

Municipal—
Accounting system, uniform....1004, 1019
Elections....314
Franchise conditions....364
Powers measured by....360, 361, 364
Public utility funds....605, 606

Municipal Railway—
Construction....49-51
Employees, preference....463

Museum, Golden Gate Park....841
Napa charter....745
Neal v. Rolph....926
New positions....608, 609
New York charter....532
Non-compliance with provisions....325

Notices—
Civil service examinations....491
Elections....49, 50, 373

Nuisances....448, 513

CHARTER—(Continued) PAGE

Obstructions, removal of....668
Occupancy, unsafe structures....513

Office—
Forfeiture of....345
Removal from....747

Officers—
Bonds....189, 220, 497
Personal interest in public contracts....344, 345, 445
Powers, duties and liabilities....504
Salaries payable monthly....713, 714

Official advertising....743, 777, 778
Official newspaper....340, 491, 492, 744
Open public streets....499
Opening of streets....98, 135-38, 195, 278, 410, 411, 525
Operator to Chief, Fire Department....347

Ordinances—
Effective sixty days after passage....414
Equal dignity with....812
Passage to print....179
Provisions same effect as charter provisions....135
Public utility franchise, going into effect....317
Publication of....340
Referendum provisions....414
Subject matter and title....535
Votes for passage of....339, 340

Organic law of city....72, 360, 404, 410, 694
Overhead construction....98, 136-38, 410, 411, 525
Panama-Pacific Exposition....457, 793
Paramount....926
Parents, pension to....352
Park Commissioners, jurisdiction....260, 467, 468, 680, 957, 958

Parks—
Control of....260, 467, 468, 957
Fund....776, 811
Leasing....841
Playgrounds set apart in....546
Structures in....468, 469
Tax levy....775, 776, 941

Partisan struggle, removal of employees from....104

Passage—
Measures....339, 340
To print, bill or resolution....179

Passenger vehicles....520
Patented pavement....453

CHARTER—(Continued) PAGE

Paving—
- Patented 453
- Railroads to do 358

Pay rolls 672-74, 939
Pensions 128, 129, 352, 355, 443, 444, 578-80, 584, 585, 620, 621
Percentage of receipts 98, 411

Permits—
- Liquor, sale of 481-84
- Poles 135, 525
- Revocable 550
- Spur tracks 28

Pipes, laying of 410
Playground Commission 7, 635, 636, 740
Playgrounds 468, 546
Poles, erection of 98, 136-38, 410, 411, 525

Police—
- Alarm station 548, 549
- Laws, making 59, 98, 139, 191, 278, 289, 426, 427, 564, 710
- Pensions 355, 578, 579
- Relief and Pension Fund 579, 811

Police Department—
- Chief, secretary to 1008-10
- Commission, liquor permits 481-84
- Composition of 812
- Dismissals 683
- Officers acting as health officers 808
- Promotions 716
- Rank 579, 580
- Reinstatements 580
- Residence 252
- Salaries 579, 580, 713, 714
- Suspension of officers 580, 683
- Trials of officers 684

Politics—
- Employees removed from 104
- Removal from office for 747

Positions, creation of 608, 609, 1008, 1009, 1018, 1019

Power—
- Franchises 525
- Rates and service 410, 411, 618, 717

Powers—
- Municipality measured by 360, 361, 364
- Supervisors 448, 504, 520, 625, 630
- Supervisors to make and enforce laws 59, 98, 139, 191, 278, 289, 426, 427, 564, 710

CHARTER—(Continued) PAGE

Preference, Municipal Railway, former employees....463
Premiums on bonds....189, 497
Printing contracts....777, 778
Prisons....539, 625
Probationers....130
Progressive payments, contracts....999
Promotion....75, 268, 405, 716

Public—

Building fund....811
Buildings, construction and repair....487
Contracts, interest of employee in....344, 345, 445
Libraries....305
Property, disposal of....339, 340

Public utilities—

Acquisition of....373, 887
Board of Public Works, charge of....545, 886-89
Construction of....49, 518, 887
Franchise; when ordinance goes into effect....317
Municipally owned....605, 606
Regulation....98, 135, 195, 278, 410, 411, 525
Supervisors, control by....717

Public Work—

Authorization by Supervisors....1000, 1001
Defective condition, city's liability....424

Publication....73, 179, 339, 340, 491, 492, 743, 744, 777, 778
Pumping works....501
Purchase of lands for tunnels....311, 312

Railroads—

Entering City....226, 317, 358
Paving by....358

Railway construction....49-51
Rank....579, 580
Rate Fixing....410, 411, 525, 618
Ratification by State....367
Real estate, exchange....609
Recommending appointments.... 62
Reconstruction of streets....696-700

Recorder—

Copyists....977
Duties....769
Employees, civil service....389, 390, 803

Referendum provisions, ordinance....414
Registration of voters....724
Regrading....440, 441
Regulations, making....
....59, 98, 139, 191, 278, 289, 426, 427, 564, 710

CHARTER—(Continued) PAGE.

Reinstatements 580
Relief Home lands, sale 342

Removal—
From office 747
Of obstructions 668

Repair—
Public buildings 486
Streets 695-97, 829
Streets by railroads 358

Reserve fund 605, 606, 993
Reservoir construction 501
Residence qualification 14, 20-24, 252, 267

Resolutions—
Passage to print 179
Publication of 340

Restrictions—
On business 36
On use of property 36

Retirement—
Age 579
Firemen 130

Revocable permits 550
Rights of way for tunnels 311, 312
Sacramento charter 325

Salary—
Actual service 583
Payable monthly 713, 714, 756
Two positions 447

Sale—
Delinquent assessments 845, 846
Goods, license 484
Lands 58, 339, 340, 371, 854
Liquor 481-84
Relief Home lands 342
To city, employee interested in 344

Saloons 481-84
San Francisco Hospital, visiting physicians 126
Sanitary laws, making 59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Santa Rosa charter 447
Schools 486, 893, 951, 952
Seal Rocks 467
Secretary to chief of police 1008-10
Sergeant-at-arms, appointing 63

CHARTER—(Continued) PAGE.

Service—
Quality of....410
Regulation of....135, 618

Sewers—
Assessments....502, 503
Construction....499, 501
Defective, city's liability....424
Flushing of....410, 618

Sheehan v. Scott, 145 Cal., 688....71
Sheriff's employees, civil service....389, 390, 803
Side track permits....28, 550

Sixty days after passage, ordinance, public utility franchise....317

Special deposit fund....811
Special elections....373
Speed, rates of....234
Sprinkling of streets....410, 618
Spur track permits....28, 550

Squares—
Control of....467, 468
Playgrounds set apart in....546

St. Louis charter....506

State—
A law of the....823
Ground for exposition building....841
Ratification by....71, 359, 367, 618

Stationery....926
Statute for all municipal purposes....71, 72
Steam heat....618

Steam railroads—
Entering city....226, 317, 358
Street work....358

Street railways—
Construction and operation....190
Franchises....190
Regulation....234

Streets—
Assessments....628, 868, 869
Board of Public Works, supervision....695, 700
Closing of....310, 565
Contracts....696-99
Control of....135, 203, 262, 695, 700
Dedication of....309, 320
Defective condition....690
Definition....499

CHARTER—(Continued). PAGE.

Expenditures under five hundred dollars....695-98, 701
Improvements....51, 418, 440, 441, 656, 750
New, map showing....71
Open public streets....499
Proceedings....695, 700
Reconstruction....696-700

Repairs—

Ordinary....696
Railroads....358
Urgent....695-97

Sprinkling and cleaning....410, 618
Use of....98, 135-38, 195, 278, 410, 411, 525
Written contracts....696-99

Structures—

In parks, supervision....468, 469
Public, construction and repair....486

Students, instruction, San Francisco Hospital....126
Subdivisions....71
Subsistence of prisoners....539

Supervisors—

Appointments....964
Debarred from personal interest in contracts, etc....344, 345
Employees, civil service....389, 390, 803
Power to make and enforce laws....59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Powers of....448, 520, 618, 625, 630
Rate fixing....618
Regulation of utility services....135, 618, 717

Supplies....539, 777, 926, 935, 988
Surety bonds, officials....189, 497

Surplus—

Bond proceeds....603
Fund....730, 811
Municipal public utility operation....605, 606

Suspension—

Employees....676, 693, 861, 862
Of operation of section....138
Police officers....580

Tax Collector—

Employees, civil service....389, 390
Qualifications....71

Tax levy....5, 305, 775, 776, 941, 952
Tax sales....345

CHARTER—(Continued) PAGE.

Taxation, limitations on....798

Teachers—

Appointing....703
Salaries....704, 713, 714

Telegraphic rates and service....135, 410, 618, 717
Telephonic rates and service....135, 410, 618, 717
Temporary appointments....29, 83, 936, 938, 1019
Temporary buildings....448
Tracks, regulation....234
Transfer of funds....891
Transfer of unused city land to another department..371, 372

Treasurer—

Approving demands....673
Employees, civil service....389, 390, 803

Trials—

Civil Service Commission....223, 224
Firemen....747, 752, 766
Police officers....684

Tunnels....311, 312, 604

Unapportioned Fee Fund....567, 811
Uniform system of municipal accounting....1004, 1019
Unsafe structures....448, 513
Unused city lots, transfer of....371
Urgent necessities fund....388
Urgent repairs to streets....695-97, 829
Use of streets....98, 135-38, 195, 278, 410, 411, 525
Vacant city lots, transfer of....371
Vacant positions....130, 816, 817
Vacations....387
Vehicles, passenger....520
Violating intention of....1, 6, 80, 84, 325, 503, 504, 901
Violation of contract....253
Visiting physicians, San Francisco Hospital....126
Void provision through conflict with Constitution....137

Voters—

Notice to....49, 50
Registration of....101,724

Votes, passage of ordinance....339, 340

Water—

Front, railroads running to....358
Rates and service....410, 618, 717
Service....410

Wires, erection of....98, 136, 137, 410, 411
Written contract, public work....1001

CHARTER AMENDMENTS— PAGE.

1907, November 5....58, 371, 372, 618
1912, December 10....609, 694, 1004
1913....443, 444, 463, 672
1915, March 16....777
Accounting system, uniform municipal....1004
Advertising, official....777, 778
Appeals from dismissals....682-85
Approval by Legislature....389, 549, 693, 694
Approval of salary roll....381
Assembly concurrent resolution....694
Assessor's employees, civil service....389, 390, 803
Board of Public Works, control, Great Highway....613
Bonds selling below par....58
City property, sale of....58
Civic Center property, exchange....609

Civil service—

Appeals from dismissals....682-85
Benefits, continuous service....803
Commission approving salary roll....381
Employees brought under....389-92, 771, 802, 803, 830, 831, 897, 898
Exempt positions....389

Conduits, laying of....98
Constitution, procedure....100
Constitutional provision....58, 694
Coroner's employees, civil service....389, 390, 803
County Clerk's employees, civil service....803
Death from injuries....351, 352, 355
Demands, approval of....672
Departments brought under civil service by charter amendment....389, 390
Dismissal of employees....682-85
Election, procedure....100-102
Elections....777, 895, 896, 1004

Employees—

Brought under civil service....389-92, 771, 802, 803, 830, 831, 897, 898
Dismissals....682-85
Municipal Railway, preference....463

Exempted positions, civil service....389
Family of deceased, pension to....351, 352, 355
Fire alarm station....548, 549
Fire pensions....355, 433, 444
Fireman's family, pension to....351, 352, 355
Geary Street, Park and Ocean Railroad Co.'s employees, preference on Municipal Railway....463

CHARTER AMENDMENTS—(Continued) PAGE

Great Highway, bringing under control of Board of Public Works 613
Injuries, pension 351, 352, 355
Jefferson Square, fire alarm station 548, 549
Justices' clerks, civil service 389, 390, 803
Lands, sale of 58, 273, 371, 372
Legislative body conducting election 100
Legislature, approval of 549
Library block, sale of, amendment first necessary 58
Mission Creek lands, sale 58
Municipal Railway employees, preference 463
"Municipal Record," official advertising 778
Official advertising 777, 778
Panama-Pacific Exposition 793
Parents, pension to 351, 352, 355
Pay rolls 672
Pensions 351, 352, 355, 443, 444
Pipes, laying of 98
Police alarm station 548,549
Preference, Municipal Railway, former employees 463
Recorder's employees, civil service 389, 390, 803
Registrar of Voters acting on behalf of Clerk of Supervisors at election 101, 102
Relief Home Tract, selling portion 273
Salary roll, approval of 381
Sale of lands 58, 273, 371, 372
Senate concurrent resolution 694
Sheriff's employees, civil service 389, 390, 803
Supervisors—
Employees, civil service 389, 390, 803
To conduct election 100-102
Suspension of employees 693
Tax Collector's employees, civil service 389, 390
Treasurer's employees, civil service 389, 390, 803
Water mains, laying by city 518

CHARTER FRAMERS, INTENT—
Compensation for injuries 585
Dismissals, police officers 683
Employees 104
Expenditures 6
Land for tunnels 312
Police officers 585
Public utilities 888
Supplies, contracts 540
Temporary appointments 938
Use of streets 411

PAGE.

CHARTER OAK CLUB—Dance....508

CHAUFFEURS—Licenses....489, 490

CHECK—
Accompanying bid....80, 622, 623, 668, 669, 777
Payment of taxes....631, 632

CHENERY STREET—
Closing of portion....55
Dedication....53, 55
Maps showing....53, 54
Private ownership....54, 55
Sewer right of way....54
Union Park Land Co., title....54, 55

CHERRY RIVER—Water supply....494-96

CHESTNUT STREET—
Farley, Mary, title to lot....786, 787
Rights, Sierra and San Francisco Power Co....524, 525

CHICAGO PARK COMMISSION—Powers....501, 502

CHIEF ENGINEER, FIRE DEPARTMENT—
Assignment of probationers....801, 813
Assistants to....74, 83, 936-39
Charter....937
Constitutional amendment....752
Control of firemen....165
Discretionary powers....348
Dismissal....752-55
Exempted from civil service provisions of charter....747
Exposition firemen....781
Harrassing employees....808
Holds office until removed, retired, incapacitated or deceased....753
Hose specifications....82
Murphy, Thomas R., removal from office....746-55
Operator to....346-49
Protest, Martin Spellman....283, 285
Qualifications....754
Term of office indefinite....753

CHIEF OF POLICE—
Confidential secretary to....1007-10
Moving picture regulation....1011
Power to suspend....683

CHILDREN— PAGE.
Abandoned minor....400, 401
Naturalized alien....702

CHIMNEYS—
Construction or repair....653, 654
Laundries....161
Ordinances....653, 654
Patent chimney, permit....651-55

CHINATOWN—Electric wiring....596

CHINESE—
Birth certificates....330
Discrimination against....552, 554
Laundries....552, 554, 712

CHOLERA CASES—Removal of....848

CHOP SUEY RESTAURANTS—White women employed in....426-28

CHURCH AND CLARK—Contract....866

CHURCH STREET, MUNICIPAL RAILWAY—
Agreement with United Railroads....943-45
Employment of none but citizens....925
Mission Park....840-42
Ordinance....604

CHURCHES—
Garage near....573-75
Kinetoscope parlor near....398-400, 569
Knights of Pythias Hall, religious services....577, 578
Latter Day Saints....577
Saloon near....399, 568, 569, 577
Second Church of Christ, Scientist....577, 578
Stable near....919

CHUTES—License....648

CITATIONS—(See front of volume).

CITIZENS—
Employment on Church Street Railway....925-27
Exclusive right to employment on public work....902
Laws....701, 703

CITY AND COUNTY— PAGE.

Acceptance of streets 265
Access to ocean front 466, 467
Accounting system, uniform municipal, 1004, 1006, 1018, 1019
Additional county offices, creation by Legislature 455
Aliens, employment prohibited 902
Bodies, disinterment of 395-97
Boundaries 117, 466
Cemetery removals, power to order 395-97
Charter—
Organic law 72
Powers under 278
Conditions, power to prescribe 413
Congress, grant by 117
Consolidated City and County 455
Consolidation Act (See Consolidation Act)
Constitution, powers under 72, 248, 278, 426, 710, 711
Constitutional amendment 1911 21
Control of streets 367
County under Motor Vehicle Act 941
Deeds to clear up titles 371
Defective condition, public work 424
Disinterment of human remains 395-97
Drawbridges across streams, authorizing construction 800
Dual political character 455
Employees, contractual relations with 345
Enacting of ordinances and resolutions 245
Fee in streets, ownership of 246
Fine, imposing on 133
Franchises, power to grant 246-48, 367
Free passes, authority to provide 364
General laws govern except in municipal affairs 584, 750
Governmental functions 362, 363, 367
Grant by Congress 117
Hospitals maintained by 585
Injuries, liability for 424
Land titles 117
Laws, making and enforcing 72, 248, 278, 426, 710, 711
Legislative authority 367, 413
Liability for injuries through defective construction 424
Littoral proprietor 466
Local laws, making 72, 248, 278, 426, 710, 711
Organic law 72, 404
Park lands, title to 466
Patent, Pueblo lands 115, 116, 466, 547, 548
Patent rights, assignment to 454
Police laws, making 72, 248, 278, 426, 710, 711

CITY AND COUNTY—(Continued) PAGE

Powers—

Charter, under....278
Franchise grants....360, 361, 367
Insurance against fire....306
Laws, making and enforcing, under Constitution 72, 248, 278, 426, 710, 711
Measured by grant from State....368

Protection of property from excavation....315
Pueblo lands, title to....115, 116, 466, 547, 548
Railroads entering 310, 317, 358
Railroads using streets....359-368
Rate fixing powers, retaining....758-61
Repair of streets....265
Sale of lands....371, 372
Sale to, officer interested in....344
Sewer construction....501
Shifting of population....370
Sidewalk construction....264

State—

Delegation of powers....367
Police regulations, subject to....488, 489

Streets—

Control of....367, 409-14
Ownership of fee in....246
Repair and reconstruction....265

Tide lands—

Grant by State....327
Jurisdiction over....466
Rights in....328, 329
Use of....275

Title to lands....117, 547, 548
Tracks, etc., street railway, ownership....206, 207
(See also Municipality; San Francisco.)

CITY AND COUNTY HOSPITAL—(See San Francisco Hospital).

CITY ATTORNEY—

Action to abate nuisance....450
Correction of assessments....611
Dismissal of litigation....425, 426

CITY COUNCIL—

Ordering extensions, railway lines....650
Street improvements....656

CITY ELECTRIC COMPANY— PAGE.
Arrests of employees....415
Asphalt plant, light and power....762-65
Corporation yard, light and power....762-65
Enjoining rate ordinances....474
Public buildings and streets, light, heat and power....622-24
Revocable permits, street openings....195
Right to charge rates they please....474
Right to put up poles and wires....414, 415
Temporary permits....415

CITY ENGINEER—
Army Street, improvement....732
Baker's Beach Outfall Sewer....858
Beacon Street....478
Beale Street, bridge....235-38
Bemiss Street, grades....736
Bond moneys for extension of mains....595
Capp Street, encroachments....357
Cars, Municipal Railway, patent royalties....718-21
Chenery Street....55
Cornwall, Bruce, credits for grading....825-27
Corporation Yard....764, 765
Cronin, Ann, improvement, Army Street....732, 733
Darby, Samuel E., patent royalties....719, 720
Dore v. Truett....707
Extensions of mains....595
Fairmount tract....172
Finn, John, credits for grading....825-27
Geary Street—
Jurisdiction....794
Railway construction work....155
Golden Gate Park, railway across....954
Grading certificates....826
Great Highway....259, 261
Harrison Street, grading....440, 825-27, 968, 969
Havelock Street, at Southern Pacific crossing....691-93
Hetch Hetchy system, integral part of....595, 596
Howard Street sewer, extension....381
Inadequacy of water supply....595, 596
Islais Creek Incinerator....193
Jewett Car Co., patent royalties on cars....718-21
King Street, paving....335
Laidley Street, grades....736
Mahoney Bros., contract, Municipal Railway....153, 155
Main Street, grades....968, 969
Maps of subdivisions....72
Mateo Street, grades....737
Mile Rock Tunnel....856
Monuments, placing of....72

CITY ENGINEER—(Continued) PAGE

Municipal Railway—

Across Golden Gate Park....954
Construction, Geary Street....153, 155
Patent royalties, cars....718-21

Newell-Murdoch Co., water service, Forest Hill....123
Noe Street....172
Norton, Patrick, injury to....645
Ocean Avenue, viaduct over....650
Ocean Shore Railway Co., viaduct....650, 651
O'Shaughnessy, M. M., demand....120, 121
Patent royalties on cars, Municipal Railway....718-21
Point Lobos Avenue, jurisdiction....794
Prepayment Sales Car Co., patent royalties....719, 720
Relief Home tract, running water pipe through....123
Richmond District, extension of mains....595
Roanoke Street, grades....737
Ross & McDonald, royalties....718
San Bruno Avenue, paving....655
Santa Rosa Avenue....599
Sierra and San Francisco Power Co....523
Southern Pacific fence, Havelock Street....691-93
Stanley Place....440
Stark Street, encroachments....844, 873
Stockton Street tunnel....606
Street names, duplication of....72
Subdivisions....72
Sunset District, extension of mains....595
Surveyor's field assistants, vacation....403
Test wells, sinking....595
Thirtieth Street....172
Vacation for dismissed employees....403
Van Ness Avenue, northerly from Beach Street, procedure to declare open public street....707
Vassar Place, grading....825-27
Water supply, inadequacy of....595
Wetmore, Manuel and Wetmore, grading contract....440
Yerba Buena Improvement Co., grading contract....440

CITY HALL—

Consulting architect's services....46, 47
Elevator operators....988
Extensions of time....858

CITY LAND ASSOCIATION TRACT—Extension of streets....845

CITY PROPERTY—

Bush Street, protection from excavation adjoining city property....315
Civic Center lots....609

CITY PROPERTY—(Continued) PAGE

Eighteenth Avenue, transfer....685-87
Excavation, adjoining lot....315
Exchange for private property....609, 851-55
Exchange of....370-72
Fire, insurance against....304-306
Hamilton Square....546, 547
Jefferson Square....548
Lane, Franklin K., sale....372
Leasing....852-54
Legislature, conveyance in trust....685, 686
Libraries....304-306
Library purposes, power of Supervisors to set aside for....58
Macdonough Estate Co., excavation adjoining city property....315
Market Place lots....852-55, 880-83
Mission Creek....58, 854
Mission Park....840
Nineteenth Avenue, transfer....685-87
Official to surrender upon expiration of term....220, 221
Park Commission, transferring....546, 547
Pipes on, ownership by city....123
Playground, Seventh and Bryant Streets....370-72
Playground Commission, transfers to....546, 547, 685-87
Produce Exchange lots....852-55, 880-83
Public utility, municipal, rights of way across....954
Pueblo grant....547, 548
Relief Home lands....123, 273, 339-44
Sale of....58, 273, 339-44, 370-72, 854
San Francisco Ladies' Protective and Relief Society, deed....685
South of Market Playground....370-72
State, conveyance in trust....855
Street through....273, 274
Title of city....547, 548
Transfer from one department to another....371, 372, 546, 547, 685-87
Vacant and unused lots....370-72, 686
Van Ness ordinance....547, 548

CITY STREET IMPROVEMENT CO.—

Arguello Boulevard, paving....180-84
Lincoln Way, contract....198, 199
San Bruno Avenue, paving....607, 608
Schudel v. City Street Improvement Co....607
Stanke v. City Street Improvement Co....607

CIVIC CENTER— PAGE.
Charter 890
Exchange, Library site 56
Howard, John Galen, services as consulting architect 46, 47
Library Trustees, acquiring site 56
Paving streets 695

CIVIL CODE—
Buildings, repairs to 590
Citations (See front of volume)
Common carriers 563
Construction of railroad 229, 230
Contracts 72
Electricity, furnishing of 292
Excavation, adjoining lot 315
Extensions of time 907
Fires, water for, free 295
Forfeiture of franchise 907
Franchise, street railway 88, 89, 95
Freight, hauling of 105
Furnishing of service 292, 295
Gas, furnishing of 292
Maps to be filed by railroad 27
Marriages 581, 582
Non-user of franchise 231
Notice of excavation adjoining property 315
Nuisances 448, 450
Operation of railroad 229, 230
Oral contracts 72
Poles, erection of 240
Pensions 706
Railroads—
Constructing across streams, etc 358, 359
Construction, time limit 229, 230
Filing maps 27
Laying tracks 88, 89
Powers 227
Repair of streets 86, 832, 833
Using streets, etc 359, 361, 363
Recording instruments 369, 769
Repairs to buildings 590
Service—
Connection by lighting company 292-94
Furnishing of 292, 295
Refusal of 292, 293
Steam heat, furnishing of 292
Street railway construction 907
Streets, use of, by railroads 359, 361, 363
Telegraph companies 240

CIVIL CODE—(Continued) PAGE

Telephone companies....240
Tracks, laying of....88, 89
Water service, furnishing of....292
Written contracts....72

CIVIL SERVICE—CIVIL SERVICE COMMISSION—

Abandonment of position by employee....222
Absence from city....251-53
Absence without leave....296
Act, New York Legislature....147, 148
Advertising notice of examinations....491, 492
Amendment to rules....75

Appeals from—
Dismissals....682-85
Findings of departmental head....694
Suspensions....676

Appointments—
Legal right to preference....148
Making of....390, 391
On probation....83
Rules....83, 405
Temporary....83, 936
Unauthorized....504
Without civil service examination....282, 285

Approval—
Appointments....83
Demands....939
Salary roll....381

Assessor, Chief Deputy....389-91

Assignments—
To positions....390-92
Without examination....285

Assistant Chiefs, Fire Department....74, 83, 936-39
Barry, David A., changing position....896-901
Battalion Chiefs, promotion....74-76
Board of Public Works, pay roll....980-83
Brackett, Dr. G. F., druggist, County Jail....965-68
Bureau of Efficiency....63, 64
Bureau of Weights and Measures....454
Cancel certification....147, 149
Carrell, J. W., reinstatement....380
Casserly, Thomas, plumbing inspector, suspension....861, 862

Certifications—
Eligible list, from....267, 268
Findings....223, 224
Health Department....332
Refusal to accept....332, 333

CIVIL SERVICE, CIVIL SERVICE COMMISSION—(Cont'd) PAGE

Charges, investigations....223-25, 298, 676, 683, 684

Charter amendments, employees brought under civil service....268, 284, 287, 389-92, 771, 802, 803, 830, 831, 897, 898

Charter provisions....452, 455

Chief Deputy, Assessor's office....389-91

Chief Deputy, Recorder's office....389

Chief Engineer, Fire Department, exempt....747

Chief's Operator, Fire Department....346

Classifications....74-76, 390, 451, 452, 899, 900

Code, James A., suspension....676-78

Coercion, resignation through....296-98

Collins, Jeremiah L....346

Conductor, Municipal Railway, reinstatement....996, 997

Consent necessary, temporary appointments....83, 84

Consolidation of classes....75, 76

Contracts, employees personally interested in....344-46

Control, temporary appointments....83, 84

Corporation Yard employees....103

County Clerk, copyist....802, 803

Created to do away with the spoils system....678

Credits—

Continuity in service....716

For service....715-17

Crosky, R. V., standing....389-91

Delay in making application for appointment....284

Delegation of power....672-74

Demands, approval of....672-74, 939, 968, 982

Dennis, Charles B., removal from register....221-25

Director, Bureau of Efficiency....63, 64

Discharge of employees....222-24

Discretionary power....405

Dismissals....682-85

Dismissed employee certified for appointment....332

Druggist, County Jail....965

Efficiency, Bureau of....63, 64

Elections Department....44

Electricity Department inspectors, reinstatement....380, 381

Eligible list—

Fire Department....267, 268

Number of names from....267, 268

Nurses....451

Placing at foot of....252

Policemen....251-53

Removal from....147-49, 221-25

Restoration to....251-53

Eligible, reinstatement of....405, 406

Ellison, Edward, assistant gas and water inspector....771-75

Emergency leaves of absence....387

CIVIL SERVICE, CIVIL SERVICE COMMISSION—(Cont'd) PAGE

Employees—
Abandoning position....222
Bidding on public work....344-46
Brought under civil service by charter amendment....
268, 284, 287, 389, 390, 771, 802, 803, 830, 831, 897, 898
In exempt position at time of charter amendment not barred from benefits....390
Engineers, Assistant, Fire Department....74, 83, 936-39
Examinations—
For promotions....74-76, 282, 285, 405
Notice of....491
Police Department....716
Examiners, salaries of....920, 921
Exempt from operation of civil service, positions, charter amendment....389
Failure—
To answer charges....224
To respond to notice....405
Findings of appointing boards, review of....684
Fire Department....
74-76, 83, 103, 104, 267, 268, 282, 284, 287, 346, 387, 558, 936
Gas and water inspectors....771-75
Golden, William, examiner....920
Greene, Edward M., standing....879, 880
Hampton, Robert W., gas and water inspector....771-75
Head of department assigning employees to duties....390, 391
Health Department, certifications....332
Hearing of charges....223-25, 683, 684
Henzel, Edward F., reinstatement....380
Hoseman, appointed a lieutenant....282-85
Hyer, John J., reinstatement....380
Inspectors—
Department of Electricity....380, 381
Gas and water....771-75
Supplies....963
Insufficient examination....148
Interest in public contract of employee....344, 345
Investigations—
Charges....223-25, 683, 684
Suspensions....676-78
Investigators, salaries of....920
Isolation Hospital, non-civil service ward-woman....332
Johnson, Samuel W., restoration to eligible list....251-53
Jurisdiction over civil service employees....693, 694
Lane, Franklin K., opinion....683

CIVIL SERVICE, CIVIL SERVICE COMMISSION—(Cont'd) PAGE

Layden, James F., Assistant Chief, Fire Department....936-39
Leaves of absence....345, 387
Lieutenant, hoseman appointed as....282-85
Machinists, Fire Department....103, 104
Madsen, C. W., right to employment, Union Street line....836, 837
Maxwell, John R., Assistant Chief, Fire Department....936-39
McAvoy, Edward....147, 149
McDevitt, E. J., civil service standing....391, 392
Mechanics, Fire Department....103, 104
Merit, basis for promotion....75
Municipal Railway, conductor....996, 997
New York City....147
Notice—
  Of examinations....491
  Of vacancies....130
Number of names certified from eligible list....267, 268
Officers of special and limited jurisdiction....147
Official newspaper, publication in....491, 492
Operator to Chief, Fire Department....346
Pay day twice a month....714
Pay rolls....672-74, 939, 968, 980-83
People v. Cobb, 43 N. Y. S. 122....147, 148
Per diem employees....980-83
Personal appointments, civil service created to do away with....678
Peterson, James E., reinstatement as conductor....996, 997
Physical examinations....148
Police Department....251-53
Police officer, reappointed, entitled only to credit since reappointment....716, 717
Positions, creation of....921
Powers....224, 405
Preference, former employees, Union Street line....836, 837
Probationers....83, 130, 147, 148
Promotions—
  Corporal to sergeant....715
  Fire Department....74-76, 268
  Police Department....268, 715
  Rules....405
Public work, employee bidding on....344, 345
Publication, notice of examinations....491, 492
Ranking for promotion....75, 76
Recorder, Chief Deputy....389
Refusal—
  To accept certifications....332, 333
  To put name on eligible list....149

CIVIL SERVICE, CIVIL SERVICE COMMISSION—(Cont'd) PAGE

Register, removal from....221-25
Reinstatements....296-98, 380, 405, 406, 996
Relief firemen....103, 104
Removal from eligible list....147-49, 405
Residence in city....252
Resignations....296-98, 451
Restoration to eligible list....251-53
Review of findings of appointing boards....684
Rogers, John W., change in position....896-901
Rule invalid....268
Rules....74, 83, 84, 225, 252, 387, 405, 451

Salaries—

Roll, approval of....381
Twice a month....714

San Francisco Municipal Civil Service Association, suspensions....676

Sealer, Weights and Measures....454
Seniority in service....75, 715, 716
Smith, J. J., employee bidding on public work....344
Spellman, Martin, fireman....282-85
Stenographer-typewriter, removal from register....221-25
Stoltz, Charles M., standing....389
Supervisors, clerks....895-901
Surveyors' field assistants....403
Suspensions of employees....676-78, 861

Tax Collector—

Clerk, reinstatement....296-98
Suspensions....676-78

Temporary appointments....83, 936
Teutenberg, Frank J., credits for service....715-17
Trials....223, 224, 676, 683
Tripp, Edwin B., suspension....676-78
Twice a month salaries....714
Unauthorized appointments....504
Vacations....387, 980-83
Ward-woman, Isolation Hospital....332
Water and gas inspectors....771-75
Weights and Measures Bureau....454
Whelan, John J., copyist, County Clerk....802, 803, 830-31
Wolff, Charles A., reinstatement....296-98

CLAIMS—

Ambulance colliding with automobile....314
Conlon, James, family of....425
Damages....805
Defective condition, public work....424
Firemen, losses sustained by fire in quarters....477

CLAIMS—(Continued) PAGE

Lambert, Mrs. W. D....318, 320
Lloyd and Spengler, premiums on bonds....497
Lynch, Patrick, family of....425
Main Street, change of grade....541-43
Municipality not answerable for negligence of officers....315
Patent royalties....718
Playground Commission....740, 741
Sewer employees killed....425
State Board of Control, maintenance of minors....401
Supervisors, discretionary power....3
Tax refund....318, 320
Westinghouse Electric Manufacturing Co....442
Workmen's Compensation Act....617

CLASS—

Discrimination....436
Females, discrimination against....427
Legislation....36, 427, 428, 461, 462, 572, 638-40

CLASSIFICATION—

Amendment to rules....75
Basis of differentiation....461
Budget appropriations....1, 2, 8
Businesses....638-40
Charter amendment, positions brought under civil service....390
Charter provisions....75, 76
Civil Service....390, 451, 452
Consolidation....75, 76
Dances....637-41
Decisions, invalid for taxing purposes....640
Discrimination....462, 638-40
Districts....461, 462
Fire Department....74, 76
Occupations....638-40
Subjects of regulation....461
Supervisors, employees....899, 900

CLAY STREET—

Dougherty v. Hitchcock, grading contract....181
Sewer, employees asphyxiated....423, 424

CLEANING—

Public buildings....885
School windows....902, 903

CLEMENT STREET—

Extension of....299
Open public street....298, 299
Portion originally part of Golden Gate Cemetery....298

CLERKS—(See Employees). PAGE.

CLIFF HOUSE....259, 261

CLINICS—
Definition....438
Dental clinic, schools....1026
Free....127
Lane Hospital, adjunct....437
San Francisco Polyclinic....127
Stanford Medical....437, 439

CLOSING—
Hours, ordinance....570-72
Offices on holidays....492

CLOSING OF STREETS—
Charter provisions....310, 565
Chenery Street....55
Eighteenth Street....565, 566
Fourth Street, between Townsend and Berry....310
Jurisdiction, Board of Supervisors....310
Southern Pacific Co., application....309, 310

CLOVER STREET—Assessment, street work....628, 629

COAL—Forbidding hauling in certain districts....1013, 1014

COBB, JOHN F.—Judgment....119

CODE, JAMES A.—Suspension....676-78

CODE OF CIVIL PROCEDURE—
Amendment 1911....9
Appeal not operating as a stay....480
Building contracts, filing of....9
Citations. (See front of volume.)
Contracts, filing of....9
Contracts, temporary deposits held out....316
Estates, possession of....610
Execution sale....167
Executors....610
Notices of sale, posting of....167
Personal property, sale of....167
Real property—
Sale of....167
Title, appeal not operating as a stay....480

CODES—(See Citations, front of volume; Civil Code; Code of Civil Procedure; Penal Code; Political Code).

COERCION— PAGE.
Casserly, Captain John, reduction in rank....767, 768
Franchise conditions....368
Police officers resigning....255
Resignation through....296-98, 808, 809
Where it exists....297

COLLECTORS—Rent....528

COLLEGE OF PHYSICIANS AND SURGEONS—
Students, City and County Hospital....127

COLLEGES—Medical....127

COLLINS, JEREMIAH L., Operator to Chief, Fire Department, ...346-49

COLLISIONS—
Ambulance, Emergency Hospital, with automobile....314
Susskind, S. H., automobile with steam roller....689-91

COLUMBIA REALTY CO.—Construction, lodging house....708, 709

COLUMBUS—Franchise, street railway....91, 92

COMERFORD STREET—
Lambert, Mrs. W. D., refund on tax sale....318-20
Meyers v. Kenyon, 7 Cal. App. Rep. 112....308, 318, 319
Not an open public street....307-309, 319, 320

COMMISSIONS—
Commissioners of the Funded Debt....119
Commissioners of the General Land Office....115, 116
Definition....528
Liability for unauthorized appointments....503, 504
Merchants, license....613
Middlemen....613
Real estate agents....528
Term of office....747-50
(See also Boards; Departments.)

COMMITTEES—
Extension of water mains....516
On outside lands....261

COMMON CARRIERS—
Business of....33, 34
Meat transportation....300
Regulation....563, 564

PAGE

COMMON RIGHT—To halls, stairs, etc.....537, 538

COMMON SCHOOL FUND.....1007, 1026-28

COMMONWEALTH BONDING AND CASUALTY CO.—Mile Rock Tunnel.....856, 857

COMPELLING BY MANDAMUS.....650

COMPENSATION—

Act 1913.....526
Actual time employed.....29, 43-45
Amendments, Workmen's Compensation Act.....904
Automobile damaged passing playground.....439
Barnett, Benjamin, teamster, injured.....787, 788
Board of Public Works employees.....626, 627, 645, 646, 663, 664, 687, 688
Cahill, John, park employee.....742, 743
Cement dust, employee incapacitated.....664
Charter framers' intent.....585
Charter provisions.....584, 585
Death.....424, 820, 821
Decisions.....585, 627, 645, 646, 664, 787, 820-22
Dow, Burritt N., treatment, street sweeper injured.....1021, 1022
Election officers.....721-25
Emergency Hospital, treatment at.....687
Employees using their own automobiles.....445, 487
Employers' liability.....616, 626, 627, 645, 646
Eyes street sweeper injured.....1021, 1022
Failure to report injury.....742, 743
Father, deceased employee.....819-22
Firemen at exposition.....780-83
Glanders, employee contracting.....905
Grant, Harry E., motorman, Municipal Railway.....877-79
Hannon, John, street sweeper.....687, 688
Horse runaway, frightened by paving machine, driver injured.....670-72
Hospital treatment.....585, 687, 878, 879
Industrial Accident Commission.....585, 627, 645, 646, 664, 787, 820-22
Interference with property rights.....144
Laborers.....724
Lead poisoning.....664
Leahy, Dennis, laborer.....663, 664
Lump sum settlement.....821
Massachusetts Workmen's Compensation Act.....905

COMPENSATION—(Continued) PAGE

Middleman 613
Minimum wage 724
Norton, Patrick 626, 627, 645, 646
Notice to employer 742, 743
Occupational diseases 664
O'Donnell, J. W., street sweeper injured 1021, 1022
O'Donnell, Patrick, street sweeper 616
Private property taken or damaged for public use 738
Property cannot be taken for public use without 485
Stack, Edmond, death of son 819-22
Street sweepers injured 616, 1021, 1022
Team driver injured 787, 788
Tobin, Agnes, nurse, contracting typhoid fever 903-906
Use of streets 239, 240
Wisconsin, Workmen's Compensation Act 906
Workmen's Compensation Act 424, 526, 583-85, 616, 626, 627, 645, 646, 687, 688, 742, 782, 783, 787, 797, 820-22, 904, 905

COMPETITION—

Bidding on contracts 545
Charter provisions 545
Destroyed where bid for incomplete performance of work accepted 183
Encouraging or discouraging 624
Franchise let without calling for bids 365
Gas and electricity bids 624
Long term contract preventing later 292
Patented articles 453, 991, 992
Plans, public buildings 338
Promotion 76
Tuberculosis Hospital plans 338

COMPROMISE—

Advertising, Municipal Railway cars 544
Deposits, street openings 560-62
Litigation 425
Sewer employees killed, families' claims 425
United Railroads, percentage of receipts 422

COMPULSORY REMOVAL IN CONTAGIOUS DISEASES 770, 807, 808, 848

CONCERTS—

Entrances, etc., obstructed 332
License 532

CONCESSIONS— PAGE.
"Fighting the Flames" 647
License 647, 648
Outdoor park 665
Panama-Pacific Exposition 456-58

CONCRETE MIXERS—Bids 668-70

CONDEMNATION—
All property subject to 484
Bernal, J. C., sewer right of way 600, 601
Buildings 168
Constitution 485
Contracts 485
Destruction of condemned buildings 448
Flooring of building 433, 434
Fort Miley, land for 298
Fruit stand, open 433
Globe Theatre 509
Hetch Hetchy, rights of way 496
Integral part, existing utility 779
Lands for tunnels 311, 312
Meat 303
Opera House, donors' rights 484, 485
Portion of structure 417, 418
Rooms, certain ones, in lodging house 417, 418
Santa Rosa Avenue, sewer right of way 599-601
Seat in a public building 485
Street railway tracks, etc 207
United States v. San Francisco 298
Unsafe structures 513

CONDITIONS—
Blasting bonds 705
City power to prescribe 413
Contracts 927
Inclusion in franchise 358-68, 410, 414
Not in conflict with charter 413
Railroad estopped from denying validity 366, 367
Specifications 777, 778

CONDUCTORS—
Bonds, liability, charter requirement 497
Municipal Railway, bonds 189
Peterson, James E., reinstatement 996, 997
Premiums on bonds 497, 498

CONDUITS (See Pipes, laying of; Underground Conduits)—

CONFIDENTIAL SECRETARY TO CHIEF OF POLICE 1007-10

CONFISCATORY RATES 474

CONFLICT— PAGE.
Charter provision with constitution....137
Constitution with statute....242
General laws, making laws not in conflict with....59, 72, 98, 139, 191, 248, 278, 289, 710, 711
Ordinances with general laws....849-51
Vrooman Act with Los Angeles charter provisions....750

CONGESTION OF STREETS—Motor vehicles....520, 947

CONGRESS—
Franchise, Western Union Telegraph Co....239
Hetch Hetchy grant....494
Pueblo lands, grant....117, 466, 547, 548
Rights in streets under Act....239, 242
Seal Rocks, cession....467
Telegraph companies, grant....239

CONLON, JAMES—Killed by asphyxiation....422-26

CONNECTIONS—
Electroliers....431, 432
Service (See Service Connections.)—
Telephone systems....402

CONSENT—
Abandonment of franchise....907-909
Amusement pier....466
By acceptance of franchise....651
Civil Service Commission, appointments....936
Correction of assessments....611
Expenditures under two hundred dollars....675
Fire Wardens....552
Laundries....551
Lot owners, cemeteries....475
Municipality to use of streets....360-64
Park Commission to railway across park....955, 961, 962
Temporary appointments....83, 84

CONSOLIDATED CITY AND COUNTY....455, 751-53

CONSOLIDATION—
Civil service classifications....75, 76
License ordinances....527
Railroads....208
United Railroads....420

CONSOLIDATION ACT— PAGE.
Acceptance of streets....177
Amendment, 1862....246, 404
Amendment, 1872....404
Building....540
Contracts....540
Dedication of streets....404
Lighting of streets....246
Park Commission, authority....470
Printing contracts....540
Repair of streets....178
Street improvements....245
Supplies for prisoners....540

CONSTITUTIONALITY—
Advertising on refuse cans, contract....506
Apartment house license ordinance....522
Assessment, cemetery property....829
Bid, typewritten signature....669
Bill board ordinance....142
Bond issue proceedings....374, 376-79
Building Law section....393, 394, 461, 462, 552, 556
Business license....638-40
Charter provision—
Erection of poles....134
In conflict with Constitution....137
Civil service rule....268
Class legislation....36, 427, 428, 638-40
Contract—
Clause in specifications....777, 778
Differing from resolution of intention....656
Extending beyond term of office....290, 291
Where bid incomplete....181-84
Courts, consideration by....638
Dogs in flats, ordinance....434-37
Enactment of law similar to code section....242
Franchise—
Condition in....366, 367
Depends upon use....421
Fresno, license tax on merchants....640
Garbage disposal proceedings....1020
Interference with rights....34
Laundry ordinance....551, 552
Law v. San Francisco....377
Legislature exceeding power granted by Constitution....38
License ordinance....638, 640
Lighting poles ordinance....717
Modesto bond issue....374
Municipality exceeding power granted by Constitution....38

CONSTITUTIONALITY—(Continued) PAGE

Ordinances—

Must be obnoxious to be invalid....638

Only where fundamental rights or personal privileges invaded....553

Protection, health, safety and property....436

Subject not expressed in title....535

Taking away powers of Police Commission....481

Unauthorized appointments....504

Undertaking establishments....31

Peddler's license....638

Penal Code section....572

Permits, use of streets, by constitutional amendment....415

Resolution No. 7814 (New Series), Board of Public Works....28

Restaurant license....522

Santa Rosa bond issue....375-77

Stable ordinance....251, 530

Stockton Street Tunnel assessments....257

Street improvement procedure....181-83, 871

Street opening ordinance....195, 197, 201, 204, 270, 271, 402, 642, 643

Tenement House Act....553

United Railroads franchises....421

Vacations ordinance....288, 290, 982

Weights and Measures Bureau, ordinance....727

CONSTITUTIONS—

AMENDMENTS—

1885, February 12....243

1896, November 3....750, 751

1906, November 6....748

1911, October 10....19, 20, 96, 134-37, 176, 195, 196, 200-203, 240-43, 250, 293, 295, 402, 408, 409, 411, 412, 415, 523-25, 587, 597, 619, 642, 748, 751, 759

Boards of Education....21

Charters, City....21

Consolidated city and county....751

Dismissal from office....748

Municipal ownership of public utilities....409

Officers, removal of....21

Railroad Commission fixing rates....758-61

Recall from office....751

Rights of corporations in streets....19, 20, 96-98, 134-37, 176, 195, 196, 200-203, 240-43, 250, 293, 295, 402, 408, 409, 411, 412, 415, 523-25, 587, 597, 619, 642, 748, 751, 759

Senate Constitutional Amendment No. 48, 1911....20, 21

Streets, control of....409, 410

Term of office....748

CONSTITUTIONS—(Continued) PAGE

CALIFORNIA—

Boards of Education....21
Bonded indebtedness....58
Business, restrictions on....36

Charter—
Amendments....58, 100, 694
Organic law of the city....72, 694
Provisions subject to....101
Superior to....410, 413

Charters—
City....21, 751
Ratification of....694

Citations—(See front of volume.)

Cities subject to general laws except in municipal affairs....584, 750

City, power to make and enforce laws....72, 248, 278, 426, 710, 711

Condemning—
Portion of utility....779, 780
Private property for public use....485, 738

Conflicting with statute....242
Consolidated city and county....751

Corporations' rights in streets....96-98, 134-38, 176, 195, 196, 200-204, 240-43, 249, 277, 293-96, 402, 408, 409, 412, 415, 523-25, 587, 597, 598, 618, 619, 642

Damages, city's liability for....542

Discrimination—
Against females....427, 428
By railroads....362

Elections, holding....100
Eminent domain....485, 779, 780
Equal protection of law....427
Exclusive privileges....525
Exemption from taxation....472
Females, discrimination against....427, 428
Franchises, granting of....247
Indebtedness, incurring by cities....58
Interest on bonds....58
Laws, making and enforcing....72, 248, 278, 362, 426, 710, 711

Lighting companies using streets....97, 135-37, 200, 201, 241, 249, 293, 294, 408, 409, 412, 415, 523-25, 587, 597, 598, 619, 642

Local laws, making....72, 248, 278, 362, 426, 710, 711
Municipal corporation, powers conferred upon....72, 278, 366
Municipal ownership of public utilities....241
Office, term of....747-50

CONSTITUTIONS—(Continued) PAGE

CALIFORNIA—
Officers, removal of....21, 749-53
Opening of streets....19, 96, 97, 134-38, 176, 195, 196, 200-203, 240-43, 249, 293-96, 402, 408, 409, 412, 415, 523-25, 587, 597, 598, 619, 642
Panama-Pacific Exposition....457
Pipes, laying of....19, 97, 137, 176, 200-203, 241, 249, 293-96, 408, 409, 412, 523-25, 587, 642
Poles, erection of....408, 409, 412, 415, 523-25, 587, 597, 598
Police laws, making....72, 248, 278, 362, 426, 710, 711
Power of Supervisors to make and enforce laws....72, 248, 278, 362, 426, 710, 711
Powers conferred on municipality....72, 278, 366
Private property, taking prohibited....485, 738
Property, restrictions on use of....36
Public service corporations, exemption, taxes....597
Public use, taking private property for....485, 738
Public utilities....241
Railroad Commission fixing rates....758-61
Railroads, discrimination by....362
Rate regulation....525, 758-62
Recall from office....751
Redemption of bonds....58, 59
Regulations, making....72, 248, 278, 362, 426, 710, 711
Removal from office....21, 749-53
Sanitary laws, making....72, 248, 278, 362, 426, 710, 711
Senate Constitutional Amendment No. 48, 1911....20, 21
Sex, discrimination against....427
Streets, use of....19, 96, 97, 134-38, 176, 195, 196, 200-203, 240-43, 249, 293-96, 402, 408, 409, 412, 415, 523-25, 587, 597, 598, 618, 619, 642
Supervisors, power to make and enforce laws....72, 248, 278, 362, 428, 710, 711
Tax, bond interest and redemption....58
Taxation, exemption from....472, 597
Term of office....747-50
Uniform operation of law....427, 555
Veterans, exemption from taxation....472
Violation of....427
Water companies using streets....19, 97, 200, 201, 241, 295, 296, 408, 409, 587

MASSACHUSETTS....32, 33
NEW YORK....148
OKLAHOMA....887

UNITED STATES—
Citizenship....702
Deprivation of rights....32
Equal protection of law....427
Violation of....427

VIRGINIA....1009

CONSTRUCTION— PAGE.
Amusement places....511-15, 647, 649
Asphalt Plant, spur tracks....550
Bill boards....141
Board of Public Works supervising....394, 448, 486, 487, 511, 652, 666, 710, 711
Bridges....800
Building Law....350, 511-15, 649
Chimneys....652, 653, 654
Contrary to law....512
Defective....737
Delays—
Avoidable and unavoidable....153
In work....150-56
Drawbridges....800
Election booths....486, 487
Embarcadero, sidewalks....533-35
Exposition buildings....666
Failure to comply, code section, railroad....229, 230
"Fighting the Flames," amusement enterprise....647, 649
Fire houses....486
Fire limits....161
Fire Wardens, supervision....511, 515
Fireplaces....653, 654
Garages....634
Grandstands....649
Hetch Hetchy project....495, 496
Hospitals....349, 350, 995
Laundries....552
Laws—(See Laws.)
Legislative authority....710, 711
Legislature no power to legislate....710
Lodging houses....708
Mission Viaduct....322-25
Moving picture houses....511-15
Municipal Asphalt Plant spur tracks....550
Municipal Railway....49, 51, 958
Nickelodeons....511-15
Ocean Shore Railway Co....230
Outdoor parks....666
Patent chimneys....653, 654
Permits, Board of Public Works....652, 666
Police power to regulate....233
Public buildings....305, 486
Public utility....49
Pumping works....501
Railroad preceding laying out of streets....210
Railroads....227, 229, 230, 360, 365
Reservoirs....501
Roadbed....233

CONSTRUCTION—(Continued) PAGE

Sanitariums 995
School houses 486, 995
Sewers 501
Sidewalks 264, 270, 533-35
Spur tracks 550
Stables 251, 393, 394, 552
State highways 68
State Hotel and Lodging House Act 785
State Tenement House Act 712
Statutory construction 528, 530
Street railway 907, 908
Street through Relief Home Tract 273
Tenement houses—(See Tenement Houses.)
Theatres 511-15
Time limits 229, 230, 708
Tunnels 311, 312
Unlawful 512
Waterworks 247

CONSULTING ARCHITECTS—Demands 46, 47

CONTAGION—

Compulsory removal 770, 807, 808, 848
Quarantining 770
State laws 303, 848-51

CONTRACTS, CONTRACTORS—

Acts of Providence delaying 153

Advertising—

For bids 80
Municipal Railway cars 290-292, 543-46
Official 743, 777-79

Aggregate of bid 80
Appropriations in treasury to meet 56, 57
Architectural competition 338
Arguello Boulevard, paving, etc. 180-84
Army Street, improving 732
Asphalt Plant, light and power 762-65
Auditor endorsing as to available funds 56, 57
Automobiles of employees, renting by city 487
Avoidable delays 153
Awarding 80
Baker's Beach Outfall Sewer 856-61
Barley Asphalt Paving Co. 866, 867
Barley for Hetch Hetchy 1022-25
Beale Street Bridge and cut 235-38
Bids 80-82, 180, 182, 183, 622, 656

CONTRACTS, CONTRACTORS—(Continued) PAGE

Board of Public Works—
Entering into 325, 1001, 1002
Procedure for letting 699
Supervision 705

Bonds—
Electricians 596
Maintenance of street work 124-126

Bonus, Mahoney Bros. 150, 153, 156
Booths, election 253, 723
Buggies 16-18
Building contracts 9, 10, 540
Cancellation of 777, 778
Cars, Municipal Railway 157-60, 543-45, 720, 721
Certified check accompanying bid 80, 777
Change in work after contracts let 181-83
Charter framers, intent 540
Charter provisions 18, 56, 57, 80, 199, 253, 325, 344, 345, 445
Church and Clark, contract 866
Church Street Railway 925
Citizens only to be employed 925
City Electric Co. 762-65
City Street Improvement Co. 180-84, 198, 199
Civil Code 72
Competitive bidding 545, 926, 991
Concrete mixers 668, 669
Condemnation proceedings 485
Consolidation Act 540
Constitution, grants of authority 363
Continuation new job, on basis of unit prices old contract 198, 199
Corporation Yard, light and power 762-65
County Jail buildings 999, 1000
Decisions 81, 181-83, 291, 292, 325, 363, 366, 367, 446, 447, 504, 656, 705, 736
Default 159
Delays 150-56, 193, 194
Deposits held out by Treasurer on judgments 316
"Dillon on Municipal Corporations" 363, 504
Eight-hour day for laborers 133, 834
Election booths 253, 723
Electricians' bonds 596
Electricity, public buildings and streets 622-24
Employee, contractor not a 903

Employees—
Bidding on public work 344-46
Personal interest in 17, 344-46, 445-47, 487

Estoppel, doctrine of 366, 367
Extending more than one year 290-92

CONTRACTS, CONTRACTORS—(Continued) PAGE.

Extensions of time....157-59, 178, 179, 856-61
Failure to live up to....194, 323
Fay Improvement Co....732
Federal Construction Co....655
Filing mandatory....9
Fire Department, supplies....80
Fires delaying....153
Fiscal year, extending beyond....290-92
Five-year contract....290
Flinn and Treacy....867
Franchise acceptance constituting contract....89, 90, 95, 367
Fresno sewage disposal....290
Garbage disposal....192-94, 1020, 1021
Gas, streets and public buildings....622
Harrison Street, grading....440
Healy-Tibbitts Construction Co....322-24
Heating public buildings....622-24
Hetch Hetchy, barley....1022-25
Hetch Hetchy railroad....975
Holman, W. L. Co., cars....157-60, 442
Home industry, preference to....580, 581
Horse shoeing....934, 935
Hours of labor, charter provision....133
Installment payments on public....999
Installment plan sales....594
Interest of officers in....17, 344-46, 445-47
Invalid, procedure for street work....181-83
Irregular....180-84, 199
Irregularity in bid....80-82
Islais Creek Incinerator....192-94
Jail buildings....999, 1000
Keystone Construction Co....322, 323
Laborers, eight-hour day....133
Laidley Street, grading....736
Laws, contracting parties charged with notice of....504
Legislature, grant of authority....363
Liability of Contractor....235-38
Lighting....162, 431, 432, 622,-24, 762-65
Limiting term of....291
Lincoln Way improvement....198, 199
Locally manufactured goods, preference....580, 581
Long term contracts creating monopoly....291
Los Angeles....699
Loss of time allowed....156
Lowest regular bid to be accepted....622, 777, 991
Mahoney Bros., Municipal Railway....150-56
Malley, Ed....856
McHugh, J. J....844
"McQuillin on Municipal Corporations"....991
Mile Rock Tunnel....856-61

CONTRACTS, CONTRACTORS—(Continued) PAGE.

Mission Viaduct fill....322-26
Modification of....253, 254
Money in treasury to meet....56, 57
Monopoly created by long term contracts....291
Municipal Railway—
Cars....157, 422, 720
Cars, advertising in....290-92, 543-46
Construction....925
Mahoney contract....150-56
Neal v. Rolph....926
No bid, no jurisdiction to award....669
Notices inviting proposals, street work....180-83
Ocean Shore Railway Co. with other railroads....105
O'Day, Daniel Co....734, 735
Officers of municipality interest in....17, 344-46, 445-47, 487
Official advertising....743, 777-79
Oral....72
Pacific Gas and Electric Co....162, 431, 432, 762-65
Patented articles....991
Playground Commission....636
Political Code....447
Power....162, 622-24, 762-65
Preference, local goods....580, 581
Printing....540, 777-79
Prison supplies....539-41
Private contracts....736, 739, 866, 867
Procedure for letting....699
Progressive payments....999
Property, held to be....485
Protection of city....81
Public buildings, light, heat and power....622-24
Public service conduits delaying work....154, 155
Rain delaying work on....155, 156
Recorder's fee for filing....9, 10
Recovery on....446, 447
Relief Home, boilers....321
Remington Typewriter Co....281
Remission of penalty for delays....194
Rent, recovery of....446
Residents of San Francisco only to be employed on....925
Resolution of intention specifying different work to that in contract....181-83
Rolandi, F., Hetch Hetchy railroad....975
Rolled barley....1022, 1023
Sacramento Charter....325
San Bruno Avenue, paving....655-57
Sanitary Reduction Works plant, operation of....997, 998
Schools, cleaning windows....903
Schools, typewriter for....281

CONTRACTS, CONTRACTORS—(Continued) PAGE

Scott, Magner and Miller, barley for Hetch Hetchy....1022-25
Seventeenth Street car barn, excavating....734, 735
Sherman Clay & Co., installment sales....594
Smith, Fred P., garbage reduction....997, 998
Southern Pacific Co. 550
Spencer Street Planing Mill....253
St. Louis, advertising on refuse cans....505
Stark Street 844
State Improvement Co....868
Steam heat, public buildings....622-24
Storms delaying 153
Storrie, R. C. & Co....856-61
Street improvements 181-83, 656
Strikes 153, 154
Superintendent of Streets....656
Supervisors debarred from personal interest in....17, 344, 345, 445-47, 487
Supplies....16-18, 539-41, 925, 1023
Surety company completing work....323
Teams 16-18
Technicalities 18
Term of office of authorities, making beyond....290, 291
"Tiedeman on Municipal Corporations"....363
Typewriters, schools 281
Unavoidable delays 153
Unit prices, paving....198, 199
Unlawful restrictions 125
Violation of 253
Void if in violation of charter....80
Wetmore, Manuel and Wetmore....440
Window cleaning, schools 903
Written contracts 696-99, 735
Yerba Buena Improvement Co....440

CONTROL—

Abdicating 507
Amusement enterprises 648
Appointments 83, 673
Appropriations 1, 4
Auditorium 885-90, 924
Auxiliary high pressure system....781
Bill boards 139-46
Blasting 705
Board of Public Works....135, 234, 235, 262, 486, 487
Buena Vista Park 467
Building construction 511, 710, 711
Charter framers, intent....6
Civil Service Commission....83, 674
Conduits, laying of....98

CONTROL—(Continued) PAGE

Construction of public buildings....486, 487
Department of Electricity....586-88, 596, 601-603, 796, 797
Departments, of own affairs....6
Diphtheria cases....850
Election booths....486, 487
Elections....101, 567, 724
Electric lighting service....717
Embarcadero....382-84
Excavations in streets....201, 202, 245, 248, 258, 270, 271, 272, 294, 402, 409-15, 575, 576, 587, 597, 598, 619, 642-44
Expenditures....3, 4, 6, 121, 305, 388, 407, 603, 635
Finances....3, 6, 388, 407, 468, 635, 951-54
Fire Department....165, 267
Fire houses, construction and repair....486
Gas rates and service....618
Geary Street....794
Great Highway....467, 468, 499-501, 612
Health Department....3, 4, 6
Heat rates and service....618, 717
Jitneys....520, 521
Lighting poles....717
Lighting rates and service....618, 717
Maintenance of public buildings....486
Motor buses....520, 521
Moving pictures....931-33
Ocean Front....466-68, 612
Park Commission....499-502, 957-61
Parks....467, 468, 500-502
Pipes, laying of....98, 249, 409-14, 523-25, 575, 576, 587
Playgrounds....468, 546
Point Lobos Avenue....794
Poles, erection of....135, 234, 277, 278, 409-12, 415, 523-25, 587, 597, 598, 717, 718
Police Department solely a municipal affair....584
Power rates and service....618, 717
Public buildings....486
Public utilities....135, 413, 545, 618, 758-61
Railroad Commission....758-61
Railway construction....233, 234
Rates....618
Registration of voters....101, 724
Repair of public buildings....486, 487
Schoolhouses, construction and repair....486
Service....618, 717
Squares....467, 468
State Harbor Commissioners....382-84, 534, 565
State, restrictions by....367
Steam heat rates and service....618, 717
Street openings....97, 98, 201, 202, 240, 245, 248, 258, 270, 271, 278, 294, 402, 409-12, 415, 523-25, 587, 597, 598, 619, 642-44

CONTROL—(Continued) PAGE
Streets 135-38, 203, 262, 367, 409-14
Streets, water front....382-84, 534
Subdivisions 72
Telegraph rates and service 618, 717
Telephone rates and service....618, 717
Temporary appointments 83
Tide lands 565
Track construction 234, 235
Water front 382-84, 534
Water rates and service....618, 717
Wires....277, 278, 294, 409-12, 415, 523-25, 587, 597, 598

CONTROLLER, STATE—Tax sales....973-75

CONVERSION—Of building into apartment house....271, 272

CONVEYANCE BY STATE IN TRUST....855

COOK, WALTER—Protest, salary, secretary to Chief of Police....1007

COOPER, J. A.—Stockton Street Tunnel assessment....256, 257

COPYISTS—Whelan, John J., County Clerk....802, 803, 830, 831

CORNWALL, BRUCE—Credits for grading....825-27

CORONER'S employees brought under civil service....
....389, 390, 771, 803, 830

CORPORATION YARD—
Lighting and power....622, 623, 762-65
Location and limits....764
Machinists 286, 557, 558
Mechanics, Fire Department....103

CORPORATIONS—
Acceptance of franchise involves performance of duties....651
Arrests of employees....415, 985, 986
Civil Code section, furnishing of service....292
Constitutional amendment limiting rights in streets....
....293, 409, 410, 415, 524, 587, 597, 598
Department of Electricity, permits....586-88
Extension of Service (See Extension of Service.)
Forfeiture of franchise....230, 231
Keppelmann, In re....402, 560, 596, 597, 598, 642
Obligation to furnish service....293
Rights in streets....19, 96-98, 134-38,
163, 164, 176, 195, 200-204, 239-50, 258, 277, 293-96, 402, 415
Russell, In re....
....136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913

CORPORATIONS—(Continued) PAGE

Service—
Furnishing of 292-94
Refusal to furnish....292, 293

Supreme Court on rights in streets....201
Vested rights in streets....200-203, 241, 277, 293, 409, 597, 598
(See also Public Service Corporations.)

CORRALS—Removal of 30, 39-42

CORRECTIONS IN ASSESSMENTS....611

COST—
Cartage, portion cost of materials....17, 18
Municipal Railway construction....49, 51
Pavements 628
Public utilities 888
State highways 68
Water 517

COUNTIES—
Bonded indebtedness 58
Highways, State 68
Maintenance of minors....401
Motor vehicle licenses....940-42
Officers—(See Officers.)
State police regulations, subject to....488, 489

COUNTY CLERK—
Board of Control, jurisdiction over office....1005
Employees brought under civil service....771, 803, 830
Whelan, John J., copyist....802, 803, 830, 831

COUNTY JAIL—
Alterations to buildings....999, 1000
Brackett, Dr. G. F., druggist....965-68

COUNTY LINE MUNICIPAL WATER WORKS—
Deposits for connections 863

COURTS—
Additional, creation 1009
Considerations before declaring ordinance invalid....638-40
Impounded moneys, rate litigation, assessment....614, 615
Money in custody of....536, 614
Property owners' interests guarded....183
Review of ordinances.... 38
Uphold municipality in its local regulations....638

COW STABLE—Permit....552

CREATION— PAGE.
Additional—
County officers 455
Courts 1009
Bureau of Efficiency 62-64
Gas and Water Inspection Bureau 772
Industrial zones 461
Monopoly 291, 507
Obligation, unauthorized 504
Positions 63, 388, 608, 823, 824, 1008-10, 1018, 1019
Reserve fund 606
Weights and Measures, office of 455, 729
Widows' Pension Bureau 400

CREDITS—
Continuous tenure of office 716
Cornwall, Bruce, grading 825-27
Finn, John, grading 825
Fireman 286-88
Grading 825-27
Per diem men, vacation 982
Police officer reappointed entitled only to credits since reappointment 716, 717
Seniority in service 715, 716
Solvent credits 594
Teutenberg, Frank J., police corporal 715-17

CROCKER NATIONAL BANK—Bond from 331

CROKE STREET—Sewer right of way 600

CRONIN, ANN—Title to lot, Army Street 732, 733

CROSIER, SAMUEL—Title, Stark Street 873, 874

CROSKY, R. V.—Civil service standing 389-91

CROSSINGS—
Acceptance 177
Ocean Shore Railway Co 25, 226, 229
Southern Pacific Co 210, 214, 318
Valencia Street line 210

CROTHERS, JUDGE G. E.—Per diem men 980, 984

CUL-DE-SACS—
Beach Street 275
Chenery Street 54

CULVERT—Falling into 691

CURBS— PAGE.
Acceptance 177
Arguello Boulevard 180
Charter provisions 440, 441
Ocean Shore Railway Co. 233
Resetting 176-78

CYCLORAMAS—
"Fighting the Flames" 648
License 648
Ordinance regulating 648
Permits 482, 648

D

DAIRY STABLE—Permit 552

DAMAGES—
Ambulance, Emergency Hospital, in collision with automobile 311
Automobile—
Colliding with steam roller 689-91
Passing playground 439
Bemis Street, landslide 736-39
Blasting 704-706
Charter not providing for payment of 542
City's liability 542, 737-39
Claims for 805
Condemning portion of utility 779
Constitution providing for 542
Defective condition—
Public work 424
Street 690, 691
Destruction—
Materials, condemned buildings 168
Property 449
Excavation—
Adjoining lot 315, 316
Falling into 690
Harrison Corporation, overflow of water, Eighteenth Avenue 976
Indemnity bonds 258
Injuries caused by runaway horse 670, 671
Kohler and Chase, glass window damaged by fire truck 972
Laidley Street, landslide 736-39

DAMAGES—(Continued) PAGE

Lichtig, A. J., automobile damaged, hole in street....791
Maier, Minna, removal of buildings....734-36
Main Street, change of grade....541-43
Municipality not answerable for negligence of employees....315, 965, 972
Openings in streets....258
Patent infringement, street flushers....334
Pavements, by public service corporations....409, 560, 618
Private property for public use....738
Rains....736, 737
Russell, J. E., foot injured by steam roller....805
Service, refusal to furnish....293
Streets—
Openings in....643
Repair work....125, 441
Surface water....737
Workmen's Compensation Act....617

DAMS—Hetch Hetchy....495

DANCE HALLS—
License....508
Ordinances regulating....508, 637-41

DANCES—
Classification of....637
Given for profit....637, 640
Ordinance regulating....637-41

DANGER—
Billboards....141
Blasting....704
Buildings....449
Contagious diseases....808
Delay in tearing down building....185
Dogs....435
Electrical installation, faulty....598
Fireworks....705
Food, unwholesome....471
Garages....530
Gasoline storage....789, 790
Globe Theatre....510, 514
Height of buildings....143
Hospitals....350
Laundries....161
Lubricating oil, storage....789
Materials, razed buildings....168, 169

DANGER—(Continued) PAGE
Nuisance 185
Public health and safety 462
Stables 393, 462
Streets, defective condition 690, 691, 697
Theatres 514

DANIEL WEBSTER SCHOOL—Purchase of land 891-94

DARBY, SAMUEL E.—Patent royalties 719, 720

DAVIDSON AVENUE—Title 106, 120

DAY—Of rest 132, 133

DAY LABOR—
County Jail buildings 999-1002
Ordinance not authorizing 999, 1000
Street improvements 696, 699-701

DEALERS—
Real estate 528
Secondhand 824, 825

DEATH—
Cause of 353
Compensation under Act 424, 820, 821
Fireman, from injuries 352-56, 443, 444
In discharge of duties 584
Police officers 584, 585
Sewer gas 422-26
Stack, Edward J., asphalt worker 819-22
Suicide 352, 353
Workmen's Compensation Act 424, 616

DEBRIS—Razed buildings 168, 169

DECISIONS—
Abatement of nuisances 448-50
Accidents 352-55, 585, 627, 645, 646, 664, 671, 787, 820-22
Additional positions, creation of 1009
Administrators 610
Advertising—
In street cars 639
Official 745
On waste cans 505-507
Aliens 702
Alleyway used by adjoining owners 308, 318, 319

DECISIONS—(Continued) PAGE

Alterations 552
Amusement places 482
Animals 39, 435
Appointments 504, 823, 824
Assessments 256, 614, 615, 658, 828, 829, 869, 870
Assignments 706
Attachments 706
Bail money 536
Barber shops 572
Bernal Rancho, title 109-115
Bids 81, 181-83
Bill board regulation 140-42
Blasting 477, 478
Board, powers and duties of 383
Bonds 374-79, 780
Brokers 613, 614
Building permits 394
Buildings 143, 144, 185, 449, 552
Business regulation 33-37, 638-40, 712
Butchers 639
Cabaniss, Judge G. H. 31
Cars, advertising in 639
Cattle 39
Chestnut Street lot 786
Church, saloon near 577
Citations (See front of volume)
Citizenship 702
Class legislation 436, 638-40
Classifications 638-41
Clinics 438
Closing hours 570, 571
Commission merchants 613, 614
Compensation 585, 627, 645, 646, 664, 787, 820-22
Condemning portion of utility 779, 780
Conduits, laying of 243, 293, 295, 402, 409-11, 586, 587, 597, 598, 642
Consolidated city and county 455
Construction of laws 677
Contagious diseases 770, 808
Contracting parties charged with notice of laws 504
Contracts 81, 181-83, 291, 292, 325, 363, 366, 367, 446, 504, 656, 705, 736
Credits for service 716
Crothers, Judge G. E. 980, 984
Culvert, falling into 691
Cycloramas 482

Damages—
City's liability 691, 737-39, 965, 972
Lowering of grade 739

DECISIONS—(Continued) PAGE

Dedication of streets....404, 405

Defective—
Building construction....737
Condition of streets....691

De Haven, Judge....555

Delinquent—
Assessments....256
Taxes....658

Dereliction of officers....689
Disability....354, 355
Discretion....483
Discrimination....427
Diseases....770, 808, 905
Districts....143-46, 461, 462
Dogs....435
Dore v. Truett....274-76, 327-29, 707
Duties of a public board....383
Emmet Place, title....479
Employers' liability....627, 645, 664
Erection of poles....135-37, 239, 240, 278, 293, 409-11, 586, 587, 597, 598
Erroneous assessments....631, 632, 658
Estates....610
Excavation, falling into....690
Excavations in streets....135-37, 201, 239, 240, 243, 293, 402, 409-11, 586, 587, 597, 598, 642
Executors....610
Exemptions....828, 829
Explosives, use of....478
Extension of lines....650
Extensions of service..293, 295, 409-11, 586, 587, 597, 598, 642
Extensions of time to contractors....859
Factors....613
Fences....60
Fire Insurance....305
Fire limits....552
Firemen's pensions....352, 353, 355
Fireworks....705
Flushers, street....333, 334
Food inspection....300, 302
Forfeiture of franchise....231
Franchise....26, 87-92, 231, 239-42, 278, 293, 295, 359-68, 402, 409-11, 586, 587, 597, 598, 642, 1020, 1021
Garnishment....536
Grades....834
Gray Bros., blasting....477, 478
Height of buildings....143, 144

DECISIONS—(Continued) PAGE

Heirs 610
Home Telephone Co., merger 402
Hospitals 438
Hotel license 522
Impounded moneys 614, 615
Industrial districts 145, 461, 462
Infringement of patents 334
Injuries 352-55, 585, 627, 645, 646, 664, 671, 690, 691, 787, 820-22
Inspectors, Department of Electricity 380
Interest on bonds 374-79
Interstate shipments 303
Intoxicants, sale of 482
Islais Creek, title 109-115
Itinerant vendors 1015
Kinetoscope parlors 482
Label, union, on printing 926
Laches 809
Laundries 145, 461-63, 551-55, 570, 712
Laying of pipes 201, 243, 293, 295, 409-11, 586, 587, 642
Lead poisoning 664
Legislative power 251, 549
Liability of municipality 705, 706, 735, 736-39
Licenses 482, 483, 522, 638-41
Limitations, statute of 766
Liquor business 145, 482
Lots, changes in surface 738
Maintenance of street work, bond 124, 125
Mandamus 650, 651
Mandonnet v. All Persons 479
Materials furnished municipality 325, 326
Meat inspection 300, 302
Merchants 640
Merger, telephone 196, 197, 402
Middlemen 613, 614
Milk 552
Moving picture shows 482, 876, 931, 932
Municipality, non-liability 689, 735-39, 965, 972
Murasky, Judge F. J. 380, 478, 706
Museums 482
Naturalization 702
Negligence of officers 689, 965, 972
North Peter Smith Tract, partition of 274
Nuisances 185, 386, 395, 449
Obstructions 386, 844
Occupations 638-40
Office—
Becoming vacant 817
Removal from 749, 809
Term of 749

DECISIONS—(Continued) PAGE

Officials interested in public contracts....446, 447
Open public streets....404, 405
Openings in streets....135-37
201, 239, 240, 243, 293, 402, 409-11, 586, 587, 597, 598, 642
Ordinance equal dignity with charter....812
Overhead construction....
....135-37, 239, 240, 278, 293, 409-11, 586, 587, 597, 598
Ownership....854
Pacific Telephone and Telegraph Co., merger....402
Panoramas....482
Parks....500-502
Patent rights....333, 334
Paving by railroad....89-92, 833, 834
Pawn shops....570, 928
Payment, voluntary....632
Peddlers....638
Penalties....631, 632
Pensions....352-55, 444, 706
Per diem men, vacations....980, 984
Permits....393, 394, 462, 482-83
Phonograph parlors....482
Pipes, laying of....201, 243, 293, 295, 409-11, 586, 587, 642
Poles, erection of....
....135-37, 239, 240, 278, 293, 409-11, 586, 587, 597, 598
Police power....33-37, 139-42, 278, 435, 462, 483
Policemen....219, 253-55
Poolrooms....482
Positions, creation of....1009
Powers of a public board....383
Promotions....716
Protection from surface water....737
Public buildings....305
Public health....850, 851
Public service corporations using streets....
....96, 135-37, 201, 239,
240, 243, 278, 293, 360-67, 402, 409-11, 586, 587, 597, 598, 642
Public utilities....886, 887
Publication....745
Pueblo lands, San Francisco....116, 466
Railroad Commission....863
Railroad in park....842
Railroads....82-92, 228, 359-67, 650, 651
Rails....386
Rains, surface water....738
Reconstruction....552
Refund of taxes....631, 632
Refuse cans, advertising on....505-507
Reinstatements....380, 766, 767
Remissness of officers....689

DECISIONS—(Continued) PAGE

Removal—
From office 749, 809
Tracks 386

Repairs—
Buildings 552, 590
Streets by railroads 89-92

Residence 15, 22, 24
Residence districts 145, 461
Resignations 255, 297, 809, 810
Restaurants 427, 428, 522
Salaries 812

Sale—
Delinquent assessments 256, 257
Liquor 482
On commission 613

Saloons 145
San Bruno Avenue, street work 607, 608
Seawell, Judge J. M. 208, 256, 274, 600, 730, 824, 872
Second-hand dealers 570, 571
Service connections 863
Sewers 501, 502
Shacks 449
Sidewalk construction 264
Slaughter houses 39, 40
Special policemen 219
Stables 250, 393, 394, 461-63, 552, 553
State Board of Control 1005, 1006
Statute of Limitations 810
Stockton Street Tunnel assessments 256
Street assessments 869, 870
Street flushers 333, 334
Street railways 87-92, 360-67, 386, 650, 651
Street repair by railroads 89-92
Street work 65, 66, 124, 125, 181-83, 404, 405, 656
Streets, use of 96, 135-37, 201, 239, 240, 243, 278, 293, 360-67, 402, 409-11, 586, 587, 597, 598, 642
Supplies, what term covers 17
Surface water, protection from 737
Tax levy 374, 377
Tax sales 256, 257, 658
Taxes 614, 615, 631, 632, 798, 828, 829
Teachers 22, 24, 900
Telegraph companies 239-42
Telephone merger 196, 197, 402
Temporary buildings 449
Tenants 590
Tenement houses 553
Tenure of office 749, 750

DECISIONS—(Continued) PAGE

Term of office....749
Theft....929
Tide lands....114, 115, 274-76, 327-29
Tracks....386
Trading stamps....640
Treatment, injured employee....878
Troutt, Judge J. M....786
Tunnel assessments....256
Unauthorized appointments....504
Undertaking business....33
Union label on printing....926
Use of streets....96, 135-37, 201, 239, 240, 243, 278, 293, 360-67, 402, 409-11, 586, 587, 597, 598, 642
Vacant office....817
Vacations....289, 980, 984
Voluntary payment....632
Waste cans, advertising on....505-507
Weights and Measures Bureau....728-31
Workmen's compensation....585, 627, 645, 646, 664, 671, 787, 820-22
Written contract....736
Zones....143-46, 461, 462

DECREES—

Chestnut Street lot....786
Distribution....536
Dore v. Truett....274-76, 327, 328, 707
Gray Bros., blasting....478
Mandonnet v. All Persons....479
Pueblo lands, San Francisco....116, 117, 466
Telephone merger....196
Weights and Measures Bureau....729

DEDICATION—

Library purposes, city real estate for....58
Parks....501, 549

DEDICATION OF STREETS—

Beacon Street....478
Castro Street Land Co....478
Charter provisions....309, 320
Chenery Street....53, 55
Consolidation Act....404
Decisions....404, 405
Diamond Street....54
Dore v. Truett....328, 329
Failure to make....328, 329
Fairmount Tract streets....174
Fourth Street....309

DEDICATION OF STREETS—(Continued) PAGE
Great Highway 499
Havelock Street 692
Japan Street 460
Leroy Place 979
Locust Avenue 661
Merced Street 175
Noe Street 175
Randall Street 727
Redwood Street 661
Southern Pacific Co., Fourth Street 309
Width required 309, 320
Wilder Street 54

DEDUCTION—Salary for pension 578, 579

DEEDS—
Anglo American Land Co., land for opening streets 326
Authority for president of corporation to execute 326, 327
Bernal, Carmen Sibrian de 106, 107
Bernal Rancho 106-108
California Academy of Sciences, Pueblo lands 686
Carthwaite, H. & C. T. 979
Casserly, Eugene 215
Center, John, to Southern Pacific Co. 210, 214, 216
Chenery Street extension 55
City deeds to clear up titles 371
Delinquent assessments, streets opened 845
Farley, Thomas 786
Hollis, William 979
Islais Creek 106-108
Jefferson Square 548
Juno Street widening 322
Kains, Archibald 322
Legislature, trust 686
Leroy Place 978, 979
New deed to replace lost tax deed 188
Nineteenth Street, opening of 326
Rancho Rincon de las Salinas y Potrero Viejo 106, 107
Recording 369
San Francisco Homestead Union 216
San Francisco Ladies' Protective and Relief Society 685
Santa Rosa Avenue 99
Seward Street, opening of 326
Southern Pacific Co. 99
Stockton Street Tunnel assessments 257
Tax deeds—(See Tax Deeds.)
Treat, John and George 215
United Railroads 54, 55

DEFAULT OF CONTRACTOR 159

DEFECT, DEFECTIVE— PAGE.
Assessments 611
Buildings 449
Drainage pipes 737
Electric installation 596, 598
Proceedings, bond issue 374
Public work, City's liability 424
Resolution of intention 655-57
Sewer 424
Street, city's liability 690, 691
Vrooman Act 689, 690

DEFICIENCIES IN LAW 10

DEFICIT—Departmental funds 6

DEFINITIONS—(See Words and Phrases).

DE HAVEN, JUDGE—Laundry cases 555

DELAYS—
Application for appointment 284
Avoidable delays 193, 194
Baker's Beach Outfall Sewer contract 858
Construction work, through public service conduits 154, 155
Contagious diseases, removal 808
Deductions for 193, 194
Demands, presenting for payment 982
Islais Creek Incinerator 193, 194
Labor Day holiday 156
Municipal Railway, construction of tracks 150-56
Rain, through 155, 156
Recording—
Tax deeds 18, 19
Without delay 369
Reinstatements 766, 767
Strikes 153, 154
Tearing down of building 185
What constitute 153

DELEGATE—
Civil Service Commission, powers 672-74
Discretion to a board 553
Election duties 101
Legislative authority 247, 251, 507
Municipality, powers to 314
Police powers 395
Powers 247, 482
State, of powers to city 314, 367, 395

DELINQUENT TAXES— PAGE.

Advertising 744
Aitken, Frank W., refund, illegal tax sale....658
Alferitz, Suzanne, refund....630-32
Blackwood Street, portion erroneously assessed....657-59
Deeds 188
Delay in mail 630
Erroneous assessments 657-59
Extension of streets....845
Noe Street lots....171, 173
O'Reilly, Patrick J., refund, void tax sale....657-59
Political Code 174
Refund, penalty 630-32
Sale of property....166-68, 973-75
Stockton Street Tunnel assessments....256, 257

DELIVERY—

Cars, Municipal Railway....158-60
Companies, license 535
Milk 552

DEMANDS—

Actual time basis 43-45
Approval of 3, 121, 122, 381, 407, 672-74, 740, 741, 939, 953, 1006, 1007, 1026-28
Barry, John F....406, 407
Board of Education approving 953
Charter provisions 121, 621
Civil Service Commission approving 381, 939
Delay in presenting barring payment....982
Elections Department 44
Employees renting automobiles to city....447
Exceeding appropriation 740
Expenditures under two hundred dollars....675
Experts 47
Grand Jury expert 406, 407
Health Department 3
Howard, John Galen 46, 47
Lane, Franklin K., opinion 3, 740, 953
Non-resident experts 47
O'Shaughnessy, M. M. 120, 121
Playground Commission 740, 741
Printing, non-contract 675
Public Libraries 305
Schools, printing circulars 1006, 1007
Superintendent of Schools 1026-28
Weights and Measures Bureau, salaries....728-31

DEMOLITION— PAGE.
Board of Public Works, power, shacks....184-86
Building law....649
Building or part....417, 418, 448-50
Buildings, materials from....168, 169
Laundry permit....161
Only if a public nuisance....449, 450

DENIAL—
Corporation's rights....279
Tax refund, Mrs. W. D. Lambert....318, 320
Validity of contract....367

DENNIS, CHARLES B.—Removal, civil service register....221-25

DENOMINATIONS OF BONDS—Changing....373-80

DENTAL CLINIC—Schools....1026

DEPARTMENTS—
Accounting system, uniform municipal....1004, 1019
Aliens not to be employed by....902
Appropriations....811
Assignments to positions....390-392
Auditorium, maintaining office in....986
Board of Education—(See Education, Board of.)
Board of Health—(See Health Department.)
Board of Public Works—(See Public Works, Board of.)
Board of Supervisors—(See Supervisors.)
Budget appropriations, limited to....388
Budget estimates....5, 6
Bureau of Efficiency—(See Efficiency.)
Bureau of Engineering—(See City Engineer.)
Bureau of Weights and Measures—(See Weights and Measures.)
Certification, Civil Service Commission, no power to refuse....333
Civil service, brought under by charter amendment....389, 390, 771, 883
Civil Service Commission—(See Civil Service.)
Control of own affairs....6
Deficit in funds....6
Department of Agriculture....299-303
Department of Elections—(See Election Commission.)
Department of Electricity—(See Electricity Department.)
Department of Public Health—(See Health Department.)
Employees, additional....1008
Estimates for budget....5

DEPARTMENTS—Continued) PAGE

Expenditures—
Limited to appropriations 741, 953
Under two hundred dollars....675

Fire Commissioners—(See Fire Department.)
Fire Pension Fund Commissioners—(See Fire Pensions.)
Funds....6, 388, 675, 741, 951-54
Head of—(See Head of Department.)
Insuring property against fire....304, 306
Interior Department 494-96
Park Commission—(See Parks.)
Playground Commission—(See Playgrounds.)
Police Commissioners—(See Police Department.)
Police Relief and Pension Fund Commissioners—(See Police Pensions.)
Printing, non-contract orders....675
Public Library Trustees—(See Libraries.)
Responsible for expenditures 741
Supplies 539-41, 1023, 1024
Temporary appointments, making....83, 84
Transfer of city property....371, 372, 546, 547

DEPENDENT FAMILY—Deceased employee....819-22

DEPOSITORY BOND—Crocker National Bank....186, 187

DEPOSITS—
Arrearage, street openings....641-44
Impounded moneys, rate litigation....614, 615
Pacific Gas & Electric Co....559-62
Service connections 863
Street openings 200, 270, 271, 559-62, 641-44
Treasurer holding deposits from contractors....316

DEPRIVATION—
Business rights 35
Property 32
Rights 147, 241

DEPUTIES—(See Employees.)

DERELICTION OF OFFICERS—Liability for....689

DESTRUCTION—
Animals 42, 436
Board of Public Works, power, shacks....184-86
Building Law 649
Building or part....417, 418, 448-50
Damages for 449

DESTRUCTION—(Continued) PAGE
Delays endangering public safety 185
Dogs 436
Materials from condemned buildings 168, 169
Only if a public nuisance 449, 450
Property rights 449, 450

DESTRUCTOR COMPANY—Litigation 998

DETECTIVES 842, 843

DETROIT STREET RAILWAY—Litigation 90, 650

DIAMOND STREET—
Blasting by Gray Bros. 478, 803, 804
Dedication 54

"DILLON ON MUNICIPAL CORPORATIONS"—
Ambiguity in franchise 229
Bonded indebtedness of municipalities 59
Contracting parties charged with notice of laws 504
Contracts, power to make 363
Dismissals 754, 755
Franchises 229
Grades 739
Legislative authority 228, 229, 251
Municipal ownership 247
Officials 445, 446
Permits, discretion in issuing 790
Powers—
Of a corporation 191
Of municipality 246, 247
Railroads occupying streets 228, 229
Rains, surface water 738
Removal from office 754, 755
Sewer construction 501
Streams 738
Surface of ground, change in 739
Surface water 737, 738
Waterworks 247

DIPHTHERIA GERM CARRIERS—Isolation 848-51

DIRECTORS—School 21, 22

DISABILITY—
Cement dust taken into system 664
Charter provision 129
Continuance in duration 356

DISABILITY—(Continued) PAGE

Edwards v. Sweigert 354
Fireman 129
From injuries in discharge of duties 354-56
Lead poisoning 664
Occupational diseases 664
Pension right 129-32
Police officers 579, 580, 584, 585
Retirement 579, 584, 620
Workmen's Compensation Act 820, 821

DISCHARGE—

Firemen 837
Fireworks 705
Illegal 166
Probationers 130
Temporary 837
(See also Dismissal.)

DISCIPLINE—

Fire Department 288, 801
Firemen at Exposition 781
Rules 288, 289

DISCRETION—

Assessment district, defining 870
Board of Education 704
Board of Public Works 699, 700, 1000, 1001
Chief, Fire Department 347, 348
Civil Service Commission 405
Claims, allowance of 3
Decisions 483
Delegating to a board 553
Election Commission 722
Franchise, granting of 363, 368
Head of Department 387, 390, 391
Health Department 740, 807
Legislative body 639, 1001
Legislature 36
Municipal corporation 314
Permits, issuing of 789, 790
Police Commission 482, 483
Public officers 483
Recording 370
Removal, contagious diseases 807
State highways 68
Street improvements 699, 700
Superintendent, Municipal Railway 464
Suspensions 677
Temporary appointments, making 84
Tunnel funds 605

DISCRIMINATION— PAGE.
Arbitrary and unreasonable 427
Business license 638-40
Chinese 552, 554
Class legislation 427, 428, 436
Classification of businesses and occupations 638-40
Classification of subjects 462
Constitution of California 362, 427
Decisions 427
Elections, Department Employees 44
Females, against 427, 428
Home-made goods 580, 581
Laundries, regulation 552, 554
License ordinance, Alameda 639
Locally manufactured goods 580, 581
Permits for stables 462
Persons standing in same relation 427
Railroads, by 362
Randall Street, assessment 867
Stable ordinance, section 250, 553
State Tenement House Act 553
Temporary employees, against 44

DISEASE—
Diptheria germ carriers, isolation 848-51
Entering State, prevention 303
Meat, Australian, free from 299-303
Occupational diseases 664
Political Code 848, 849
Quarantine against 303, 770
Removal, contagious cases 770, 807, 808, 848
State laws 303, 848-50
Typhoid fever, nurse contracting 903-906

DISINFECTION—Rules 849

DISINTERMENTS 395-98, 475, 476

DISMISSALS—
Appeals to Civil Service Commission 682-85
Appointing boards and officers 684
Board of Public Works, stenographer 222
Cause, for 747, 754, 766
Charges, without 766
Charter amendment 682-85
Charter framers, intent 683
Charter provisions 682-85, 747, 748
Constitutional provision 748
Dennis, Charles B 222
"Dillon on Municipal Corporations" 754, 755

DISMISSALS—(Continued) PAGE.
Firemen 682-85, 747, 752-55, 766, 767, 781, 782
Heads of departments 682
Illegal 166
Isolation Hospital, non-civil service ward-woman 332
Lane, Franklin K., opinion 683
Leuterdt, C. F., hoseman 766
Litigation 425, 426
Macphee, Arthur F., police officer 816
Official relations severed 403
Police officers 580, 682-85, 816
Probationers 130
Reduction in rank to avoid 767
Surveyors' field assistants 403
Taylor, Charles H., police officer 816
Vacations after dismissal 403

DISORDER—Prevention of 428

DISPOSITION—Material of razed buildings 168, 169

DISQUALIFICATION—
Employee entering into contractual relationship with city 345
Sex 427

DISTINCTION—
Clinic and hospital 438, 439
Different trades 638, 639

DISTRIBUTION—Decree of 536

DISTRICT ATTORNEY—
Action to abate nuisance 450
Additional assistants 823
Bail money, return of 674
Board of Control, jurisdiction over office 1005

DISTRICTS—
Bill boards 139, 143-46
Boston 143
Brickyards prohibited certain districts 531
Buildings, heights varying 143
Classification 461, 462
Hauling certain substances in certain districts, forbidding 1013, 1014
Industrial 145, 250, 251, 461-63, 554
Laundries, prohibiting 551, 554, 555
Los Angeles 145, 554
Order No. 214 (Second Series) 277
Permits necessary some, unnecessary others 461
Residence 145, 250, 461, 554
Tallow rendering 847
Underground 277

DIVERSION— PAGE.
Funds 51, 603-606, 992
Traffic 948

DIVISADERO STREET—United Railroads franchise 421

DIVISION STREET—
Ocean Shore Railway Co., franchise 25
Overhead crossing 25
Southern Pacific Co., franchise rights 212, 217

DOCTORS—
Dr. G. F. Brackett, County Jail 966
Misleading advertising 932
Practice of medicine 966

DOCTRINE OF ESTOPPEL 366, 367

DOGS—
Danger from 435
Flats, keeping in 434-37
Hospital conducted without permit 30
Impounding 436
Licensing 435, 436
Muzzling 436
Police control over 435, 436

DOLAN, M. J.—Fireman's pension 128, 129

DOLGE, WILLIAM—Percentage of receipts, United Railroads 419-22

DOLLAR LIMIT—Taxing above 592

DOMICILE—(See Residence.)

DONATIONS 371, 423, 425

DONORS—Opera House, rights 484, 485

DORE v. Truett, decree 274-76, 327-29, 707

DOUBLE—
Assessment, where taxation escaped 610, 611, 615
Tracks 90

DOUBTS—
Favor of municipality 87
Franchises 26, 87, 229
Legislative authority, exceeding 553
Resolved to uphold law-making power 638

DOUGHERTY, SUSAN E.—Pension 266, 620, 621

DOW, BURRITT N.—Treatment, street sweeper injured 1021, 1022

DRAWBRIDGES— PAGE.
Act of Legislature....800
Islais Creek channel....317, 799

DRAYING FIRMS—License....535

DRINKING CUPS—Native Sons' Monument, replacement....680

DRUGGIST—County Jail....965

DUAL POLITICAL CHARACTER—City and County....455

DUKE, ROBERT D.—Advertising on waste cans....505-507

DUNN, JAMES H.—Injured, horse frightened by paving machine....670-72

DUPLICATION—Street names....72

DURESS—(See Coercion.)

DUST—Forbidding haulage of materials giving off....1013, 1014

DUTIES—
Auditorium manager....883-90
Board of Public Works....181, 203
Board, public....383
Chief of department assigning employee to....391
Election Commission....724
Employees, bonds....221
Finance Committee....884
Firemen....267, 268
Franchise, under....650, 651
Gas and water inspectors....774
Injuries in discharge of....352-56, 443, 444, 616
Killed in performance of....584
Lane, Franklin K., opinion....203
Library Trustees....306
Licenses, collection of....930
Mandamus compelling performance of....650, 651
Neglect of....815, 816
Officers....504
Operator to Chief, Fire Department....347-49
Police Commission....483
Probationers....131
Public board....383
Public service corporations, under franchise, performance compelled by mandamus....650, 651
Repairs to streets....92, 93
Sealer, Weights and Measures....455
Special policemen....219
Tax Collector....930
Torts in discharge of....314
Water company....295

E

EASEMENTS— PAGE.
Cemetery lots 398
Discharge of surface water over lower land 737, 738
Eminent domain, subject to 485
Santa Rosa Avenue 99
Southern Pacific Co. 99
Tunnels 311, 312
Twin Peaks Tunnel 311, 312

EAST MISSION IMPROVEMENT CLUB—Complaints, Ocean Shore Railway Co. 231

EDDY STREET—
Shacks 184
United Railroads franchise 420, 421

EDUCATION, BOARD OF—
Acceptance, school houses 952
Appropriations for, can be used for other purposes of department 810
Bannerman v. Boyle, 160 Cal., 197 22
Battaini Window Cleaning Co., claim 902, 903
Budget 951
Common School Fund 1026-28
Constitutional Amendment, 1911 ..... 20, 21
Daniel Webster School, land and buildings 893
Demands, approval of 953, 1006, 1007
Dental clinic 1026
Disbursements 952
Funds, control over 951-54
Land purchases, payment out of reconstruction of buildings fund 810
Lincoln School lot, sign on building 262, 263
Maintenance, school buildings 385
Member, changing status of 21
Members of 21, 22
New schools 952
Pension fund 566, 567
Political Code sections, direct tax for school buildings 384, 385
Printing circulars, demands 1006, 1007
Reduction in salaries of teachers 703, 704
Remington Typewriter Co., contract 281
Removal of members 21, 22
Residence of teachers in San Francisco 20-24
Salaries, schedule of 704
Sign on building, Lincoln School lot 262, 263
State officers, members 21, 22

EDUCATION, BOARD OF—(Continued) PAGE
Stuart v. Board of Education, 118 Pac. Rep., 713....22
Substitute teachers, pension fund....566, 567
Superintendent of Schools, traveling expenses....1026-28
Tax levy....384, 385, 1028
Teachers—
Pension fund....566, 567
Reduction in salaries....703, 704
Residence....20-24
Traveling expenses, Superintendent....1026-28
Typewriters, contract....281
Window cleaning, claim....902, 903
Wise Realty Co., lease....262

EDWARD STREET—Paving....180

EDWARDS, SAGER AND WOOSTER—Patent rights....333

EFFICIENCY—
Bureau of, creating....62, 63
Civil Service Committee....923
Director, Bureau of....63, 64
Employees using own automobiles....445
Fire Department....288, 801
Leaves of absence....288
Relief of employees killed....425
Vacations promoting....288, 289, 862, 977, 980

EGRESS—Rights of abutting owners....784

EIGHT-HOUR DAY—
Charter provision....133, 834
Exceeded in Police Department....132
Females....388
Hospitals....388
Laborers....133
Nurses....388
Senate Bill No. 466, 1913....388
Slaughtering limited to....471

EIGHTEENTH AVENUE—
Lot transferred to Playground Commission....685-87
Overflow of water, damages....976

EIGHTEENTH STREET—
Change in name....565
Closing of....565, 566
Franchise rights, Southern Pacific Co....211
Width of....565

EL DORADO STREET—Franchise streets, Southern Pacific Co....211

ELEANOR LAKE—Water supply....77, 494-96

ELECTION COMMISSION— PAGE.

Appointments 43-45, 486
Appropriations 723
Booths, construction and repair 486, 487, 723
Budget estimates 723
Carpenter, employment of 486, 567
Compensation, election officers 721, 722
Construction and repair, buildings and booths 486, 487, 723
Construction of election laws 875
Contract, frames for booths 253
Control of elections 101, 567
Delegation of authority by Supervisors 101
Discretion 722
Election officers, additional compensation 721-25
Employees 29
Employees' absence from work, payment for 44, 45
Extra clerks 29
Power to adjust contract 253, 254
Precincts, reduction in number 722, 723
Registration of party affiliation of voters 875
Salary during sickness 29
Spencer Street Planing Mill, contract 253, 254
Unapportioned Fee Fund 567
Violation of contract 253

ELECTIONS—

Advertising, official, on election day 314
Bonds, constitutional provision 58
Charter amendments 100-102, 777, 895, 896, 1004
Charter provisions 101
Closing city offices on election day 492
Constitution 100
Geary Street Railway bonds 48
General laws applicable to 722
Grant, Senator, recall 678, 679
Hetch Hetchy 494, 495
Holidays 314, 492
Library Bonds 57
Liquor sale during 678, 679
Lower Market Street, Municipal Railway bonds 48
Modesto, bonds 374
Municipal 314
Notice to voters 49, 50, 373
Precincts 722, 723
Primary 314, 679
Public utilities, acquisition of 373
Railroad Commission, transferring powers 759-61

Recall election—

A special election 679
Senator Grant 678, 679

ELECTIONS—(Continued) PAGE

Santa Barbara, bond issue....378
Santa Rosa, bonds....374
Special....373
Supervisors conducting charter amendment election....100-102
Votes cast at....722, 723
Water bonds....77, 495
Water Supply bonds....494, 495

ELECTRICIANS—

Bonds....596
Registration....598
Reporting installations....601-603

ELECTRICITY—

Asphalt plant....762-65
Board of Public Works....717
Board of Supervisors—
Control of....717
Fixing rates....758-62
Bonds, installations....596
Building Law....596
Cable lines, electrification of....421
Chinatown....596
City Electric Co....622-24, 762-65
Civil Code section re service....292
Contract, Pacific Gas and Electric Co....162, 431, 432
Corporation Yard....762-65
Defects in installations....596, 598
Department of Electricity, approval....586, 588, 598
Electricians' bonds....596
Electroliers....431, 432
Excess rates charged....473, 474
Franchises....244, 277, 294, 411, 913-16
High tension pole leads parallel to low voltage....586
Inspection fees....598
License tax on companies prohibited....597
Ordinances regulating....596-98, 619
Pacific Gas and Electric Co....596-99, 622-24, 762-65
Panama-Pacific Exposition grounds....523-25
Permits for laying conduits....576, 598
Public buildings, bids....622-24
Railway franchise....229
Rate for current....431, 432
Rate litigation....473, 474
Reasonable rate of return....474
Reporting installations....601-603, 985
Right of corporations to charge rates they please....474

ELECTRICITY—(Continued) PAGE

Service, control of....717
Sierra and San Francisco Power Co....523-25
Station, Jefferson Square....548
Telephone motors....601-603
Universal Electric and Gas Co....408, 414
Western Electric Co....601-603

ELECTRICITY, DEPARTMENT OF—

Approval of overhead construction....245, 586-88, 598
Bonds, electricians....596
Buildings, installations....596
Carrell, J. W., reinstatement....380
Chinatown, electric wiring....596
City Electric Co., permits....415
Civil Code section, furnishing of service....292
Defects in installations....596, 598
Electricians, bonds....596
Extension of service....586-88, 597, 598
Fire alarm bells, exempted from charges....337
Henzel, Edward F., reinstatement....380
High tension pole leads parallel to low voltage....586
Hyer, John J., reinstatement....380
Inspection....586, 588, 598, 796, 797, 985
Inspectors, litigation....380
Installations....601-603, 985
Jefferson Square fire alarm station....548, 549
Licensing firms maintaining electrical departments..796, 797
Lighting companies furnishing service within hundred feet of established mains....292-94
Opening of streets....164, 292-94, 586-88, 597, 598, 913-16
Pacific Gas and Electric Co., overhead construction....245, 596-99
Pacific Telephone and Telegraph Co., electric motors..601-603
Permits—
  Opening streets for lighting poles....164, 586-88, 598
  Overhead construction....415, 586-88, 598
Plans approved and permits issued before installation, ...586, 588
Poles for street lighting....164, 586-88, 598
Reinstatements....380
Reporting electrical installations....601-603, 985
Russell decision not affecting power or telephone service..587
Second extension to service connection....293, 294
Service connection by lighting company....292
Service wires....596
Sierra and San Francisco Power Co....523-25, 912
Streets, use of....164, 292-94, 586-88, 597, 598, 913-16
Violations, ordinance, electrical installations....985
Western Electric Co., telephone motors....601-603

ELECTROLIERS— PAGE.
Connections to 431, 432
Lighting by Pacific Gas and Electric Co....430-32
Rate for current 432

ELEVATED RAILROAD—Water front 280

ELEVATOR OPERATORS, City Hall, uniforms for 988

ELEVENTH AVENUE SOUTH—Title 106, 120

ELEVENTH STREET—Forbidding haulage of certain substances 1013

ELIGIBLE LISTS—
Absence from city....252, 253
Act, New York Legislature....147, 148
Appointment, preference for....148
Assistant Chiefs, Fire Department 83, 936, 938
Consolidation 75, 76
Disqualification cause of removal....147
Failure to respond to notice....405
Fire Department 83, 267, 268, 557
Health Inspectress of Schools....451
Hosemen 557
Ignoring of 84
Johnson, Samuel W., restoration to....251-53
McAvoy, Edward 147, 149
Municipal Railway 463
Physical fitness 148
Placing at foot of 252
Policemen 147, 149, 251-53
Preference, former railway employees....463
Refusal to put on....149
Removal from 147-49, 221-25, 252, 405
Restoration to 251, 252, 405, 451
Rules—
Civil Service 451
For removal from 252
Stenographer-typewriters 221-25
Surveyor's field assistants 403
Tenure of office....223

ELLISON, EDWARD—Assistant gas and water inspector....771-75

ELLISON, JUDGE—Telephone merger 196, 402

EMBALMING ESTABLISHMENTS 30-33, 38, 42

EMBARCADERO— PAGE.
Act of March 15, 1878....383, 534
Addition to building....429
Building encroaching on....429
Construction and repair....382
Jurisdiction, State Harbor Commissioners....382, 383, 429, 430
Municipal Railway from....604
Political Code sections....382, 383
Property owners, liability for sidewalks....533-35
Sewer across....382-84
Sidewalks....382
State Harbor Commissioners, responsibility....533, 534
United Railroads, abandonment of franchise....169, 170
Water Front Realty Co., building....429, 430
Width....382, 534

EMERGENCY—
Leaves of absence....288-90, 387, 977
Publicity literature, appropriation....591, 592
Safeguarding of health in....4

EMERGENCY HOSPITAL—
Ambulance damaged in collision with automobile....314
Ambulance knocking down D. J. Hagen....964
Injured employee treated....626, 645, 646
Nurse contracting typhoid fever....903-906

EMINENT DOMAIN—(See Condemnation.)

EMMET PLACE—
Decision Superior Court, open public street....839
Fences put up....480
Judgment in favor of city....784
Mandonnet v. All Persons....479, 783, 784, 839
Never assessed....479
Obstructions....479, 480
Public street, use as....479
Restraining order....839
Stairway....839

EMPLOYEES—
Abandonment of service....165, 222
Absence—
From city....252, 253
From work....44, 45
From State without leave....346
Without leave....296
Accidents—(See Accidents.)
Acts of....220, 221

EMPLOYEES—(Continued) PAGE

Actual—
Service, pay for 583
Time employed 29, 43, 45

Additional 62, 608, 609, 822-24, 898
Alien motorman, Union Street Railway 836, 837
Aliens prohibited 902

Appointments—
Additional 62, 608, 822
Unauthorized 503, 504
Without civil service examination 282, 285

Arata, John 351
Asphalt Plant 582
Asphyxiation, deaths from 422-26
Assessor 389-92, 822-24
Assistant Chiefs, Fire Department 74, 83, 936
Assistant Gas and Water Inspector 771-75
Auditor 29
Auditorium manager 883-90, 923
Automobiles, renting to city 445-47, 487
Back salaries, demands 937
Badges of office 267
Band, Municipal, leader 8
Barnett, Benjamin, teamster 787, 788
Barry, David A. 896-901
Battalion chiefs 74-76, 936
Bermingham, Samuel 10-16
Bidding on public work 344, 345

Blanketing into civil service 284, 287, 389-92, 771, 802, 803, 830, 831

Blacksmiths 557

Board of Public Works 189, 221-25, 403, 582, 626, 645, 646, 663, 664, 687, 688, 787, 788, 980, 1021

Bonds (See Surety Bonds)
Brackett, Dr. G. F. 965-68
Bridge, Islais Creek 798-800
Byrne, James W., fireman 814
Byrne, Stephen A., Gas and Water Inspector 772
Cahill, John, park employee 742, 743
Captains 74-76, 346-49
Carpenter, Department of Elections 486, 567
Carrell, J. W. 380
Cashier, Assessor 389, 390
Casserly, Captain John, reduction in rank 767, 768
Casserly, Thomas, plumbing inspector 861
Cement dust, employee incapacitated 664
Changing positions 896-901
Charges, investigation of 223-25
Charter amendments 284, 287, 389-92, 771, 802, 803, 830

EMPLOYEES—(Continued) PAGE

Charter framers, solicitude for....104

Chief Deputy—

Assessor's office....389-91
Recorder's office....389

Chief of Police, Secretary to....1007-10
Chiefs, Assistant, Fire Department....74, 83, 936
Church Street Railway....925
Citizens only....925

Civil service—

Benefits, charter amendment, only in cases of continuous service....803

Brought under by charter amendment....284, 287, 389-92, 771, 802, 803, 830, 831

Certification....332, 333
Commission, approval of demands....672, 673

Code, James A....676

Coercion—

By superiors....255, 767, 768
Resignation through....296-98, 808, 809

Collins, Jeremiah L....346

Compensation—

For use of their own property, charter forbids....487
Injured employee....526

Conductors....497, 498, 996
Confidential secretary to chief of police....1007-10
Conlon, James....422-26
Contract of employment, termination....165
Contractor not an employee....903
Contracts, public, personal interest in....17, 344-46, 487
Copyists....802, 803, 830, 831, 977
Coroner....389
Corporation Yard....103, 557, 558
County Clerk....802, 803, 830, 831
Credits for service rendered....286-88
Crosky, R. V., Civil Service standing....389-91
Day of rest....132, 133
Death....352-56, 422-26, 443, 444, 584, 585, 819-22
Debarred from appointment....345
Defined....584
Dennis, Charles B....221-25
Department of Electricity....380, 381
Disability....129, 354-356, 579, 580, 584, 585, 620, 664
Discrimination, temporary and permanent....44
Dismissal....130, 166, 222, 223, 332, 403, 425, 580, 682-85, 747, 752-55, 766, 767, 781, 782, 816

EMPLOYEES—(Continued) PAGE

Dismissed employee—
Certified for appointment....332
Vacation....403

Druggist, County Jail....965
Efficiency increased by vacations....289
Eight-hour day....132, 133, 388, 834
Elections Department....29, 43-46, 486, 567, 721-25
Elevator Operators, City Hall....988
Ellison, Edward, Assistant Gas and Water Inspector..771-75
Employers' liability....424, 526, 583-85, 616, 626, 627, 645, 646, 663, 687, 688, 742, 743, 782, 783, 787, 820-22, 1021
Examinations (See Examinations)
Examiners, civil service....920, 921
Exempt position at time of charter amendment not barred from benefits....390
Expert to Grand Jury....406, 407
Extra clerks....29
Eyes injured....1021
Females....388
Field assistants, surveyors'....403
Finn, Joseph E....286
Fire Department....74, 76, 83, 103, 104, 164, 166, 267, 268, 282-85, 286-88, 346-49, 351-53, 557-59, 813, 814, 837, 838, 936
Fireman an employee, not an officer....165
Forcada, Frank, reinstatement....693, 694
Forfeiture of office....345
Former employees, vacation....403
Former railway employees, preference....463
Franchise grant, personal interest in....345
Gas and Water Inspectors....771-75
Geary Street, Park and Ocean Railroad Co., preference..463
Golden Gate Park....755, 756
Grand Jury expert....406, 407
Grant, Harry E., motorman....877-79
Greene, Edward M....879, 880
Hampton, Robert W., Gas and Water Inspector....771-75
Hannon, John, street sweeper, injured....687, 688
Hardenedy, W. E....164, 166
Head of Department assigning to duties....391
Health Department....2, 4, 332, 333, 487
Henzel, Edward F....38
Hock, Harry, fireman....813, 814
Hosemen....282-85, 557
Hospital, treatment at....626, 645, 646, 687, 877-79
Hospitals, eight-hour day....388
Hyer, John J....380
Illness, salary during....582, 583
Ingham, Richard L....255

EMPLOYEES—(Continued) PAGE

Injured employee having own physician....526
Injuries (See Injuries)
Inspectors....380, 771-75, 861, 963
Interest, personal, in contracts with City....17, 344-46
Intoxicated while on duty....767
Irregular appointments....814
Islais Creek Bridge....798-800
Isolation Hospital, non-civil service ward-woman....332
Johnson, Samuel W....251-53
Jones, Robert J....837, 838
Justices' Clerk....389, 390
Killed in discharge of duties....352-56
Laborers....663, 664
Lane, Franklin K., opinion....557, 558
Layden, James F....936
Lead poisoning....664
Leader, Municipal Band....8
Leahy, Dennis, laborer....663, 664
Lease to City, personal interest in....344
Leaves of absence....288, 289, 345, 346
Levy, Louis....883-90, 923
Liability bonds (See Surety Bonds)
Lieutenants, Fire Department....282-85
Lynch, Patrick....422-26
Machinists....557, 558
Macphee, Arthur F., police officer....815-18
Master and servant, relation....133
Maxwell, John R....936
Mayor recommending appointments....62
McAvoy, Edward....147, 149
McDevitt, E. J., Civil Service standing....391, 392
Mechanics, Fire Department....103, 104, 557, 558
Minimum wage....724, 832-35
Moriarty, John J....582
Mothers' Pension Bureau....400
Motormen....497, 498, 836, 837, 877-79
Municipal Band, leader....8
Municipal Railway..189, 463, 464, 497, 498, 836, 837, 877-79, 996
Murphy, Joseph A., Secretary to Chief of Police....1007-10
Neglect of duty....815, 816
Negligence of, Municipality not answerable for....315, 965, 972
Nesfield, Margaret....400
Non-citizens....836, 837, 902
Non-resident leader of Municipal Band....8
Norton, Patrick....626, 627, 645, 646
Nurses....388, 903-906
Occupational diseases....664
O'Donnell, J. W., street sweeper, injured....1021, 1022
Official bonds, liability of official for acts of subordinates....221

EMPLOYEES—(Continued) PAGE

O'Leary, Frank, Assistant Gas and Water Inspector....772
Omissions of 220, 221
Operator to Chief, Fire Department....346-49
Painters 557
Parks....742, 755, 756
Partisan difficulty, charter object to remove....104
Pay checks 121, 122
Pay day twice a month....713-15, 755, 756
Pay rolls, approving....672, 673
Per diem men 756, 807, 862, 980
Permanency of tenure 104
Peterson, James E....996, 997
Physical fitness 148
Police Chief, Secretary to....1007-10
Police Department....133, 147, 149, 251-253, 255, 578-80, 583-85, 715-17, 815, 816
Police patrol boat....811, 812
Preference, former employees, Geary Street Railway Co. 836, 837
Preferred runs, Municipal Railway....463, 464
Premiums on bonds 497, 498
Probationers 147, 148
Promotions 74-76
Public work, bidding on....344, 345
Rank....557, 558, 579, 580, 754, 755
Recorder 389, 390, 977
Reduction in rank....754, 755
Refusal to serve....165
Reinstatements 296-98, 380-81, 765-67, 996
Relinquishment of office....297
Renting automobiles to City....445-47
Residence qualification 8, 10-16, 20-24, 252, 267, 925
Resignation....164, 166, 255, 256, 296-298, 320, 808, 809
Retiring age 579
Rogers, John W. 896-901

Salary—
- Actual service only....43, 45, 583
- During sickness 582, 583
- Payable monthly 713, 714
- Twice a month 713-15, 755, 756
- Two positions 447

Sale to City, interested in....344
Sealer, Weights and Measures....728
Secretary to Chief of Police....1007-10
Sergeant-at-arms, appointing 63
Severance of relations with city, how effected....345, 346
Sewer Department employees, asphyxiated....422-426
Sheriff 389, 390, 879, 880

EMPLOYEES—(Continued) PAGE

Sickness, salary during 582, 583
Smith, Henry A., fireman 807-10
Smith, J. J. 344
Spellman, Martin 282-85
Stack, Edward J., asphalt worker 819-22
State Law controls 967
Status changed at will of head of department 391
Stoltz, Charles M. 389
Street sweepers injured 687, 1021, 1022
Supervisors authorizing appointments 62, 63
Supervisors' office 63, 389, 390, 896-901
Supplies, interested in furnishing 17
Supplies Bureau 922, 963
Surety bonds (See Surety Bonds)
Suspensions 676-78
Surveyors' field assistants 403
Tax Collector 296-98, 389, 390, 676
Tax sales, personal interest in 344
Taylor, Charles H., police officer 815-18
Teachers 20-24
Teamsters 787, 788, 805-807
Temporary appointments 29, 44
Teutenberg, Frank J., police corporal 715-17
Time actually employed, compensation for 43, 45, 583
Time book 43
Tobin, Agnes, nurse 903-906
Transportation allowance 445, 487
Treasurer 389, 390
Treatment, injured employees 626, 627, 646, 1021, 1022
Tripp, Edwin B. 676
Twice a month salaries 713-15, 755, 756
Unauthorized appointments 503, 504
Uniforms 988
Vacations 288, 289, 862, 977
Ward-woman, Isolation Hospital 332
Water and Gas Inspectors 771-75
Weights and Measures Bureau 728
Whelan, John J., copyist, County Clerk 802, 803, 830, 831
Widows' Pension Bureau 400
Withdrawal of resignation 255, 256
Wolff, Charles A., reinstatement 296-98
Workmen's Compensation Act 424, 526, 583-85, 616, 626, 627, 645, 646, 687, 688, 742, 782, 783, 787, 820-22

EMPLOYERS—

Collecting poll tax from 304
Defined 583, 584

EMPLOYERS' LIABILITY— PAGE.

Board of Public Works 616, 617, 626, 627, 645, 646, 663, 664, 687, 688, 787, 788, 819-22
Charter framers' intent 585
Charter provisions 584, 585
Death, compensation to family 424
Emergency hospital, treatment at 687
Employee having own physician 526
Failure to report injury 742, 743
Firemen at exposition 780-83
Hospital and medical treatment for injured 585, 626, 645, 646, 687, 878, 879
Industrial Accident Commission 627, 645, 646, 787, 820-22
Lead poisoning 664
Lump sum settlement 821
Notice to employer 742, 743, 1021
Occupational diseases 664
Park Commission 742, 743
Police officers 583-85
Runaway horse striking street sweeper 687
Salary during sickness 582, 583
Sewer Department employees, asphyxiated 422-26
Street sweepers injured 616, 617, 687, 688
Team driver injured 787, 788
Treatment—
Employee refusing 1022
Employer, exemption 627
Employer, obligation 627, 646
Furnishing of 1021, 1022
Workmen's Compensation Act 424, 526, 583-85, 616, 626, 627, 645, 646, 687, 688, 742, 782, 783, 787, 820-22

EMPLOYMENT—

Actual 831
Aliens on public work, prohibited 902, 925
Females in certain restaurants 426-28
Injuries incident to 616
Void if made contrary to charter 504

ENACTMENT—

Amendment enacting laws 751
Law similar to code section 242
Ordinance under initiative provisions of charter 569

ENCROACHMENTS—

Army Street 732
Beacon Street 478
Bluxome Street 459, 460
Capp Street 357

ENCROACHMENTS—(Continued) PAGE.
Embarcadero 429, 430
Emmet Place 479, 480
Nerio v. Maestretti 844
Oriental Warehouse, Bluxome Street 459, 460
Purpresture 956
Randall Street 727
Stark Street 844, 845, 873, 874

ENTERTAINMENTS—
License 532, 533

ENTRANCES—
Defined 574, 575
Emmet Place 480
Romeo Flats 538, 539
School or church 573-75
Tenement houses 538
Theatres, obstructing 331, 332

EQUIPMENT—
Franchise condition as to character 368
Municipal Railway 604

ERECTION—
Election booths 723
Poles (See Poles, Erection of)
Structures (See Construction)

ERRORS—
Assessments 174, 611, 657-59
Bids 80-82
Taxes 631, 632, 970

ESCAPING TAXATION 614

ESOLA, FRANK W.—Withdrawal of resignation 255

ESPLANADE—Ocean Shore 612

ESTATE—
City and County in grant from State 854, 855
Vocation, acquired in 34

ESTATES—
Assessment double year after taxation escaped 610, 611
Code of Civil Procedure 610
Executor entitled to possession of 610
Heirs, double assessment on 610, 611

ESTIMATES— PAGE.

Board of Public Works....700
Budget requirements....5, 723, 891
Election expenses....723
Municipal Railway construction....49, 51
Public utility construction....49, 51, 888
Supplies for city....1025

ESTOPPEL—

Denying validity of a condition....366, 367
Liability, disputing....325
Title to alleyway....308, 319

EXAMINATIONS—

Appointment without....282, 285
Assistant Chief, Fire Department....74-76
Charter provisions....405, 491
Civil Service....405, 451, 452, 491
Civil service examiners....920, 921
Competitive among members of next lower rank.... 76
Fire Department....282, 285, 557, 558, 938
Insufficient....148
Meat, Australian....299, 301
New York....147, 148
Notices of, publishing....491, 492
Physical fitness....148
Police Department....715
Promotions, for....74-76
Waiters and pantry workers....332
Weights and Measures Sealer....454

EXCAVATIONS—

In streets (See Opening of Streets)
Laidley Street....736
Lights, placing....690
Macdonough Estate Co., excavation adjoining city property....315, 316
Seventeenth Street car barn....734, 735

EXCESS—

Demands over appropriations....740
Electric rates....473, 474
Gas rates....473, 474
Municipal Railway funds....605, 606
Parks, tax levy, seven cents....775, 776
Public utility, municipal....605, 606
Rates, over ordinance....614
Street work, beyond resolution of intention....656

EXCHANGE— PAGE.
Charter amendment 58
City property for private 609
Civic Center lots 609
Library block for Civic Center site 56
Market Place and Produce Exchange lots 851-56
Playground, Seventh and Bryant, unoccupied 370-72

EXCLUSION—
Chinese from keeping laundries 552, 554
Implied through express mention 85

EXCLUSIVE—
Powers, building laws 711
Privileges 247, 358, 410, 414, 505, 525, 902

EXECUTION—
Cemetery lots exempt from 397
Code of Civil Procedure 167
Judgment 275, 536
Pensions exempted 706
Rancho Rincon de las Salinas y Potrero Viejo 107
Sale of property on 167
Smith, Peter, sales 327, 460

EXECUTOR—
Code of Civil Procedure 610
Lien of 611
Money in hands of 536

EXEMPTIONS—
Affidavits, filing 472, 473
Assessments 827, 828
Cemetery lots from—
Execution 397
Taxes 827-29
Electrical installations, reporting 602
Execution 397
Fire alarm bell, charges 336, 337
License tax, public service corporations 597
Lien 397
Minnesota statute 828
Motor Vehicle Act 489, 493, 910-12
Pensions, from assignment 706
Political Code 174
Positions exempt from civil service 389
Public service corporations 597
Taxation 472, 597, 827-29
Veterans, from taxation 472
Workmen's Compensation Act 584

EXHIBITIONS— PAGE.
Anatomical museums 593
Boxing 757
Building Law 666
"Fighting the Flames" 647
License 532
New York Charter 532
Obstructing passageways, etc. 331, 332

EXHUMATION—Bodies 395-97

EXITS—
Globe Theatre 510, 514
Theatres 331, 332, 514

EXPENDITURES—
Accounting system, uniform 1005
Aggregate 1, 2, 4, 5, 8
Auditor's estimate 5
Bond proceeds 603
Budget appropriation, differing from 891-94
Budget appropriations, departments limited to 388
Cemetery removals 396, 397
Control of Supervisors 6
Deficit in funds 6
Department responsible for 741
Departments limiting 5, 6, 953
Estimates from departments 5
Excess over appropriations 740
Grand Jury 407
Great necessity, cases of 994
Health Department 1-4, 388, 740
Lane, Franklin K., opinion 3, 740, 741, 953
Library Trustees 305
One-twelfth in any one month 121
Passage to print 179
Playground Commission 635, 740
Public utility municipally owned 605, 606
Resolution, advertising 179
Sacramento charter 325
Schools 952
Street improvements 695-701
Superintendent of Schools 1007
"Supplies," items coming under 17
Tracks, removal of 386
Tunnel funds 605
Under five hundred dollars 695-98, 701
Under two hundred dollars 675, 994
Weights and Measures Bureau 729

EXPERTS— PAGE.
Accountants 1018, 1019
Barry, John F. 406, 407
Grand Jury 406, 407
Howard, John Galen.... 47
Klink, Bean & Co. 1004-1006, 1016-19
Residence provision of charter not applying.... 47
Supplies Committee 964

EXPIRATION—
Franchises, Presidio & Ferries Railroad Co....205, 206
Franchises, United Railroads....88, 91, 95

EXPLOSIVE—Injunction against use of....478

EXPOSITION—
Auditorium 923, 986
Changing overhead construction to underground....523-25
Fire protection 781
Golden Gate Park, use of....841
Injuries to firemen....780-83
Inside Inn 456-59
Lobos Square, use of 841
Moving picture shows 793

EXPRESS POWERS 247

EXPRESSMEN—Reporting moving of trunks, etc....563, 564

EXTENSION OF MAINS, SERVICE—
Absence of charter or ordinance provision forbidding....413
Arrests, corporation employees....415
Bloom, J. W. 19, 20
Bond moneys for 77, 78, 595, 596
Charter amendment 518
Charter provisions 98, 135, 195, 410, 411
City Electric Co. 195
Civil Code section 229, 292-94
Constitutional amendment, 1911....19, 96, 134-37, 195, 196, 200-203, 240-43, 250, 293-95, 409, 411, 412, 415, 587, 597, 642
Constitutional amendment limiting..293, 409, 410, 415, 597, 598
Constitutional privilege prior to 1911 amendment..19, 20, 97, 136, 137, 200-203, 240-43, 249, 293-96, 409, 587, 597, 598, 642
Decisions 293, 295, 409-11, 586, 587, 597, 598, 642
Department of Electricity, approval....245, 292-94, 586-88
Forest Hill 122, 123
Franchises....195, 202, 294, 409, 411, 412, 415, 575, 576, 586, 587, 597, 598, 642-44

EXTENSION OF MAINS, SERVICE—(Continued) PAGE.

Growth, keeping pace with....295
Hearing, public, by Board of Public Works....203
Hetch Hetchy project, integral part of....77, 78
Hillcrest....19, 20
Keppelmann, In re....402, 560, 596, 597, 642
Lighting companies....294, 409, 411, 412, 415, 575, 576, 586, 587, 597, 598, 642-44
Los Angeles....586, 587
Lukrawka vs. Spring Valley Water Co. 295
Ocean Shore Railway Co. 227, 228
Ordinances....97, 195, 200, 204, 575, 576, 597, 598, 642-44
Pacific Gas and Electric Co....200
Pacific Telephone and Telegraph Co....196
Permits....195, 294, 415, 575, 576, 586, 587, 597, 598, 642-44
Protests 203
Railroads....227, 228, 229
Relief Home Tract....122, 123
Richmond District....595
Russell, In re....96, 97, 136, 201, 243, 293, 410, 413, 586, 587, 597, 642
Spring Valley Water Co. 200, 295, 296
Sunset District 595
Supervisors, power to grant or withhold privilege....202
Supreme Court on constitutional privilege....201, 293, 586, 587, 597, 598, 642
Universal Electric and Gas Co....408, 414
Water Mains....200, 295, 409, 410, 587

EXTENSION OF STREETS—
Anglo American Land Co. 326
Arch Street 845
Beverly Street 845
Bixby Street 845
Bright Street 845
Buchanan Street, northerly....328
City Land Association tract....845
Clement Street 299
Dore v. Truett, decree....328
Forty-eighth Avenue 299
Havelock Street 692
Head Street 845
Ingleside Terraces 845
Jefferson Street 327-29
Laguna Street, northerly....328
Market Street 311-13
Monticello Street 845
Nineteenth Street 326
Political Code section 382
Ralston Street 845

EXTENSION OF STREETS—(Continued) PAGE.

Ramsell Street 845
Santa Rosa Avenue 99
Seward Street 326
Van Ness Avenue 327-29
Vernon Street 845
Victoria Street 845
Vulcan Street 419
Water front, width of 382

EXTENSIONS—

City Council ordering 650
Howard Street sewer 381-84, 534
Municipal Railway 604, 954
Public utility, municipal 605, 606
Railroads, compelling 650
Sewers, water front 382-84
Tracks, Fresno 359

EXTENSIONS OF TIME—

Adopted resolutions 179
Baker's Beach outfall sewer 856-61
Board of Public Works recommending 857, 859
Board of Supervisors only power to grant 859
Bonus, Municipal Railway construction 150-56
Cars, Municipal Railway 157, 159
Charter section 859
City Hall 858
Civil Code section 907
Contracts 178, 179
Customary practice 858
Delays, avoidable and unavoidable 153
Holman, W. L., car contract 157, 159
Islais Creek Incinerator 193
Mile Rock Tunnel 856-61
Passage to print of resolutions 178, 179
San Francisco Hospital 858
Storrie, R. C. & Co. 856-61
Vote necessary 859

EXTRA—(See Additional)

EYES—Street sweeper, injured, bill for treatment 1021, 1022

F

PAGE.

FACTOR—Defined 613

FAILURE—
Civil service eligible responding to notice 252
Contract, living up to 194
Contractor, Mile Rock Tunnel 856
Dedication of streets, to make 328, 329
Delinquency of taxes, delivery by mail before 631
Electric installations, reporting 601-603
Employer furnishing medical treatment 627, 646
Filling openings in streets 258
Injury, reporting 688, 742, 743
Keystone Construction Co. contract 323
Mission Viaduct, contractors 323
Railroad operating 229, 230
Removal of obstructions 386, 844, 845
Reserve for street purposes, to make 328, 329
Street railway construction within time fixed by statute 908
To follow ordinance, bond issue 374
To revoke permit 429

FAIRMOUNT EXTENSION HOMESTEAD—Private ownership in streets 54, 55

FAIRMOUNT STREET—Assessment 866-68

FAIRMOUNT TRACT 171-75

FAMILIES—
Asphalt worker, died 819-22
Death benefits 820, 821
Fireman pensioner during lifetime 620, 621
Naturalized alien 702
Pensioning of 352, 356, 584
Sewer Department employees killed 423-26
Tenement houses 538
Workmen's Compensation Act 424, 617

FARES—
City regulating 361-64
Discrimination 362
Motor buses 520, 521
Passenger 361-64
Regulation by Supervisors 520, 521
School children, half fare 90

FARLEY, MARY—Title, Chestnut Street lot 786, 787

FARMING OUT—Streets and sidewalks 507

PAGE.

FATHER—Deceased employee, compensation....819-22

FAY IMPROVEMENT CO.—Contract, Army Street....732

FEDERAL—(See United States)

FEDERAL CONSTRUCTION CO.—Paving bid....655

FEE—
Streets....246, 601
Tide lands....466

FEES—
Acknowledgments....519
Automobile registration....488-90, 493
Builder's bond, filing....9, 10
Building contract, filing....9, 10
Dances....637
Definition....528
Department of Electricity....598
Filing maps....416, 417
Inspection—
Electrical work....598
Street openings....643
Real estate agents....528
Recorder for filing....9, 10

FELONY—Office becoming vacant....817

FEMALES—
Business, etc., sex disqualification....427
Constitution of California....427
Discrimination against....427, 428
Eight-hour day....388
Employment in Greek or chop suey restaurants....426-28

FENCES—
Action of tort for injury....60
Alleyway, on....308, 319
Buffalo ordinance....142
Decisions....60
Emmet Place....480, 839
Havelock Street....691-93
Height limitation....60, 61
Kansas City ordinance....142
Police power over....60
Power of Supervisors to regulate....59-61
Southern Pacific Co....691-93

PAGE.

FEVER CASES—Removal 848

FIELD ASSISTANTS—Surveyors', vacations 403

FIELD, JUDGE—Decree, Pueblo Lands 116, 117

FIFTEENTH AVENUE—South, bed of Islais Creek 113, 114

FIFTH AVENUE—Tearing up tracks 385, 386

FIFTH STREET—Franchise rights, Southern Pacific Co. 211, 213, 214

"FIGHTING THE FLAMES"—Permit 646-49, 665-67

FILINGS—
- Bonds of employees 189, 190, 497
- Builder's contract and bond 9
- Buildings, alterations, etc., with Board of Public Works 652
- Claims for damages 805
- Estates, inventory of 610
- Fees to Recorder 9, 10
- Hetch Hetchy water supply 494-96
- Maps 416
- Maps by railroads 27
- O'Neil and Haley Tract Map 403
- Railroads, maps 27
- Tax exemption affidavits 472, 473

FILL-IN—
- Beale Street Bridge 235-38
- Mission Viaduct 322-26

FILLMORE STREET—
- Sierra and San Francisco Power Co., rights 524
- United Railroads, franchise 277-79

FILMS—Rejection 932

FINAL PASSAGE—
- Advertising 73
- Ordinances 339-41, 609
- Resolutions 340
- Votes required 339-41

FINANCE COMMITTEE—Duties 884

FINANCES—(See Budget; Expenditures; Funds).

FINES— PAGE.
Bail money 537
Day of rest law 133

FINN, JOHN—Credits for grading 825-27

FINN, JOSEPH E.—Fireman, credit for service 286-88

FIRE ALARMS—
Jefferson Square, station 548, 549
Organizations exempted from charges 337

FIRE BOATS—Bids for repairs 795, 796

FIRE DEPARTMENT—
Alarm bells, parties exempted from charges 336, 337
Appeals from dismissals 682-85
Appointing power to make selections for promotions 268
Appointments 267, 268, 282-84, 747, 814, 936, 938
Arata, John 351, 355
Assignment—
Probationers 813
Without examination 285
Assistant Chief Engineers 74, 83, 936-39
Automobiles, competitive bidding 992
Automobiles, state license fees 488-90, 493
Auxiliary high pressure system 781
Back salaries, demands 937
Badge of officer, surrender 165, 166
Barley contract 1022
Battalion Chiefs 74-76, 936
Bermingham, Samuel, residence qualification 10-16
Bids—
Fire boats 795, 796
Hose 79-82
Irregular 795, 796
Rejection 796
Blacksmiths 557
Board of Public Works, charge of construction and repairs 486
Brown, machinist 103
Buildings, construction and repair, control of Board of Public Works 486
Byrne, James W., assignment to vacancy 814
Captain—
Discharging duties of operator 347-49
Reduction in rank to hoseman 767

FIRE DEPARTMENT—(Continued) PAGE.

Casserly, Captain John, reduction in rank....767, 768
Certifications from eligible list....267, 268
Charges against employees....747, 752, 766
Charter provisions....267, 268, 284, 287
Chauffeur's license....489, 490

Chief Engineer—
- Appointment....747
- Assistants to....83, 936-39
- Declaring office vacant....746
- Discretionary powers....348
- Exempted from civil service provisions of charter....747
- Operator to....346-49
- Removal from office....746-55

Civil service classifications....74-76
Civil Service Commission, appeals from dismissals....682-85
Coercion, resignation through....767, 768, 808, 809
Collins, Jeremiah L....346-49

Commission—
- Appointive power....268
- Dismissals....683
- Organization of....267
- Powers....267, 288, 683
- Promotions....268

Construction of houses....486
Contract for supplies....80
Corporation Yard employees....103, 286, 557, 558
Credits for service rendered....286-88

Delay—
- Bar to reinstatement....766, 767
- Making application for appointment....284

Disability....129-32
Discipline....288, 801
Dismissals....682-85, 747, 752-55, 766, 838
Dolan, M. J....128, 129
Duress, employees....767, 768, 808, 809
Efficiency....288
Eligible lists....267, 268, 557
Emergency leaves of absence....387

Employees—
- Blanketing into civil service....284, 287
- Dismissals....682-85, 747, 752-55, 766, 838
- Harassing....767, 768, 808, 809
- Prior to charter....284, 287, 557, 558

Employment in, requisites for....267, 268
Engine company members, losses by fire....477

Examinations—
- Appointment without....282, 285
- For promotion....74-76

FIRE DEPARTMENT—(Continued) PAGE.

Exemptions, fire alarm charges....337
Exposition firemen, insurance against injuries....780-83
Fifth alarm, men subject to call on....103
Finn, Joseph E., credit for service....286-88
Fire alarm bells, exemptions from charges....337
Fire boats, bids for repairs....795, 796

Firemen—

Employees not officers....165, 320
Exposition, insurance against injuries....780-83
Injuries to....129-31
Intoxicated while on duty....767
Losses sustained by fire in quarters....477
Prior to charter....284, 287, 558
Requisites to become....267, 268
Status of....165
Working Saturday afternoon....471

First Assistant Chief Engineer....83, 936-39
Gasoline supply stations....633
Hardenedy, W. E., withdrawal of resignation....164-66
Hock, Harry, transfer for cause....813, 814
Horse shoeing....16, 17
Hose, bids for....79-82
Hosemen....282-85, 557
Houses, repair and construction....486
Injuries to firemen....129-31
Interpretation of bids....79-82
Intoxication while on duty....767

Irregular—

Appointment....814
Bids....80, 82, 795, 796

Jefferson Square, fire alarm station....548, 549
Kohler and Chase, glass window damaged by truck....972
Laches barring reinstatements....767, 809
Lane, Franklin K., status, employees prior to charter....287, 557, 558
Laundry certificates....161
Layden, James F., assistant chief....936-39
Leaves of absence....288-90, 387
Leuterdt, C. F., reinstatement as hoseman....765-67

Lieutenant—

Correspondence in rank with fireman....282
Hoseman appointed as....282-85

Los Angeles....489, 490
Losses sustained by firemen through fire in quarters....477
Machinists....103, 104, 286, 557, 558
Maintenance of houses....486
Management of....267

FIRE DEPARTMENT—(Continued) PAGE.

Maxwell, John R., assistant chief 936-39
Mechanics 103, 104, 557, 558

Members—
And employees, distinction between 104
Disabled 130

Moholy, machinist 103
Moore and Scott Iron Works, bid, fire boats 795, 796
Motor Vehicle Act, application of 488-90, 493, 910-12

Murphy, Thomas R., Chief Engineer, removal from office 746-55

Notices of vacancies 813, 814
Number of names certified from eligible list 267, 268
Operator to Chief Engineer 346-49
Operators, motor vehicles 489, 490

Panama-Pacific Exposition, liability for injuries to firemen at 780-83

Pay day twice a month 713-15
Pensions (See Fire Pensions)
Political opinions, removal from office for 747
Powers of Commissioners 267, 288
Preference to members before reorganization 284, 287
Probationers 129-32, 801, 802, 813
Promotions 74-76, 268
Rank 75, 76, 282-85, 347-49, 557, 558, 754, 755, 767, 768
Reduction in rank 754, 755, 767, 768
Reinstatements 766, 767, 808-10
Relief firemen 103, 104, 286, 287
Removal from office 746-55
Reorganization 104, 267, 282, 284, 287, 557, 558
Repairs to houses 486
Residence qualification 10-16, 267

Resignation—
Through coercion 808, 809
Withdrawal of 164, 166
Written, whether self-operative 320

Retirement of members 130, 838
Rules 801, 813

Salaries—
Payable monthly 713, 714
Twice a month 713-15

Second Assistant Chief Engineer 83, 936-39
Smith, Henry A., reinstatement 807-10
Spellman, Martin 282-85
Statute of Limitations 768
Supplies, bids for 80
Suspensions 684, 838
Temporary appointments 83, 84, 936, 938

FIRE DEPARTMENT—(Continued) PAGE.

Transportation, free, for firemen 90
Trials, firemen 683, 766
Twice a month salaries 713-15
Underwriters' Fire Patrol, exemption, charges for alarm bells 336, 337
Uniforms 988
United Engineering Works, bid, fire boats 795, 796
Vacancies 801, 802, 813, 814
Vacations 387
Window smashed by fire truck 972
Withdrawal of resignation 164, 166
Written resignation 320

FIRE HAZARD—

Garages 530
Gasoline, storage of 790
Globe Theatre 510, 514
Laundries 161
Materials from razed buildings 168
Theatres 514
Wooden building within fire limits 185

FIRE LIMITS—

Building regulation 161
Building, tearing down 185
Fire wardens, consent, alterations to buildings 552
Materials, razed buildings 168
Ordinances 184, 552
Province of municipality to define 184
Shacks within 184

FIRE MARSHAL—Exempted, charges, fire alarms 337

FIRE PENSIONS—

Arata, Guiseppe and Rosa 351-56
Baker v. Board of Fire Pension Fund Commissioners 352
Canty, Mary 443, 444
Ceasing on disability ceasing 130
Charter amendment 443, 444
Charter framers, intent 131
Charter provision 128, 443, 444, 620
Commissioners—
Discretion 351, 356
Findings final and conclusive 266
No power to grant 621
Power to rescind order granting pension 266, 267
Death from injuries 352-56

FIRE PENSIONS—(Continued) PAGE.

Deceased benefiting during lifetime....443, 444, 621
Decisions 352, 353, 355
Disability 129-32, 620
Dolan, M. J....128, 129
Dougherty, Susan E. 266, 620, 621
Family, relief to....443
Firemen's Relief and Pension Fund....128, 811, 1028
Injuries in discharge of duties....351-53, 356, 443
Insane through injuries 352, 353, 356
Intent of charter framers....131
Interval between injuries and death....353-55
Jones, Robert J., hoseman....837, 838
Killed in performance of duties....352, 354
Lane, Franklin K., opinion....131, 579
Length of service 132
Parents, deceased, sole support of....352, 356
Probationer entitled 129-32
Rank and salary governing....128, 129, 579, 620
Rescinding of 266, 267
Retirement pension 620, 838
Salary, one-half of....128, 129, 620
Setting aside Commission's finding....266, 267
Suicide 352, 353, 356
Time limit, death after injury....443, 444
Widow not entitled if husband benefited during lifetime 620, 621

FIRE PROTECTION—

Alarm bells 336
Department insuring its property against fire....304, 306
Laundries 161
Materials from razed buildings....168
Municipality, power to insure....306
Water for fires free 295
Wooden building within fire limits....185

FIRE WARDENS—

Laundry certificates 551
Supervision of alterations....511, 515, 552

FIREPLACES 653, 654

FIRES—

Construction delayed 153
Engine house, members' personal property....477

FIREWORKS—Discharge of 705

FIRST STREET—Paving 459

FISCAL AGENT— PAGE.
Depository bond 186, 331
Interest, payment of 375

FISCAL YEAR—Contract extending beyond 290-92

FISH—Peddler's license 638

FIXING RATES 617, 618, 758-62

FLATS—
Dogs kept in 434-37
Romeo flats 538, 539
Stairways 538

FLINN AND TREACY CONTRACTING CO.—Randall Street 867

FLOODS—Liability of owner of higher land 737, 738

FLOORING—
Condemnation 433, 434
Insanitary 433, 434
Structure, whether a 433, 434

FLORIDA STREET—
Ocean Shore Railway Co., franchise 25
Overhead crossing 25
Stable, reconstruction 392-94

FLOW—Natural, surface water 737, 738

FLUSHERS—Street, patent infringement 333, 334

FOLSOM STREET—
Acceptance, crossing of Ninth Street 94
Franchise rights, Southern Pacific Co. 216
United Railroads, abandonment of franchise 169, 170

FOOD—
Contracts, awarding 540
Inspection 540
Meat 300
Prisoners 539, 540
Pure Food and Drug Act 300, 302
Quality 540
Unwholesome, prevention of 471

FORBID—(See Prohibition).

PAGE.

FORCIBLE REMOVAL—Contagious diseases 770, 807, 808, 848

FORECLOSURE—Bernal Rancho 107, 110

FOREST HILL—Water service 122, 123

FOREST HILL COURT—Filing of map 416, 417

FORFEITURE—
- Action to forfeit franchise 230, 231, 908
- Acts sufficient to cause.....231
- Adjudication of 231
- Bail money.....537, 562, 563, 588, 589, 674
- Franchise, procedure 230, 231, 907
- Non-user of franchise.....230, 231
- Ocean Shore Railway Co., franchise.....230, 231
- People v. Sutter Street Railway Co.....231
- Railroad, uncompleted portion of.....230

FORT MASON—Tide lands 327-29

FORT MILEY—Land for 298

FORTY-EIGHTH AVENUE—
- Extension 299
- Sewer 498

FOUNDATIONS—Weakened 736, 737

FOURTEENTH STREET—Power poles 134

FOURTH AVENUE SOUTH—Title.....106, 120

FOURTH STREET—
- Closing of portion between Townsend and Berry.....309, 310
- Franchise rights, Southern Pacific Co.....211, 213, 214
- Southern Pacific Co., dedication of strip in lieu of portion to be closed.....309
- Spur track privileges.....213

FRAME BUILDINGS—(See Wooden Buildings).

FRAMERS OF CHARTER—Intent—(See Charter Framers, Intent).

FRANCHISES—
- Abandonment 169, 170, 421, 906-909
- "Abbott on Municipal Corporations".....241, 242
- Acceptance constitutes a contract.....89, 90, 234, 651
- Act of Congress, under.....239
- Act of legislature.....1020
- Action to forfeit.....230, 231
- Acts sufficient to cause forfeiture.....231

FRANCHISES—(Continued) PAGE.

Advertising....179, 505
Ambiguity in....26, 87, 229
Assignment....88, 832
Atchison, Topeka and Santa Fe Railway Co....212, 316-18
Attorney General, action to forfeit....230, 231, 908
Bidding, competitive....411
Binghampton, street railway....92
Cable franchise, abandonment of....421
California Electric Light Co....244
Central Pacific Railroad Co....208, 211, 213, 214, 217, 335
Changes in....318
Charter provisions....98, 135, 137, 139, 179, 195, 317, 410, 411, 525
Chicago, street railway....92
City letting franchise without calling for bids....365
Civil Code....88, 89, 95, 231, 907
Coercion, conditions inserted by city....368
Columbus, street railway....91
Competitive bidding for....138
Conditions, inserting....358-68, 414
Conduits, laying of....96, 241, 249, 277-79, 293-95, 409-12, 523-25, 575, 576, 586, 587, 597, 598 ,618, 619, 642
Constitutional amendment....203, 249, 293-96, 402, 409, 410, 415, 523, 524, 587, 597, 619, 642
Constitutional privilege in streets....201-203, 240-43, 247, 250, 277, 293-96, 408, 409, 415, 523, 524, 587, 597, 598, 619, 642
Contract, constitutes a....95
Decisions....26, 87-92, 231, 239-42, 278, 293, 295, 360-67, 402, 409-11, 505-507, 586, 587, 597, 598, 642, 1020, 1021
"Dillon on Municipal Corporations"....228, 229
Discretion of city to grant....363, 368
Doubts in....26, 87, 229
Duties under....650, 651
Electric railway....229
Electricity, transmission of....244
Elliott and Keppelmann, habeas corpus....402
Eminent domain, subject to....485
Employee, personal interest in granting....345
Equipment, character of....368
Erection of poles....98, 135, 137, 139, 163, 176, 239-41, 244, 245, 277, 294, 409-12, 415, 523-25, 586-88, 597, 598
Estoppel, doctrine of....366, 367
Exclusive privileges....247, 410, 414, 525
Expiration of....88, 91, 95, 205, 206
Extensions of service....195, 294, 296, 408, 409, 412, 415, 575, 576, 586-88, 597, 598
Federal....239-43
Fillmore St., United Railroads....277-79
Forfeiture, procedure....230, 231, 907

FRANCHISES—(Continued) PAGE.

"Freund on Police Power"....247
Granting....88, 95, 246-48, 310, 360-68, 411
Heat, steam....618, 619
Independent Light & Power Co....244
Jacksonville, street railway....92
Jenkins, Judge....247
Jurisdiction, Board of Supervisors....310
Laying of Pipes....96, 241, 293-95, 409-12, 523-25, 575, 576, 586, 587
Legislative authority....247, 248
Lighting....98, 164, 246, 247, 523-25, 575, 576, 586-88, 597, 598, 642
Los Angeles, street railway....90, 360
Market Street Railway Co....681, 832
Monopoly forbidden by charter....410, 414
Municipal Light and Power Co....243
Municipal Railway, not necessary....191
Municipality in fixing conditions restricted by charter and general law....364
Mutual Electric Light Co....244
New York City, street railway....92
Non-user....230
Ocean Shore Railway Co....24-28, 225-35
Officer, personal interest in granting....345
Openings in streets....98, 135, 137, 176, 195, 202, 239-50, 277, 294, 402, 408-15, 523-25, 575, 576, 586-88, 597, 598, 618, 619, 642
Orders granting....86-88, 205, 206, 211-14, 244, 469, 681, 832, 906
Ordinance granting going into effect after sixty days....317, 318
Ordinances granting....24-28, 205, 206, 211-14, 317, 335, 336
Organic law....360, 361
Overhead construction....239-41, 244, 245, 277, 294, 409-12, 415, 523-25, 586-88, 597, 598
Overlapping....420-22
Pacific Gas and Electric Co....201, 244-50
Pacific Telephone and Telegraph Co....201
Park and Ocean Railway....469
Parks....500
Paving by railroads....335, 336, 681
Percentage of receipts....98, 411, 419-22
Philadelphia, street railway....91, 92
Pipes, laying of....96, 241, 293-95, 409-14, 523-25, 575, 576, 586, 587
Poles, erection of....98, 135, 137, 139, 163, 176, 239-41, 244, 245, 277, 294, 409-12, 415, 523-25, 586-88, 597, 598
Police officers, free transportation....219

FRANCHISES—(Continued)

PAGE.

Police power—

Granting under 246-48
Held subject to 201

Power—

Municipality to grant 246-48, 360-68
Supervisors limited 190
Supervisors to deny or grant 88, 95, 310, 411

Power transmission wires 98, 244
Presidio and Ferries Railroad Co. 205-207
Public utility franchise; ordinance going into effect after sixty days 317
Publishing grant 179
Railroads, steam 210, 229, 310, 360, 367, 368, 650, 651
Referendum provision of charter, public utility 414
Refuse power to 363, 368
Repair of streets 335, 336, 681, 682
Resolutions granting 205, 213, 214, 244
Restrictions 361, 364
Roadway of streets, keeping in repair 86-96, 335, 336, 681, 682
Routing of cars immaterial in exercise of 421
Sale of 1020
San Francisco and San Joaquin Valley Railway Co. 317, 798, 799
San Francisco and San Jose Railroad Co. 208, 213, 214, 216, 217
San Francisco Gas and Electric Co. 201
Sanitary Reduction Works 1020, 1021
Separate use by company of two franchises 421, 422
Sierra and San Francisco Power Co. 175, 176, 523-25, 912
Sixty days after passage, ordinance, public utility franchise 317
South Pasadena, street railway 360-64
Southern Pacific Co. 208, 210-14, 217, 218, 309, 310, 316-18, 335, 336, 358, 368
Spring Valley Water Co. 201, 296
Spur tracks 211-214
St. Louis, advertising on refuse cans 505
State, grant of powers to city 359, 360, 367, 368
Steam heat 618, 619
Street railways 86-88, 169, 170, 190, 277-79, 360-65, 419-22, 650, 651, 681, 1020
Streets, use of 98, 135-39, 176, 195, 202, 228, 229, 239-50, 277, 294-96, 359-68, 402, 408-15, 523-25, 575, 576, 586-88, 597, 598, 618, 619, 642

FRANCHISES—(Continued) PAGE.

Supervisors—

Power to grant....88, 95, 310, 411
Power to impose conditions....414
Power to insert conditions in....358, 367, 368

Sutter Street Railroad Co....86-88
Taxation....240
Track lay-out, Southern Pacific Co....309, 310
Transfers, issuance of....90
Transportation, free....90
Trenton, street railway....92
Underground conduits, etc....241, 249, 277-79, 409-12, 523-25, 586-88, 597, 598, 618, 619, 642
United Railroads....88, 169, 170, 277-79, 419-22, 906-909 912
Use of streets....98, 135-39, 176, 195, 202, 228, 229, 239-50, 277, 294-96, 359-68, 402, 409-15, 523-25, 575, 576, 586-88, 597, 598, 618, 619, 642

Validity—

Depends upon use....421
Of a condition....366, 367

Western Pacific Railroad Co....208, 217
Western Union Telegraph Co....239-43
Williamsport, street railway....92
Wires, installation of....98, 135, 137, 139, 176, 239-41, 244, 245, 277, 294, 409-12, 415, 523-25, 586-88, 597, 598

FRANCISCO STREET—Power lines....524

FRANKLIN STREET—Street railway franchise....207

FRAUD—Resignation....297

FREE—

Cabaret show....532, 533
Fire alarm bell installation....337
Hospital treatment for injured....585
Meters....863
Pass over railroad....364
Passage along highways....506
Service connections....863
Transportation....90
Water for fires....295

FREEMAN, JOHN R.—Hetch Hetchy project....495

FREIGHT—Hauling of....105

FRESNO— PAGE.
Extension of railroad through....359
License tax, merchants....640
San Francisco & San Joaquin Railway Co., litigation....359
Sewage disposal contract....290, 291

FRUIT—Peddler's license....638

FRUIT STAND—Open, condemnation....433

FULTON STREET—Franchise, United Railroads....422

FUNCTIONS—
Administration....643
Board of Public Works....394, 545
Board of Supervisors....545
City and County....362, 363, 367
Consolidated city and county....455
Superintendent of Streets....656

FUNDED DEBT—Commissioners....119

FUNDS—
Administrative department expends....741
Bond proceeds....51
Cemetery Associations....396
Charter restrictions....605, 891, 892
Common School Fund....811, 1007, 1026-28
Consolidation Act....893, 894
Contracts, available to meet....56, 57
Control, departmental....951-54
Control of Supervisors....6
County....385
Deficit....6
Deposits, street openings....561, 562
Discretion of Supervisors....605
Diversion of....51, 603-607
Excavation Fund....561, 562
Excess to general fund....606
Exclusive management and disbursement....740
Firemen's Relief and Pension Fund....811, 1028
Geary Street Railway bonds....52
General Fund....811, 892-94, 1026-28
Grand Jury....407
Health Department....1-7, 388
Impounded moneys, rate litigation....614
Interest and Sinking Fund....811
Lane, Franklin K., opinion....3, 811, 953
Legislative department provides....741
Library Fund....811, 1028

FUNDS—(Continued) PAGE.
Maintenance of minors....400, 401
Municipal Railway....603-606
Parks....468, 776, 811, 1028
Playground Commission....7, 635, 636, 740
Police Relief and Pension Fund....579, 811
Public Building Fund....811
Public utility, municipal....605, 606
Replenishment of....811
Reserve fund....606, 993
San Francisco v. Broderick....893
Schools....810, 811, 1007, 1026-28
Special Deposit Fund....811
State....385, 400, 401, 940
State Highway Fund....68
Stockton Street Tunnel....603-606
Supervisors, control over....6
Surplus, bond proceeds....603
Surplus Fund....425, 730, 811, 892
Taxes....385
Teachers' Pension Fund....566, 567
Transfer of....51, 603-607, 891
Tunnels....605
Unapportioned Fee Fund....567, 811
Unexpended balances....57
Union Street Railway, operation....605, 606
Urgent Necessities Fund....388, 425
Water Construction Fund....595

FURNITURE—Moving of, reporting....563, 564

G

GAME—Peddler's license....638

GAMES—Of chance and skill....647, 648

GARAGES—
Clay Street, near Van Ness....573
Construction....634
Defined....634
Gasoline storage in....634
Gasoline supply stations, whether garages....633-35
Hotel, in....529-31
Lapier, L. B....525
Ordinances regulating....529, 573, 634
Pacific Taximeter Cab Co....529
Prohibited near church or school....573

GARBAGE— PAGE.
Bids for disposal 1020, 1021
Cans, advertising on 505-507
Destructor Company, litigation, incinerator 998
Islais Creek Incinerator 192-94, 792, 998
Sanitary Reduction Works plant, operating 997, 998
Smith, Fred P., bid 997, 998
Waste paper, streets 505

GARNISHMENT—
Bail money 536, 537
Money in custody of court 536
Money in hands of executor 536

GARRETTI, ANGELO—Removal of building 102

GAS, GAS RATES—
Charter provisions 410, 618
Civil Code section re service 292
Constitutional prerogative prior to amendment 409
Contract, Pacific Gas and Electric Co. 431, 432
Excess rates charged 473, 474
Merced, gas litigation 278
Meters, free 863
Public buildings 622
Railroad Commission order 863
Rate litigation 474
Reasonable rate of return 474
Right of corporations to charge rates they please 474
Service connections free 863
Streets, bid 622
Supervisors, fixing rates 758-62
Vested rights of companies in streets 914, 915

GAS INSPECTORS—
Act of Legislature 772
Appointments 772
Ellison, Edward 771-75
Hampton, Robert W. 771-75

GAS MAINS—
Legislative authority 247
Los Angeles 586, 587, 913, 914
Ordinances regulating 619
Permits to lay 576
Russell, Matter of, 163 Cal. 668 ..... 136, 586, 587, 913

GASOLINE—Storage of 789, 790

GASOLINE SUPPLY STATIONS—Permit 633-35, 788-91

GEARY STREET— PAGE.
Conduits and pipes, public service corporations....154
Gasoline pumps on street curbs....84, 85
Newhall, G. A., land for widening....835
Park Commission, formerly under jurisdiction of....794
Repaving incident to railway construction....48-52

GEARY STREET, PARK AND OCEAN RAILROAD CO.—
Former employees, preference....463
Old conduit....154
Rails, property of....385
Removal of tracks....385, 386
Tracks....206

GEARY STREET RAILWAY—(See Municipal Railway.)

GEARY STREET RAILWAY BONDS—
Election....48, 49
Fund designated by ordinance....52
Ordinances....48, 49
Proceeds from sale of....51, 52

GENERAL FUND—
How derived....811, 892-94
Lane, Franklin K., opinion....811
Surplus transferred to....606
Transfer to....1027

GENERAL LAWS—(See Laws.)

GERM-INFECTED MATERIALS—Razed buildings....168

GIFTS—
Charter provisions....371
Jefferson Square....548
Pensions....706
Sewer Department, employees killed....423

GLANDERS—Employee contracting....905

GLOBE THEATRE—Alterations....509-16

GOLDEN, WILLIAM—Civil service examiner....920

GOLDEN GATE CEMETERY....298

GOLDEN GATE PARK—
Boundaries....261, 468
Charter provisions....467, 468
Employees, pay day twice a month....755, 756
Exposition, use for....841

GOLDEN GATE PARK—(Continued) PAGE
Great Highway running through....503
Jurisdiction, Park Commission....467, 468
Municipal Railway across....954-62
Museum....841
Order No. 800....467, 468
Outside Lands Committee, report....468
Railroad in....842
Sewer construction, assessment....503
Structures, erection of....468, 469
Vacations for employees....984

GOLDEN GATE PARK FEDERATION OF IMPROVEMENT CLUBS—Sewage, Seal Rock House....498

GOODS—Installment contracts....594

GRADATION—Licenses....639

GRADE CROSSINGS—
Mandamus compelling railroads....650
Ocean Shore Railway Co....25

GRADES—
Assessment district....441
Charter provisions....65, 440, 441, 542, 969
Cornwall, Bruce, credits....825-27
Crossings by railroads....650
Damage claims....541-43
Decisions....181-83
Fairmount Street....866
Finn, John, credits....825-27
Geary Street Municipal Railway construction, incident to....49-51
Great Highway....259, 499, 500
Harrison Street....440, 441, 825-27, 950, 968
Hawthorne Street....950
Hayes Street....831
Laidley Street....736
Main Street....541-43, 968
Mateo Street....737
Power to change....65, 440, 441
Private contract....736, 739
Railroads compelled by mandamus....650
Resolution, including all changes under one....65
Roanoke Street....737
Stanley Place....440, 950
Sterling Street....440
Street railway conforming to change in....833, 834
Street railways, obligation....90, 92

GRADES—(Continued) PAGE.
Tracks, Southern Pacific Co., reconstruction to conform to change in....310
Vassar Place....825-27, 950
Whitney Street....866

GRAND JURY—
Barry, John F., services as expert....406, 407
Expense fund....407
Foreman approving demands....407
Globe Theatre....509-16
Ingham, Richard L., withdrawal of resignation....255, 256
Macphee, Arthur F., police officer....815, 816
Taylor, Charles H., police officer....815, 816

GRAND STANDS—Construction....649

GRANT AVENUE—
Acceptance....269
Sidewalks....269, 270

GRANT, HARRY E.—Injured in collision....877-79

GRANT, SENATOR—Recall election....678, 679

GRANTS—
Bernal, Jose Cornelio....108-109, 118
Big Trees....855
Concessions....458
Congress, Pueblo Lands....117, 276, 466, 547, 548
Franchises....88, 95, 310, 367, 368, 411
Freeman v. Belgarde....112
Hetch Hetchy....494
Market Place lots....852, 854
Patent to City of San Francisco....115-17, 276, 466, 547
Private grant to be interpreted in favor of grantee....112
Produce Exchange lots....852, 854
Pueblo Lands....115-17, 276, 466, 547, 548
Railroads....227
Rancho Rincon de las Salinas y Potrero Viejo....106, 107, 118
Sovereign, from the, interpretation....112
State to city....852-55
Telegraph companies....239-42
Tide lands....274, 275, 327, 852
United States to State....855
Yosemite Valley....855

GRAY BROTHERS—Blasting....477, 478, 803, 804

GRAZING....30, 39, 42

GREAT HIGHWAY— PAGE.
Act, State Legislature 260, 499
Board of Public Works, jurisdiction 259-61, 612, 613
Boundaries 261, 468
Buildings, erection of 612
Bulkhead construction 259
Charter amendment, control 613
Charter provisions 467, 499, 612
Control 259-61, 612, 613
Dedication 499
Esplanade 612
Grades 499, 500
Map, Outside Lands, delineated on 260
Order No. 800 260
Park Commission, control of 467, 468, 499-502
Pier, construction of 464-70
Reserve as public highway 260
Starting point, Cliff House end 261
State highway tax on automobiles for improvement of 940-42
Width 499, 500

GREAT NECESSITY—
Expenditures in cases of 994
Non-contract printing 675

GREEK RESTAURANTS—Employment of females in 426-28

GREENE, EDWARD M.—Civil service standing 879, 880

GREER AND FRAU—Saloon permit 568

GROCERS—License, sale of liquor 482

GROWTH—Water service keeping pace with 295

GUARDIAN CASUALTY AND GUARANTEE CO.—Bond, fiscal agent 186, 187

GUTRADT, JOSEPH CO.—Soap manufacture 846

H

HACKNEY CARRIAGES—Regulation 520

HAGEN, D. J.,—Injured by ambulance 964, 965

HAHNEMANN MEDICAL COLLEGE—Students, City and County Hospital 127

HAIGHT STREET—Track connection, United Railroads 871

PAGE.

HALF-ORPHANS—Maintenance of 400

HALLECK, HENRY W.—Mortgage 107

HALLS—Common right to 537, 538
Seating capacity 331, 332

HAMILTON SQUARE—
Hoadley v. San Francisco 546
Title 546, 547
Transfer to Playground Commission 546, 547
Van Ness ordinance 547

HAMPTON, ROBERT W.—Gas and water inspector 771-75

HANBRIDGE, F. B.—Private ownership, streets 53

HANNON, JOHN—Street sweeper, injury 687, 688

HANSBROUGH BROTHERS CO., bid 199

HARBOR COMMISSIONERS—(See State Harbor Commissioners.)

HARDENEDY, W. E.—Withdrawal of resignation 164-66

HARRIS AUTOMATIC STOP SIGNAL—Traffic 991

HARRISON CORPORATION—Damages, overflow of water 976

HARRISON STREET—
Cornwall and Finn, credits for grading 825-27
Grading 825-27, 950, 968
Hauling certain substances, prohibiting 1013
Ocean Shore Railway Co., franchise 25
Ordinances 440, 441, 950, 968, 969
Power poles 134
Regrading between First and Second 440, 441
Southern Pacific Co., tracks 210, 212
Southern Pacific tracks, portion not covered by franchise 217, 218
Wetmore, Manuel and Wetmore, grading contract 441

HAULAGE—
Building materials 535
Cars, Municipal Railway 159, 160
Freight, Ocean Shore Railway Co. 105
Manure 232
Mission Viaduct 323, 324
Ordinance forbidding, certain substances in certain districts 1013, 1014

HAVELOCK STREET—Fence, Southern Pacific Co. 691-93

HAVERHILL, Mass.—Police Department 289

PAGE.

HAWTHORNE STREET—Grades 950

HAYES MAP 662

HAYES STREET REGRADE 831-35

HAZARD—(See Danger; Fire Hazard.)

HEAD STREET—Opening 845

HEADS OF DEPARTMENTS—

- Additional employees 1009
- Appointments 83
- Assignments to position 390, 391
- Discretion 390, 391
- Dismissals 682
- Expenditures under two hundred dollars 675, 994
- Filling vacant positions before creating new ones 823
- Jurisdiction under charter amendment 694
- Leaves of absence 387
- Printing, non-contract orders 675
- Probationer, discharge of 130
- Suspensions 676, 693
- Temporary appointments 83, 938
- Unexpended balances of appropriations 57
- Vacations 387

HEALTH—

- Blasting, Gray Brothers 478
- Burials 33, 40
- Business regulation 33
- Cemeteries 398, 475
- General Laws 848-51
- Height of buildings 143
- Laundries 145, 161, 554
- Materials, razed buildings 168, 169
- Meat, Australian, free from disease 299, 300
- Meat inspection 471
- Police power 139
- Public Health Act 849
- Quarantining contagious diseases 770
- Restrictions on use of property 140
- Schools, Inspectress of 451, 452
- Sewer construction 501
- Slaughter houses 40, 41
- Stables 393, 462
- State laws protecting 303, 848-51
- Undertaking business 32
- Unwholesome trades 40
- Vacations promoting 289

HEALTH DEPARTMENT— PAGE.

Abatement of nuisance 417, 418, 433, 448-50

Ambulance, Emergency Hospital, collision with automobile 314

Ambulance, person injured 964, 965

Appointments 3

Appropriations—

Additional 388

Budget 1-4

Australia, meat shipment from 299-303

Automobiles, employees using their own 487

Births, registration of 330

Bubonic plague 848

Budget appropriations, limited to 1-4, 388

Budget estimates 5

Buildings—

Destruction of 448-50

Flooring of 433, 434

Portion of, condemnation 417, 418

Bureau of Vital Statistics 330

Butchers, inspection on holidays 492, 493

Casserly, Thomas, plumbing inspector, suspension 861

Certificates of birth 330

Certifications, civil service, refusal to accept 332, 333

Charter framers, purpose of 6

Charter provisions 1, 3, 4, 5

Chinese, certificate of birth of 330

Cholera 848

Chop Suey restaurants, white women employed in 426-28

City and County department 492

City and County Hospital, visiting staffs 127

Civil service, refusal to accept certifications 332, 333

Class legislation 427, 428

Closing office on holidays 492

Compulsory removal, contagious diseases 807, 808

Condemnation—

Flooring of building 433, 434

Portion of structure 417, 418

Contagious diseases—

Forcible removal 807, 808

Isolating 770, 848-51

Control over expenditures 1, 3, 4

Demands 3

Destroying, structure or part 417, 418

Diphtheria germ carriers, isolation 848-51

Discretionary power vested by Charter 3, 4

HEALTH DEPARTMENT—(Continued)

PAGE.

Disease—
- Isolating contagious cases 770
- Preventing spread 848-51
- Protection from 303

Dismissed employee certified for appointment 332
Eight-hour law 388
Election days, closing offices on 492
Emergency arising 4
Emergency Hospital ambulance damaged in collision 314

Employees—
- Control over 3
- Having own physician 526
- Using their own automobiles and getting transportation allowances 487

Employers' liability 526

Expenditures—
- Control over 1, 3, 4, 740
- To be limited to appropriations 388

Females, employment in restaurants 426-28
Fever, preventing spread 848
Flooring of building 433, 434
Forcible removal, contagious diseases 807, 808
Free transportation, special police officers 218, 219
Fruit stand, open, condemnation 433
Greek restaurants, employment of females in 426-28
Gutradt, Joseph Co., soap manufacture 846
Hagen, D. J., injured by ambulance 964

Holidays—
- Closing office on 492
- Meat inspection on 492, 493

Hospitals, eight-hour day 388
Imported meat 300
Injured employee having own physician 526
Insanitary structure, nuisance 417, 418

Inspection—
- Meat on holidays 492, 493
- Meat Saturday afternoon 470, 471

Inspectress of Schools 451, 452
Isolation, contagious diseases 770, 848-51
Isolation Hospital, non-civil service ward-woman 332
Itemizing of appropriations 2, 4, 5
Lane, Franklin K., opinion 1-3
Laundry certificates 161, 551
Leprosy, preventing spread 848
Light, lack of 418
Lodging house, condemnation certain rooms 417, 418

HEALTH DEPARTMENT—(Continued) PAGE.

Maintenance appropriations 1, 8
Market and Steuart Streets, temporary structure 433
Meat—
Condemnation of 303
Inspection on holidays 492, 493
Inspection Saturday afternoon 470, 471
Reinspection of 303
Shipment from Australia 299-303
Milk, sale and delivery of 552
Miller and Lux, inspection of meat 470, 471
New York City 552
Non-civil service ward-woman 332
Nuisances 417, 418, 433, 448-50
Nurse, contracting typhoid 903-906
Nurses, eight-hour law 388
Occupancy of buildings 513
Office building, repairs 590, 591
Permit, stable 393
Plague, preventing spread 848
Plumbers' signs 909
Police officers acting as health officers 808
Polyclinic, visiting privileges, San Francisco Hospital 127
Portion of structure, condemnation 417, 418
Power vested by Charter 4
Quarantining contagious diseases 770
Registering of births 330
Removal, contagious diseases 770, 807, 808, 848-51
Repairs, office building 590, 591
Restaurants, certain, employment of females in 426-28
Rooms, lodging house, unfit for occupancy 417, 418
Safeguarding public health 808
Salary appropriations 1, 2, 4, 8
San Francisco Hospital, visiting staffs 127
San Francisco Polyclinic and Post Graduate College 127
School Inspectress 451, 452
Sidewalks front of office building 591
Slaughter houses, inspection 471
Soap manufacture, regulation 846, 847
Special police officers, free transportation 218, 219
Specialist, emergency arising requiring 4
Stable permit 392-94
Stamping of meat, federal authorities 300-302
State Board of Health 330, 848-51
State Registry Bureau 330
Steuart and Market Streets, temporary structure 433
Structure, portion of, condemnation 417, 418
Summarizing of appropriations 2, 4, 5
Tallow rendering 847
Tobin, Agnes, nurse, contracting typhoid 903-906

HEALTH DEPARTMENT—(Continued) PAGE.

Transportation—

Allowances to employees 487
Free, special police officers 218, 219

Typhoid fever, nurse contracting 903-906
United States inspection of meat 299-303
Urgent necessities, additional appropriations from 388
Ventilation, lack of 418
Visiting staffs, San Francisco Hospital 127
Wholesale butchers, inspection of meat 492, 493
Workmen's Compensation Act 526, 904, 905

HEALY-TIBBITTS CONSTRUCTION CO.—Contract, Mission Viaduct 322-24

HEARINGS—

Applications to open streets 203
Charges, civil service employees 223-25
Civil Service Commission 676
Firemen 684
Police officers 683, 684

HEAT—

Charter provisions 410, 758
City Electric Co., bid 622-24
Pacific Gas & Electric Co., bids 622-24
Public buildings 622-24
Rate for 432
Regulating rates and service 617-19
Removal of mains 618
Revocable permits 619

Supervisors—

Fixing rates 758-62
Regulating 717

HEIGHT—

Billboards 139-43
Buildings 143, 144, 271, 272
Fences 142

HEIRS—Double assessment on 610, 611

HEMLOCK STREET—Open public street 372, 373

HENRY STREET 692

HENZEL, EDWARD F.—Reinstatement 381

HETCH HETCHY— PAGE.

Acceptance of grant 494
Administrative organization 496
Barley for 1022-25
Bond issue 77, 494, 495, 595, 596
Bond moneys; use on extensions of mains....77, 78, 595
Condemnation suits 496
Construction work, actual....495, 496
Elections, bond 494, 495
Extension of mains 77, 78, 595, 596
Integral part 77, 78, 595, 596, 779, 780
Maps, filing of 495
Procedure to carry out terms of grant....494-96
Propositions at elections 494, 495
Raker Act 494, 495
Rights of way 495, 496
Rolandi, F., form of sub-contracts 975
Water bonds 77, 495, 595, 596
Water supply bonds 494, 495
Withdrawal of lands 496

HEWSTON, JOHN—Bernal Rancho 109, 111

HIGHER LAND—Liability of owner....737

HIGHWAYS—

Bonds, State highways 67-69
Legislative authority to use....247
Public, belong to 506
Public entitled to free passage along....506
Routes for State highways....68
State automobile tax 940
Telegraph lines 239, 240
Telephone lines 240
Use under Act of Congress....239, 240

HILLCREST—Opening streets, water mains....19

HIRING—

Automobiles from employees 445-47
Horses and buggies 934, 935
(See also Rent.)

HOADLEY SURVEY 110

HOCK, HARRY—Fireman 813, 814

HOLE IN STREET—Automobile damaged....791

HOLIDAYS— PAGE.
Act of State Legislature....314
Barber shops closing....572
City and County offices....492
Closing city offices on....492
Election days....492
Health Department offices closing on....492
Labor Day....156
Meat inspection on....492, 493
Municipal....492
Municipal election days....314
Ordinance No. 324....314
Pawn shops closing....570-72
Penal Code section....572
Primary election day....314
Saturday afternoon....471
State....492
State law....471

HOLLADAY AVENUE—Ocean Shore Ry. Co. tracks....227

HOLLIS, WILLIAM—Deed, Leroy Place....979

HOLMAN, W. L. Co.—Contract, Municipal Railway cars....157-60, 442

HOME INDUSTRY—Bids, boilers, Relief Home....321

HOME TELEPHONE CO.—Connection with Pacific system....196, 402

HOOPER STREET—Franchise rights, Southern Pacific Co....211

HORSES—
Hiring....934, 935
Runaway, injuries....670-72, 687
Shoeing....16, 17, 934, 935
Stabling....251, 393
Under heading of "supplies"....17, 935

HOSE—Fire, bids....79-82

HOSEMEN—
Appointed as lieutenant....282-85
Eligible lists....557
Jones, Robert J....837, 838
Leuterdt, C. F., reinstatement....765-67
Machinists, Corporation Yard....557
Spellman, Martin....282-85

HOSPITALS— PAGE.
Bonds, 1908 629
Building Law 349, 350, 995
City, outside 625
Clinics, distinction 438, 439
Construction 349, 350
Definition 349, 438
Diseases, contagious, isolating 770
Dogs 30
Eight-hour law 388
Emergency Hospital ambulance 314
Existing building used for 995
Females working in 388
Injured employees treated 626, 645, 646, 878, 879
Lane Hospital clinic 437
Maintenance of by municipality 314, 585
Noises on streets, ordinance prohibiting 307
Nurse contracting typhoid 903-906
Nurses, eight-hour law 388
Ordinance No. 823 438
Permit from Supervisors 349-51
Quarantining contagious cases 770
Stanford Medical Clinic 437, 439
Supplies 539
Tuberculosis Hospital 625, 629, 630

HOTELS—
Alum Rock Park 841
Amusement license 532
Garage in, forbidden 529-31
Inside Inn, Exposition 456-59
License tax 522, 556
Ordinance No. 1677 556
Panama-Pacific International Exposition Co. 456-59
Permit to operate not necessary 458
Person renting room and selling goods 1014-16
Specifications for construction 709
State Hotel and Lodging House Act 708-10, 784, 785

HOURS OF LABOR—
Attorney General Webb, opinion 132, 133
Barber shops 572
Charter provisions 133, 724, 834
Closing time, pawn shops, etc. 570-572
Eight-hour day 132, 133, 388, 834
Junk dealers 570-572
Laborers 133
Pawn shops 570-72
Police Department 132, 133
Second-hand dealers 570-72
Slaughtering 471

PAGE.

HOWARD, JOHN GALEN—Non-resident, demands for services, 46, 47

HOWARD STREET—
Acceptance, crossing of Ninth Street....94
Deed, San Francisco Homestead Union....216
Franchise rights, Southern Pacific Co....216
Poles, Sierra and San Francisco Power Co....134
Sewer, extension....381-84, 534
United Railroads, proposed routing over....169, 170

HUBBELL STREET—Franchise rights, Southern Pacific Co....211

HUCKSTER STANDS—On streets....506

HUMAN BODIES—Removal of....395-97, 475, 476

HUMBOLDT STREET—Franchise rights, Southern Pacific Co....211

HUMPHREYS MAP....54, 175, 357, 372, 404, 460, 479, 660-62, 667, 692

HUSBAND AND WIFE—Residence....703

HYDRANTS....85

HYER, JOHN J.—Reinstatement....380, 381

I

ILLEGAL—
Appointments....814
Dismissals....166

ILLINOIS STREET—Franchise rights, Southern Pacific Co., 212, 317

ILLNESS—Salary during....582, 583

IMMORALITY—Prevention of....428

IMPLICATION—
Legislative authority....228, 229
Powers of municipality....246, 247

IMPORTED MEAT....300-303

IMPOUNDED MONEYS—Assessment....614, 615

IMPROVEMENTS—
Assessments....628, 629
Definition....499, 518
Public utility, municipal....605, 606
Street—(See Streets; Paving.)

INADEQUACY OF WATER SUPPLY— PAGE.
Bond moneys, extensions of mains....77, 78, 595, 596
Civil Code section....292, 295
Extensions of mains....295, 409, 410
Lukrawka v. Spring Valley Water Co....295
Richmond District....595
Spring Valley Water Co., extension of mains....295, 296
Sunset District....595
Test wells, sinking....595

INCINERATORS—
Islais Creek....192-94, 792, 998
Sanitary Reduction Works....997, 998

INCONVENIENCE—Obstructions....480

INCORPORATIONS—Railroads....208, 209

INDECENT ADVERTISEMENTS....140

INDEMNITY BONDS—(See Surety Bonds.)

INDEPENDENT LIGHT & POWER CO.—Franchise rights....244

INDIVIDUAL—
Burden upon....563
Interference with....564

INDUSTRIAL ACCIDENT COMMISSION—
Death compensation....424, 820
Disability, lead poisoning....664
Lump sum settlements....820, 821
Medical and Hospital treatment....626, 646, 878
Occupational diseases....664
Opinion of attorney for....585
Team driver, injury to....787

INDUSTRIAL DISTRICTS—
Creation of....461-63
Los Angeles ordinance....145
Stables....250, 251

INFECTIOUS DISEASES—
Forcible removal....770, 807, 808, 848
Preventing spread of....848-51
Quarantining....770

INFRINGEMENTS—
Patent rights, cars, Municipal Railway....718, 719
Patent rights, street flushers....333, 334

INGHAM, RICHARD L.—Reinstatement as police officer....254-56

PAGE.

INGLESIDE SHEET METAL WORKS—Patent chimney 652-54

INGLESIDE TERRACES—Extension of streets 845

INGRESS—Rights of abutting owners 784

INITIATIVE—
Boxing exhibitions 757
Ordinance enacted under 569

INJUNCTIONS—
Blasting, Gray Brothers 478
Explosives, use of 478
Patent rights, street flushers.....333, 334
San Bruno Avenue, paving 607
Sealer, Weights and Measures.....729
Tax levy to pay bonds.....374

INJURIES—
Amendments, Workmen's Compensation Act.....904
Arata, John 351, 352, 356
Asphalting plant frightening horse.....670-72
Automobiles damaged—
Collision with steam roller.....689-91
Passing playground 439
Unguarded hole in street 791
Baker v. Board of Fire Pension Fund Commissioners.....352
Barnett, Benjamin 787, 788
Billboards 141
Blasting 478
Board of Public Works employees 626, 627, 645, 646, 687, 688, 787, 788, 1021, 1022
Cahill, John, park employee.....742, 743
Cement dust, employee incapacitated.....664
Charter framers' intent 585
Charter provisions 584, 585
City's liability 424
Collision automobile with steam roller.....689-91
Culvert, falling into 691
Death benefits 820, 821
Death from 352-56, 584
Defective condition of public work.....424
Discharge of duty 255
Disease, contracting 664, 905
Dow, Burritt N., compensation, treatment, street sweeper 1021, 1022
Drivers of teams, owners insuring 797, 818, 819

INJURIES—(Continued) PAGE.

Dunn, James H. 670-72
Edwards v. Sweigert 354
Emergency Hospital, treatment at 615, 626, 645, 646, 687
Employee having own physician 526
Employers' liability 424, 526, 616
Excavation, falling into 690
Exposition, firemen at 780-83
Eyes, street sweeper, injured 1021, 1022
Failure to report injury 742, 743
Fence 60
Firemen 129-32, 351-53, 356, 443, 444, 780-83
Fireworks 705
Grant, Harry E., motorman 877-79
Hagen, D. J., injured by ambulance 964
Hannon, John, street sweeper 687, 688
Hole in street 690, 691, 791
Horse runaway, frightened by paving plant 670-72
Hospital treatment 626, 645, 646, 687, 877-79
Hospitals maintained by city 585
Industrial Accident Commission 424, 585, 626, 645, 646, 664, 787, 820-22
Ingham, Richard L. 255
Insane through 352, 353, 356
Lead poisoning 664
Leahy, Dennis, laborer, compensation 663, 664
Lewiston, damage suit 671
Lichtig, A. J., automobile, hole in street 791
Lump sum settlement 821
Massachusetts Workmen's Compensation Act 905
Medical treatment 626, 627, 646, 687, 1021, 1022
Norton, Patrick 626, 627, 645, 646
Notice to employer 688, 742, 743, 1021, 1022
Occupational diseases 664
O'Donnell, J. W., street sweeper 1021, 1022
O'Donnell, Patrick, street sweeper 615-17
Panama-Pacific Exposition, firemen at 780-83
Park employees 742, 743
Pavements, street openings 560, 618, 643
Pension, entitled to 129-32
Playgrounds—
Damage to passer-by 439
Visitor to 611, 612
Police officers 255
Probationers 131
Public service 446
Runaway horse striking street sweeper 687
Russell, J. E., foot injured by steam roller 805
San Francisco Hospital, treatment at 877-79
Stack, Edward J., asphalt worker, death 819-22

INJURIES—(Continued) PAGE.

Steam roller—
Automobile colliding with 689
Foot injured 805

Street repairing machines 670, 671
Street sweepers 615-17, 687, 688, 1020, 1021
Suicide as result of 352, 353, 356
Susskind, S. H., automobile collision 689-91
Teams 787, 788, 797, 818, 819
Typhoid fever, nurse contracting 903-906
Unguarded hole in street 791
Visitor to playground 611, 612
Vrooman Act 689, 690
Wisconsin Workmen's Compensation Act 906
Workmen's Compensation Act 424, 526, 583-85, 616, 626, 627, 646, 664, 687, 688, 742, 782, 783, 787, 797, 820-22, 1021
Wyatt & Co.'s automobile hit street sweeper 615-17

INSANE—
Arata, John 352, 356
Fireman, result of injuries 352, 353, 356
Insurer not exempted from liability 353

INSANITARY—
Buildings 433, 434, 448
Flooring 433, 434
Lodging houses 417
Ordinance No. 501 (New Series) 417
Restaurants 428
Rooms, certain ones, lodging house, condemnation 417, 418

INSIDE INN—Exposition 456-59

INSPECTION—
Blasting 705
Brand, Board of Health 301
Bureau of Animal Industry 300, 302
Bureau of Pure Foods and Drugs 299-303
Department of Agriculture 299-303
Department of Electricity 586, 588, 598, 796, 797
Electrical wire installations 586, 588, 598, 985
Federal authorities, acceptable to 299-303
Fees, street openings 643
Food supplies 540
Holidays, meat inspection on 470, 471, 492, 493
Meat 299-303, 470, 471, 492, 493
Miller and Lux 470, 471
Moving pictures 1011

INSPECTION—(Continued) PAGE.

Ordinance No. 1265 (New Series) 300-303
Overhead construction....586, 588, 598
Pacific Telephone and Telegraph Co....602
Prisoners' food 540
Pure Food and Drug Act 300, 302
Reinspection 303
Slaughtering 41, 471
Stamping, federal 300-302
Standard, U. S. 301
Street openings 560, 561, 643
State laws 303
Telephone installations 602
Underground conduits 586, 588, 598
Wires, installation of 586, 588, 598

INSPECTORS—

Byrne, Stephen A....772
Carrell, J. W. 380
Casserly, Thomas, plumbing inspector....861
Civil service 920, 921
Department of Electricity 380
Ellison, Edward 771-75
Gas and Water Inspectors....771-75
Hampton, Robert W....771-75
Henzel, Edward F....380
Hyer, John J. 380
O'Leary, Frank 772
Pacific Gas and Electric Co....560, 561
Reinstatement 380
Schools, Health 451, 452
Street openings 560, 561
Supplies 962-64
Tupper, O. M. 772
Water and Gas Inspectors 771-75

INSTALLATION—

Accounting system, uniform, municipal ..1004-1006, 1017, 1018
Alarm bells 337
Defects in 596, 598
Electrical 586, 588, 598, 985, 986
Electricians, bonds 596
Electroliers 431, 432
Negligent 618
Ordinances regulating 596-98
Pacific Gas and Electric Co....560, 561
Reporting 601-603
Steam heat 618, 619
Telephone motors 601-603
Wires within buildings 596

INSTALLMENTS— PAGE.
Contracts, progressive payments....999
Death benefits....820, 821
Sales of merchandise....594
Street assessments....441, 869, 1003

INSTITUTIONS—Supplies for....539-41, 1023, 1024

INSTRUMENTS—
Acknowledgments....519
Installment, contracts....594
Recording....621, 769

INSUBORDINATION—Suspension for....676, 677

INSURANCE—
Decisions....305
Department insuring its property against fire....304, 306
Drivers of teams....797, 818, 819
Insane person....353
Public library....304, 306
Suicide....353

INTEGRAL PART—
Existing utility, acquisition of....779, 780
Hetch Hetchy system....77, 78, 595, 596

INTENTION—
Residence in city....14, 252
Resolution of....181-83, 565

INTEREST—
Annual to semi-annual, change....375, 376
Bonds....52, 58, 186
Bonds, Santa Rosa....374-77
City to be protected....81, 82
Decisions....374-79
Employees in public contracts....17, 344, 345
Fiscal agency, New York....375
Officials in public contracts....17, 344, 345
Place of payment, change....375, 377
Property owners....183
Public utility, municipal....605, 606
Rate change, additional burden on taxpayer....377
Reversionary interest of State in streets....276
Semi-annual....375, 376
Statute....375-79
Surplus, bond funds....604
Tax levy....1028
Tax sales, illegal....659
Water mains, laying of....517, 518

INTERFERENCE— PAGE.
Access to ocean front 466, 467
Business, lawful 35, 36, 37
Individual liberty 564
Natural flow of surface water 738
Property rights 144
Rights 33
Use of park by public 956, 962

INTERIOR DEPARTMENT—Hetch Hetchy grant 494-96

INTERMENTS—A nuisance 475, 476

INTERPRETATION—
Bids 79-82, 544, 622-24
Dance license ordinance 508
Seating capacity 332
Specifications—
Beale Street bridge 235-38
Fire hose 82
Incinerator 192-94

INTERSTATE—
Federal franchise rights 242, 243
Meat shipments 300, 303
State interference with shipments 303

INTOXICANTS—Sale during election 678, 679

INVALID—
Advertising on refuse cans, contract 506
Assessment, cemetery property 829
Bond issue proceedings 374, 376-79
Building Law section 393, 394, 461, 462, 552, 556
Charter provision—
Erection of poles 134
In conflict with Constitution 137
Civil service rule 268
Class legislation 36, 427, 428, 638-40
Classification for taxing purposes 640
Contract—
Extending beyond term of office 290, 291
For less work than proposed in the resolution of intention 656
Through clause in specifications 777, 778
Where bid incomplete 181-84
Courts, considerations before declaring enactment invalid ..638

INVALID—(Continued) PAGE.
Enactment of law similar to code section....242
Fresno, license tax on merchants....640
Interference with rights....34
Laundry ordinance....551, 552
Law v. San Francisco....377
Legislature exceeding power granted by Constitution....38
License ordinances....638, 640
Lighting poles, control over, ordinance....717
Los Angeles—
Charter provisions....750, 751
License tax....640
Modesto bond issue....374
Municipality exceeding power granted by Constitution....38
Ordinances—
Must be obnoxious before being invalid....638
Only fundamental rights or personal privileges invaded....553
Street openings....195, 197, 201, 204, 270, 271
Subject not expressed in title....535
Taking away powers of Police Commission....481
Unauthorized appointments....504
Undertaking establishments....31
Penal Code section....572
Permits, use of streets, by constitutional amendment....415
Resolution—
No. 7814 (New Series), Board of Public Works....28
Of intention, street work....655-57
Use of union label....926
Santa Rosa bond issue....375-77
Specifications, clause in....777, 778
Stable ordinance....251, 530
Street improvement procedure....181-83
Street opening ordinance....195, 197, 201, 204, 270, 271
Weights and Measures Bureau, ordinance....729

INVESTIGATIONS—
Additional employees....608, 609
Charges, civil service employees....223-25, 683
Civil service....920, 921
Supervisors, power....170
Suspensions by Civil Service Commission....676-78
Widows' pensions....400

IRREGULAR—
Appointments....814
Bids....80-82, 180-84, 199, 795, 796
Proceedings, bond issues....377, 378

IRWIN STREET—Franchise rights, Southern Pacific Co....211

ISLAIS CREEK— PAGE.
Bernals, patent to 106, 107
Boundaries 108-115
Bridge over 316-18, 798-800
Freeman v. Belgarde 110-115
Incinerator—
Litigation 998
Receipts from scavengers 792
Terms of contract 192-94
Private ownership 120
Sewer right of way 599
Spring v. Hewston 109, 110
Title to bed 106-120

ISOLATION—
Diphtheria germ carriers 848-51
Persons suffering from contagious diseases 770, 807, 848

ISOLATION HOSPITAL—
Non-civil service ward-woman 332
Salaries 2

ITEMS—
Budget appropriations 2, 4, 5, 810, 811
Demands, specifying on 121
Gas and electricity specifications 622-24
"Supplies," inclusive under 17

ITINERANT VENDORS 1014-16

J

JACKSON BUILDING AND REALTY CO.—Appeal from assessment 868-70

JACKSONVILLE—Paving of streets by street railway 92, 650

JAIL—
Alterations to buildings 999, 1000
Druggist 965

JANITORS—Appointment 885

JAPAN STREET—Open public street 460

JARNAC STREET—
Extension 99
Sewer right of way 600

JEFFERSON SQUARE— PAGE.
Deed of gift 548
Fire alarm station 548, 549

JEFFERSON STREET—
Dore v. Truett 275, 276, 327-29, 707
Extension, easterly from Buchanan 328
No reserve for street, west from Larkin 328
Not open public street from Larkin to Van Ness 329

JEWETT CAR CO.—Patent royalties on cars 718-21

JEWETT STREET—Franchise rights, Southern Pacific Co. 214

JITNEYS—
Diversion from Market Street 947-49
Permit 520, 521

JOHN SWETT SCHOOL 662, 663

JOHNSON, SAMUEL W.—Restoration to eligible list 251-53

JONES, ROBERT J.—Hoseman 837, 838

JOURNAL RESOLUTIONS—
Aquatic park, exchange of lots 851
Assistant Gas and Water Inspector, appointment 771
Atchison, Topeka and Santa Fe Railway Co., drawbridge, Islais Creek 799
Band, Municipal leader 8
Belt-line Railroad, use for passengers 279
Bridge, Islais Creek 799
Budget, number of votes for passage 608, 609
Cemeteries, removal of 475
Change of grade, Main Street 541-43
Condemnation, rights of donors of opera house 484
Drivers insured by team owners 818
Eighteenth Street, closing 565
Electroliers on Polk and Mason Streets 430-32
Ellison, Edward, assistant gas and water inspector 771
Eminent domain proceedings; rights of opera house donors 484
Emmet Place, stairway and fence 839
Exchange, city property for private property 851
Extensions of water mains 516
Gas and water inspectors, appointment 771
Hampton, Robert W., Gas and Water Inspector 771, 772
Jefferson Street, from Larkin to Van Ness, whether open public street 327

JOURNAL RESOLUTIONS—(Continued) PAGE.

Lighting electroliers 430-32
Lights, additional 162
Main Street, change of grade 541-43
Market Place lots 851, 852, 880
Mason Street, electroliers 430-32
Municipal Band, leader 8
Ocean Shore Railway Co., hauling of freight 105
Opera House, condemning rights of donors 484
Pacific Gas and Electric Co., electroliers on Polk and Mason Streets 430-32
Parking of cemeteries 475
Poles for additional street lights 163
Polk Street, electroliers 430-32
Produce Exchange lots 851, 852, 880
Removal of cemeteries 475
San Bruno Avenue, litigation 607
Southern Pacific Co. 851, 880
Streets, use of 162, 163
Team owners insuring drivers 818
Use of streets 162, 163
Van Ness Avenue from Jefferson to Lewis, whether open public street 327

JUDGMENT—

Carrell, J. W. 380
Cobb, John F. 119
Contractors, temporary deposits 316
Dore v. Truett 274, 327, 707
Emmet Place 784
Execution 275
Fort Miley, land for 298
Gray Brothers, blasting 478
Henzel, Edward F. 380
Hyer, John J. 380
Inspectors, Department of Electricity 380
Mandonnet v. All Persons 479
Moss, J. Mora 107
North Peter Smith Tract 274
Pensioners, against 706
Per diem men, vacations 980, 984
Pioche, Francis L. A. 119
Pueblo lands, San Francisco 116, 117, 466
Rancho Rincon de las Salinas y Potrero Viejo 107
Recording 369
Sale of property on execution 167
San Bruno Avenue, street work litigation 607, 608
Sheriff executing upon 536
Smith, Peter 275, 327, 460
Stockton Street Tunnel assessment cases 256, 257

JUDGMENT—(Continued) PAGE.

Surplus after satisfaction of....536
Surplus fund, payment out of....730
Telephone merger....196
Treasurer holding deposits from contractors....316
United States v. San Francisco....298
Weights and Measures Bureau, salary demands....728-31

JUNK DEALERS—Ordinance regulating....570-72

JUNO STREET—Widening....322

JURISDICTION—

Board of Control....1005
Board of Public Works....135, 234, 235, 259-61, 486, 487, 511, 513, 710, 711
Board of Supervisors....310
Buena Vista Park....467
Building construction....511, 710, 711
Charges, hearing of....693, 694
City Board of Trustees....363
Civil Service Commission....390, 693, 694
Classifications, civil service....390
Closing of streets....310
Construction of public buildings....486, 487
Election booths, repair and maintenance....486, 487
Election, Charter amendments....101
Elections....724
Embarcadero....382-84, 429, 430, 533, 534
Fire houses, construction and repair....486

Franchises—
Granting of....310
Southern Pacific Co....310

Funds....3, 6
Geary Street....794
Golden Gate Park....467, 468
Great Highway....259-61, 467, 468, 499-501, 612, 941
Maintenance of public buildings....486
Monuments....680
Native Sons' Monument....680
Ocean Front....466-68, 612
Officers of special and limited....147
Park Commission....259-61, 467, 468, 499-502, 941, 957-61
Parks....467, 468, 500-502
Playgrounds....468
Point Lobos Avenue....794
Poles, erection of....234
Political Code sections....382-84
Public buildings....486
Railroad Commission....758-61

JURISDICTION—(Continued) PAGE.
Railway construction....233, 234
Repair of public buildings....486, 487
School houses, construction and repair....486
Southern Pacific Co., franchise....310
Squares....467, 468
State Harbor Commissioners....382-84, 429, 430, 533, 534, 565
Streets....135-37, 203, 409-14, 695-701
Streets, closing of....310
Streets, water front....382-84
Supervisors, streets....135-37
Tide lands....466, 565
Track construction....234, 235
Urgent repairs to streets....697
Water Front....382-84, 534
(See also Regulation.)

JUSTICES OF THE PEACE—Employees brought under civil service....389, 390, 771, 803

K

KAINS, ARCHIBALD—Deed, widening of Juno Street....322

KANSAS CITY—Bill board ordinance....142

KANSAS STREET—Improvement of street....731
Warren v. Chandos, grading contract....182

KELLY, WILLIAM A., civil service....830, 831

KENTUCKY STREET—
Bridge over Islais Creek....316-18, 798-800
Franchise rights, Southern Pacific Co....211, 212
Franchise to railroad....317

KEYSTONE CONSTRUCTION CO.—Contract, Mission Viaduct....322, 323

KILLED—
In discharge of duties....352, 354, 584
Police officers....584, 585
Sewer Department employees....423
Statute meaning....354

KINETOSCOPE PARLORS—
Laurelle v. Bush....482
License....482, 648
Near school or church....398-400, 569
Ordinances regulating....398-400, 648, 1011-13
Permits, Police Commission....482, 1011-13

KING STREET— PAGE.
Franchise rights, Southern Pacific Co.....211, 214, 335, 336
Southern Pacific Co., paving.....335, 336
Spur tracks.....211, 335, 336

KIRKWOOD AVENUE—Title.....106, 120

KLINK, BEAN & CO.—Uniform municipal accounting system.....1004-1006, 1016-19

KNIGHTS OF PYTHIAS HALL—Religious services.....577, 578

KOHLER AND CHASE—Glass window damaged by fire truck....972

KUBEY, SAMUEL—Permit, kinetoscope parlor.....399

L

LABEL—Union, on printing 926

LABOR—
Day labor 696, 699-701
Day of rest 132, 133
Eight-hour day 133, 388, 834
Hours of labor 132, 133, 570-72, 724, 834
Labor Day holiday delaying construction work.....156
Minimum wage 724, 832-35
Minors 989
State Labor Commissioner.....132
Strikes.....153, 154
Under heading of "supplies".....17
Union label on printing 926
(See also Hours of Labor.)

LABORERS—
Charter provision 724
Distinction between laborers and police officers.....133
Hours fixed by charter.....133
Minimum wage 724, 834
Norton, Patrick 626, 645, 646
United Railroads paying less than minimum wage....832-35

LACHES—
Barring reinstatement.....767, 809
Fireman's application for appointment.....284, 285

LAGUNA STREET— PAGE.
Dore v. Truett....328
Extension northerly....328
Open public street northerly from Lewis Street....328
Street reserve....328

LAIDLEY STREET—Damages, landslide....736-39

LAKE ELEANOR—Water supply....77, 494-96

LAMBERT, MRS. W. D.—Refund of taxes....318-20

LAMP POSTS—
Authorized obstructions....85
Warning, noises near hospital....307

LANDLORD—Repairs at expense of....590

LANDS—
Act, March 14, 1870....371
Agents, license....528
Anglo-American Land Co....326
Cemetery lands....396-98
Conveyance of....371
Daniel Webster School....891-94
Eminent domain, subject to....485
Exchange of....370-72
Execution sale....167
Height of buildings....143, 144
Hetch Hetchy....494-96
Islais Creek....106-120
Juno Street widening....322
Lane, Franklin K., opinion, sale....372
Library block, Van Ness....58
License tax, dealers....528
Mission Creek....58
Necessary and convenient....311-13
Nineteenth Street, opening....326
Playground, Seventh and Bryant Streets....370-72
Possession, Code of Civil Procedure....480
Real estate dealers, license....528
Recording instrument affecting title....370
Relief Home....339-44
Sale of....58, 273, 339, 370-72
Schools, purchase....810
Seward Street, deed....326
South of Market Playground....370-72
Surface water, protection from....737, 738
Titles....260
Transfer from one department to another....371, 372
Tunnels....311, 312
Twin Peaks Tunnel....311, 312
Vacant and unused lots....370-72
Values, height of buildings, relation....143
Withdrawal of....496

PAGE.

LANDSLIDE—Bemis and Laidley Streets 736-39

LANE, FRANKLIN K.—

Appropriations 741, 811
Bail money, attachment 509, 536
Board of Public Works, executive duties 203
Board of Supervisors, legislative 203
Bond, maintenance of street work 124, 126
Budget 811
City real estate, sale of 372
Demands, approval of 3, 740, 953
Dismissal of employees 683
Expenditures, departmental 740, 741, 953
Fire Commissioners' powers 288, 289
Fire Department 103, 104, 287, 557, 558
Firemen's pensions 131, 579
Funds 3, 811, 953
General Fund 811
Health Department funds 1, 2, 3, 740
Horse and buggy hire 935
Horse shoeing contract 16, 17, 935
Leave of absence 288
Maintenance of street, bond 124, 126
Mechanics, Fire Department 103, 104, 557, 558
Pensions 131
Police officers 683, 715, 716
Police pensions 132
Randall Street 726, 727
Rank relating to pension 131
Reappointed officer, rights 715, 716
Relief firemen 287
Resignations 715, 716, 809
Sale of city property 372
Supplies, definition of 17

LANE HOSPITAL CLINIC 437

LANES 499

LAPACHET, CAMILLE L.—Leroy Place 978

LAPIER, L. B.—Permit for garage 529

LARKIN STREET—Franchise, street railway 206, 207

LAUNDRIES—

Bush Street 160
Certificates under ordinance 161
Chinese 552, 554, 712
Confining within certain limits 554

LAUNDRIES—(Continued) PAGE.

Decisions....145, 461, 462, 551-55
Forbidding conduct during certain hours of night....570
Invalid section, Building Law....462
Judge De Haven....555
Los Angeles ordinance....712
Nuisance, not a....554
Ordinance No. 144....161
Ordinance, validity of....551-56
Permit not necessary....461, 463
Police power....570
Prohibited in certain districts....554, 555
Prohibition without certificate obtained....551
Reconstruction of premises....160-62
Sacramento ordinance....553
Tamura, F. C....160

LAUREL HILL CEMETERY—

Litigation with city....36, 395
Parking of....475

LAWS—

Appeal not operating as a stay....480
Authorities (Front of volume).
Broughton Act....413
Building Law....102, 349, 350, 392-94, 461-63, 511-15, 649, 652, 654, 666
Charter provision for making laws....59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Cities subject to general laws except in municipal affairs....584
Citizenship....902
Class legislation....36, 427, 428, 436, 572, 638-40
Common law, ordinances harmonizing with....362
Conflicting with general laws....59, 72, 98, 139, 191, 248, 278, 289, 362, 426, 427, 564, 710, 711
Consolidation Act (See Consolidation Act).
Constitution—
  Conflicting with laws....242
  Provisions for making laws..72, 248, 278, 362, 426, 710, 711
Construction....528, 530, 785
  Liberality of....677
  Never given which leads to an absurd conclusion....677
  So that no word shall be superfluous....828
Construing every law as a whole....528
Deficiencies in....10
Equal protection of....427
Exclusion implied through express mention....85

LAWS—(Continued) PAGE.

General Laws—
And special laws to be read together....383
Control cities except in municipal affairs....584, 750
Effect of....556
Making laws not in conflict with....59, 72, 98, 139, 191, 248, 278, 289, 362, 426, 427, 564, 710, 711
Ordinances harmonizing with....362
Powers of municipality measured by....361, 364
Preventing spread of disease....848-51
Restrictions upon lawful legislation....362

Invalid (See Invalid).
Laches....809
Landlord and tenant....590
Legislative power....251
Limitations, Statute of....472, 766, 768, 810
Local laws, making....59, 72, 98, 139, 191, 248, 278, 289, 362, 426, 427, 564, 710, 711
Massachusetts statute....32, 33, 143
Minnesota statute....33
Mothers' Pension Law....400, 401
Motor Vehicle Law....488-90, 493, 910, 940, 942
Municipal affairs, charter controls....584
Municipal Corporations Act, 1883....361, 363, 365
Municipality not liable for torts in discharge of duties..314
New Jersey statute....81
New York statute....147, 148, 447

Operation—
Prospectively and not retrospectively....272
Uniform....427

Ordinance equal dignity with charter....812
Ordinance superseded by State law....843
Organic law....72, 404, 410, 413
Pennsylvania statute....92
Plumbing law....909
Police laws, making....59, 72, 98, 139, 191, 248, 278, 289, 362, 426, 427, 564, 710, 711
Public Health Act....849
Public Utilities Act....759
Pure Food and Drug Act....300, 302
Raker Act....494, 495
Repeal through conflicting constitutional provision....242
Review by the courts, subject to....38
Rural Cemeteries Act....829
Sanitary laws, making....59, 72, 98, 139, 191, 248, 278, 289, 362, 426, 427, 564, 710, 711
Servitudes....738

LAWS—(Continued) PAGE.

Special laws—
Applicable so far as provision is made in it.....383, 384
Reading together with general laws.....383

State—
Hotel and Lodging House Act.....708-10, 784, 785
Law superseding ordinance.....843
Laws.....303, 848-51, 989
Tenement House Act.....537-39, 553, 712

Statute of limitations.....472, 766, 768, 810
Statutory construction.....528, 530
Stay, appeal not operating as a.....480
Street Improvement Act.....65
Supervisors, power to make and enforce.....59, 72, 98, 139, 191, 248, 278, 289, 426, 427, 564, 710, 711
Torts, liability for.....314, 905
Uniform operation of.....427, 555
Van Ness ordinance.....547
Vrooman Act.....90, 689, 690, 750
Widows' Pension Law.....400, 401
Workmen's Compensation Act.....424, 526, 583-85, 616, 626, 627, 645, 646, 664, 687, 688, 742, 782, 783, 787, 797, 820-22
(See also Charter; Charter Amendments; Citations at front of volume; Civil Code; Code of Civil Procedure; Consolidation Act; Constitutions; Journal Resolutions; Orders; Ordinances; Penal Code; Political Code; Resolutions.)

LAYDEN, JAMES F.—Assistant chief engineer, Fire Department.....936-39

LAYING—
Electric conduits.....576
Gas mains.....576
Pipes (see Pipes, laying of).
Spur tracks.....550
Water mains.....516-18

LEAD POISONING.....664

LEADER, MUNICIPAL BAND.....8

LEAHY, DENNIS—Laborer, compensation.....663, 664

LEASES—
Advertising bill or resolution.....340
Advertising, Municipal Railway cars.....290-92, 543-45
Charter section.....853
Chestnut Street lot.....786

LEASES—(Continued) PAGE.
Employee personally interested in, to city....344
Extending beyond term of office....290
Health Department office building....590, 591
Installment plan sales....594
Lincoln School lot....262
Market Place lots....852, 880-83
Officer personally interested in, to city....344
Park Commission....469
Parks....841
Produce Exchange lots....852, 880-83
Railroad cars or tracks....105
Repairs by tenant under....590
Sanitary Reduction Works plant....997, 998
Southern Pacific Co....852-54, 880-83
Streets, portions of....506
Tide lands....275, 327, 328
Wise Realty Co....262

LEAVES OF ABSENCE—
Actual time in service....288, 290
Civil service rule....387
Committee of Efficiency superintending....288-90
Discretion, head of department....387
Efficiency, interest of....288, 289
Employee absent without leave....296
Fire Department....288-90, 387
Lane, Franklin K., opinion....288
Ordinances....288-90, 387, 977, 980, 984
Relationship of employee to city not severed by....345, 346
Tax Collector, employee absent without leave....296
Whelan, John J., copyist, County Clerk....830

LECTURES—Obstructing entrances, etc....331, 332

LEGISLATION (See Laws; Legislature).

LEGISLATIVE AUTHORITY—
Absence—
In franchise grant....248
Ordinance repealed by state act....709, 711
Assessments....869, 870
Board of Public Works....203
Board of Supervisors....59, 72, 98, 139, 191, 203, 248, 278, 289, 362, 363, 426, 427
Building construction....710, 711
Business regulation....36-38, 531
Charter—
Amendments....100
Bound by....413
Provisions....59, 98, 139, 191, 278, 289, 426, 427

LEGISLATIVE AUTHORITY—(Continued) PAGE.

City Board of Trustees....363
Classification of subjects of regulation....461
Constitutional provisions....72, 248, 278, 362, 426
Contracts....363
Courts, review of....36
Decisions....251, 549
Delegating of....247, 251, 507
"Dillon on Municipal Corporations"....228, 229, 251
Elections....100
Exceeding....553
Expressly conferred....229
Franchises, granting of....247
"Freund on Police Power"....247
Gas mains in streets....247
Implication, by....229
Improvement of streets....65, 66
Jenkins, Judge....247
Lane, Franklin K., opinion....203
McCracken v. San Francisco....363
"McQuillin on Municipal Corporations"....843
Municipal ownership of water works....247
Park, changing use of....549
Police power....36
Public health....851
Public utilities, establishing and operation....136
Public work, discretion....1001
Railroads to occupy streets....228
Rate fixing....474
Restraint through long term contracts....291
State, delegation by....367
Streets....65, 66, 203, 367
Supervisors....59, 72, 98, 139, 191, 203, 248, 278, 289, 362, 363, 426, 427
Surrender of....291
Use of streets....136, 247
Water mains in streets....247

LEGISLATURE, STATE—

Assembly, 1839....107
Assessment district....870
Belt-line Railroad, operation of passengers over....279, 280
Births, registration of....330
Bonds, Highway....67-69
Bridges....800
Building construction in San Francisco, no power to legislate on....710
Business—
Interference with....36-38
Regulation....33, 531, 712

LEGISLATURE, STATE—(Continued) PAGE.

Charter ratification of 359, 367
Charter amendments, approval....389, 549, 618, 693, 694
Classification of occupations 640
Contracts, limiting term of....291
Conveyance of lands....371
County officers, additional, creation of....455
Day of rest....132
Defective condition, streets, etc....424
Deficiencies in law to be remedied by.... 10
Delegation of police powers....395
Detective agencies 842
Determination as to proper exercise of police powers not final or conclusive.... 36
Drawbridges 800
Election day, sale of liquor on....679
Election laws, enacting 875
Embarcadero....382, 383
Eminent domain 207
Employers' liability....424, 526, 583-85, 616, 626, 627, 645, 646, 663, 664, 687, 688, 742, 782, 783, 787, 820-22, 1021
Exceeding power under Constitution.... 38
Extension of streets....382
Franchises, sale of 1020
Gas Inspector 772
Highway bonds 67-69
Holidays, declaring 314
Hotels, restricting size of....785
Land titles 260
Lands, conveyance of 371
Liquor, sale on election day....679
Lodging houses, restricting size of....785
Map of subdivision, filing.... 70
Massachusetts 143
Minors, maintenance of....400
Mothers' Pension Law....400, 401
Motor Vehicle Act 488-90, 493, 910, 940, 942
New York 142
Nurses, eight-hour law 388
Orphans, maintenance of....400
Panama-Pacific Exposition 458
Parks, changing use of....549
Parks, setting aside....548
Police powers, delegation of....395
Political subdivisions of State, powers from....488, 489
Power to create additional county officers....455
Private detectives 843
Public health 851
Public work, defective condition....424
Pueblo lands 547
Quieting titles 260

LEGISLATURE, STATE—(Continued) PAGE.
Railroad Commission fixing rates....758-61
Railroad construction....360
Rates, public utilities....758-61
Restrictions upon lawful occupations....36
Sale of franchises....1026
San Francisco Ladies' Protective & Relief Society, deed....685
Seal Rock, bridge....261
Sealer, Weights and Measures....455
Senate Bills....388, 843
Squares....547, 548
Street railroad franchises....1020
Streets—
Defective condition....424
Extension of....382
Reserve....547
Subdivision, filing map of....70
Tide lands—
Grant....327, 852
Use by City....274, 275
Trust conveyance to city....685, 686
Virginia....1009
Weights and Measures, Sealer....455
Widows' Pension Law....400, 401
Workmen's Compensation Act....
....424, 526, 583-85, 616, 626, 627, 645, 646, 664, 687, 688, 742, 782, 783, 787, 797, 820-22, 1021

LEIMERT, WALTER H.—Sale, Relief Home lands....341-43

LENGTH—
Service connections, limiting....642
Street openings, limiting....643

LEPROSY—Preventing spread of....848

LEROY PLACE—Public street....978, 979

LEUTERDT, C. F.—Reinstatement as hoseman....765-67

LEVIES—
Assessments....503, 628
Taxes....305, 373, 374, 377, 380, 384, 385

LEVY, LOUIS—Manager of Auditorium....883-90, 923, 924

LEWIS STREET—Dore v. Truett....276, 329, 707

LEWISTON, CITY OF—Damages, runaway horse....671

LIABILITY— PAGE.

Absence of written contract, city not liable....734, 735
Abutting property owners, paving....336
Accidents—
In playgrounds....611, 612
To street sweeper....615-17
Administrative department....741
Asphalting operations frighten horse, driver injured....670-72
Automobile—
Colliding with steam roller....689-91
Damaged, unguarded hole in street....791
Beale Street Bridge, contract....235-38
Bemis Street, landslide....736-39
Blasting....704-706
Board of Public Works Commissioners, condition in streets....697
City for injuries to employees....423-25
Contracting parties charged with notice of laws....504
Contractor, maintenance of street....125
Corporations furnishing service....293
Culvert, falling into....691
Damages....542
Decisions....705, 706, 735-39
Defective condition—
Public Work....424
Streets....690, 691
Embarcadero, sidewalk repair....533-35
Employers' liability....424, 526, 583-85, 616, 626, 627, 645, 646, 663, 664, 687, 688, 742, 743, 782, 783, 787, 820-22, 1021
Estopped to dispute....325
Excavation—
Adjoining property....315
Falling into....690
Fireworks, discharge of....705
Funds....741
Hagen, D. J., knocked down by ambulance....964
Hole in street, automobile damaged....791
Injuries to employees (See Injuries).
Insurance company....353
Islais Creek bridge, operation....800
Kohler and Chase, glass window damaged by fire truck....972
Laidley Street, landslide....736-39
Legislative department....741
Maier, Minna, damages, removal of buildings....734-36
Municipality—
Escaping....125
Not liable for acts outside authority....735, 736
Not liable for damages through exercise of governmental functions....964

LIABILITY—(Continued) PAGE

Negligence of officers or agents 689, 965, 972
Nurse contracting typhoid 903-906

Officers—
For acts of subordinates 220, 221
Negligence of 315
Obligation becoming personal liability 536
Personal 503, 504

Owner of higher lot to owner of adjoining lower lot 737
Patent royalties 718

Playground—
Automobile damaged passing 439
Visitor to, accident 611, 612

Property owners to pave 336
Railroads to pave 335
Razed buildings, materials from 168
Repairs to streets 88-95
Sewer Department employees, asphyxiated 422-26
Sidewalks 264, 265, 270, 533-35
Southern Pacific Co., paving 335
State Harbor Commissioners 384, 534
Street railways 88-95
Street sweeper injured 615-17

Streets—
Repair and reconstruction 265, 270
Water front, repair 384

Subsidewalk areas, reconstruction 264, 265
Surface of ground, change in 738
Tenant to repair 590
Torts in discharge of duty, municipality not liable for 314, 905
Tracks, tearing up 385, 386
Treasurer 331
Unauthorized appointments 503, 504
Workmen's Compensation Act 424, 526, 583-85, 616, 626, 627, 645, 646, 663, 664, 687, 688, 742, 782, 783, 787, 797, 820-22, 1021
Written contract necessary for city to be liable 735, 736

LIBERTY—State laws 303

LIBERTY THEATRE—Encroaching on Stark Street 873, 874

LIBRARIES, LIBRARY TRUSTEES—
Bonds, selling below par 56-59
Charter amendment necessary to sell land 58
Charter provisions 305

LIBRARIES, LIBRARY TRUSTEES—(Continued) PAGE.

Civic Center block, exchange for Van Ness Avenue block.. 56
Exchange, Van Ness block for Civic Center site.....56, 57
Expenditures, authorizing 305
Funds 305, 892, 1028
Insurance premiums 304-306
Los Angeles 841
Money on hand before building contracts let.....56, 57
Power of Library Trustees to insure against fire.....304-306
Power of Supervisors to authorize use of City real estate for library purposes 58
Purchase of library site..... 57
Sale of land..... 58
Selection of site, Van Ness Avenue..... 57
Tax levy for maintenance.....305, 1028
Trustees, powers under Charter.....305
Van Ness Avenue block, exchange.....56, 57, 58

LIBRARY BONDS—

Election 57
Ordinances authorizing 57
Par, sale at less than.....56, 58, 59

LICENSES—

Advertising in street cars.....639
Alameda ordinances 639
Amusement places 647, 648, 665, 667
Amusements 532, 647, 648
Apartment houses 522, 537
Automobiles 80-90, 493
Ball rooms 508
Ball throwing games.....648
Bill boards 146, 639
Boarding houses 522
Boxing exhibitions 757
Brokers, commission 613, 614
Buses 520, 521
Business 638-40
Butchers 639
Cabarets 532, 533
Cafeterias 556, 557
Cars, advertising in.....639
Caterers 522
Charter provisions 146
Chauffeurs 489, 490
Chico, City of.....638
Chimney builders 653, 654
Chutes 648
Commission merchants 613
Concerts 532

LICENSES—(Continued) PAGE.

Concessions 647, 648
Consolidation, ordinances 527
Corporations maintaining electrical departments 796, 797
Cycloramas 482, 648
Dance halls 508, 637-41
Dances 637, 638
Decisions 522, 638-41
Delivery companies 535
Detective agencies 842
Discontinuing business during life of license 712
Dogs 435, 436
Electricians 598
Entertainments 532
Exemption, public service corporations 597
Exhibitions 532, 648
"Fighting the Flames" 647, 648
Firms maintaining electrical departments 796, 797
Fish peddlers 638
Fresno 640
Fruit peddlers 638
Game peddlers 638
Games of chance 648
Globe Theatre 510
Graduated 639
Grocery stores 482
Hotels 522, 532, 556
Itinerant vendors 1015, 1016
Kinetoscope parlors 482, 648, 1011-13
Laundries 712
Laurelle v. Bush 482
Liquor, sale of 482-84
Lodging houses 522
Los Angeles ordinances 482, 527, 640
Manufacture of goods 484
Meat peddlers 638
Medicine, practice of 932
Merchandise brokers 613, 614
Merchants giving trading stamps 640
Middlemen 613, 614
Monthly, cannot be arbitrarily fixed at day rate 930
Motor buses 520, 521
Moving pictures 482, 648, 1011-13
Municipality, right to impose 641
Museums 482, 648
New York charter 532
Newspapers 639
Nickelodeons 482
Office rooms, letting 640
Ordinances 482, 527, 532, 537, 556, 557, 637-41, 648, 1011-13
Ordinances, consolidation 527

LICENSES—(Continued) PAGE.

Outdoor park 665, 667
Panoramas....482, 648
Peddlers 638
Phonograph parlors....482, 648, 1011-13
Physicians 932
Poultry peddlers 638
Private detectives 842
Public service corporations, exemption....597
Real estate dealer 527, 528
Refreshment places 522, 556
Rent collectors 528
Restaurants....522, 532, 556
Retail liquor dealers....482-84
Revocation 933
Revolving wheels 648
Ring throwing games 648
Rinks, skating 648
Roller skating rinks....648
Sale of goods....484
Saloons 482-84
Scalpers, ticket 929-31
Secondhand dealers 824
Skating rinks 648
Slides 648
Subdivision owners....527, 528
Supervisors, power to impose....37, 146, 797
Tax Collector, duties 930
Tenement houses 522, 537
Theatres 1011-13
Ticket peddlers 929-31
Toboggan slides 648
Trading stamps, higher license merchants giving....640
Transfer companies 535
Vegetable peddlers 638
Wheels, revolving 648
Wholesale liquor dealers 482
Young Men's Christian Association cafeteria....556, 557

LICHTIG, A. J.—Automobile damaged, unguarded hole in street..791

LIEN—

Administrator 610
Cemetery lots exempt from....397
Executor 610
Mechanic's 17
Proceedings, street improvements, must be strictly followed, otherwise no lien....656
Street assessments 67, 917
Street railway, on, for street work....89, 90
Taxes 632

LIEUTENANTS— PAGE.
Appointment without civil service examination....282, 285
Hoseman appointed as....282-85
Spellman, Martin....282-85

LIFE—Protection of....303

LIGHT—
Lodging houses....418, 785
Ordinance No. 138....418
Railroads maintaining during darkness....650
Street repair work....690

LIGHTING, LIGHTING COMPANIES—
"Abbott on Municipal Corporations"....246, 247
Additional street lights....162
Asphalt plant....762-65
Bids....622
Board of Public Works, control, erection of poles....717, 718
California Electric Light Co., franchise....244
Charter provisions....410, 411, 525, 717
City Electric Co....415, 622-24, 762-65
Civil Code section, furnishing of service....292
Consolidation Act....246
Constitutional amendment limiting rights in streets....293, 409, 410, 415, 524, 597, 598, 642
Constitutional privilege to use in streets....97, 135-37, 200, 201, 241, 249, 293, 294, 409, 412, 415, 524, 587, 597, 598, 619, 642
Contract, Pacific Gas and Electric Co....162, 431, 432
Corporation yard....762-65
Department of Electricity, permits....586-88
Electroliers on Polk and Mason Streets....430-32
Excavation work....690
Excess rates charged....473, 474
Extension of service (See Extension of Service).
Franchises....98, 164, 241, 247, 249, 293, 294, 409, 411, 412, 415, 523-25, 575; 576, 586-88, 597, 598, 642
Furnishing service within hundred feet of established mains....292-94
Independent Light and Power Co., franchise....244, 245
Inspection fees....598
Journal resolutions....162, 430-32
Keppelmann, In re....402, 560, 596, 597, 598, 642
License tax on companies prohibited....597
Los Angeles....586, 587
Mason Street, electroliers....430-32
Meters, installing at own expense....863
Municipal Light and Power Co....243

LIGHTING, LIGHTING COMPANIES—(Continued) PAGE.

Mutual Electric Light Co., franchise....244, 245
Ordinances....249, 619, 717, 718

Pacific Gas and Electric Co.—
Franchises....244, 622-24
Contract....762-65

Parks....500, 501
Polk Street, electroliers....430-32
Public buildings....622-24
Railroad Commission order....863
Railroads maintaining light during darkness....650
Rate litigation....474
Rates....431, 432, 525, 618
Russell, In re....136, 201, 243, 293, 410, 413, 586, 597, 642, 913
Service, charter provision....618
Service connections, installing at own expense....863
Sierra and San Francisco Power Co....525
State Hotel and Lodging House Act....785
Street repair work....690
Streets....622-24

Supervisors—
Fixing rates....758-62
Regulating....717

Supreme Court of United States....913-15
Universal Electric and Gas Co....408, 414

Use of streets....96, 134-37, 200, 201, 241, 249, 293, 294, 409-12, 415, 523-25, 575, 576, 586-88, 597, 598, 619, 642

Vested rights in streets....914

LILAC STREET—Franchise rights, Southern Pacific Co....216

LIME, forbidding hauling in certain district....1013, 1014

LIMIT, LIMITING—

Assessments, fifty per cent of value....503, 868
Audience to seating capacity....331, 332
Business....145, 531
City's powers, fixed by State....367
Civil service eligible list, names from....267
Contracts, term of....291
Death after injury....443, 444
Delegated powers of subordinates....247
Denominations of bonds....378, 379
Departmental expenditures....3, 4, 6, 8, 953
Expenditures to appropriations....388, 741, 811
Fares....362
Franchises; power to grant....190
Funds, use of....605

LIMIT, LIMITING—(Continued) PAGE.
Garnishment 536
Height of buildings 271, 272
Hours of business 471
Lodging house construction 708
Ordinances 362
Police power 140
Probationers 131
Rate of interest 376
Rights of corporations in streets 293, 409, 410, 415
Salaries, budget limitation on 120, 121
Service connections, length of 576, 642
Speed, street railway cars 233, 234
Statute of limitations 766, 810
Suspensions, authority of officer 678
Tax levy, parks 775, 776, 941
Taxation, by charter 798
Tracks, laying of 699
Use of parks 841
Use of streets 524, 597, 598

LINCOLN PARK 298

LINCOLN REALTY CO.—Sign 263

LINCOLN SCHOOL LOT—Sign on building 262, 263

LINCOLN WAY—Contract, street work 197-99

LINDLEY, CURTIS H.—
Municipal Railway across Golden Gate Park 954
Pier, Ocean Beach 464, 465

LIQUOR—
Amusement enterprise, prohibited 647
Charter provisions 481-84
Church, sale in proximity of 568, 569, 577
Closing hours 570
Decisions 145, 482, 483
Drunk on premises 481, 482
Elections, sale during 678, 679
Los Angeles ordinance 482
Penal code section 679
Primary election, sale during 679
Quantities less than one quart 481, 482
Regulation 145
Sale of, permit 481-84
School, sale in proximity of 568, 569, 577
Wholesale liquor dealers 482

LITIGATION— PAGE.

Argenti v. San Francisco....656
Bernal, J. C. et al., City and County v....600, 601
Bernal Rancho....106, 107, 118, 119
Bonnett v. San Francisco....264
California Academy of Sciences v. San Francisco....686
Carrell, J. W., reinstatement....380
Cobb v. San Francisco....119
Compromise....425, 426
Conlon, James, family of....425, 426
Cooper v. City and County of San Francisco....256, 257
Destructor Company, incinerator....998
Dismissal....425, 426
Donnelly v. San Francisco....729
Dore v. Truett....274, 327-29, 707
Dougherty v. San Francisco....620
Electric rate suits....474
Electricity Department inspectors, reinstatement....380, 381
Emmet Place....783, 784
Fort Miley, land for....298
Fresno, extension of railway tracks....359
Gafney v. San Francisco....656
Gas rate litigation....474
Henzel, Edward F., reinstatement....380
Hoadley v. San Francisco....546, 547
Hyer, John J., reinstatement....380
Impounded moneys, assessment....614, 615
Islais Creek Incinerator....998
Larsen, San Francisco v....522
Law v. San Francisco....527
Lynch, Patrick, family of....425, 426
McEvers, J. W., deputy sealer, salary demands....728-31
Money and property litigated assessment....971
Nerio v. Maestretti....844
North Peter Smith Tract, partition....707
Odd Fellows Cemetery Association v. San Francisco....564
Pacific Gas and Electric Co....560, 561
Pioche v. San Francisco....118, 119
Rancho Rincon de las Salinas y Potrero Viejo....106, 107, 118, 119
Rate litigation....474, 614, 615
Restaurant license....522
San Bruno Avenue, street work....607, 608
Sanitary Reduction Works....1020
Santa Rosa Avenue, sewer right of way....599
Schudel v. City Street Improvement Co....607
Scott, M. P., deputy sealer, salary demands....729, 730
Sealer, Weights and Measures....728-31
Sewer employees killed, families' claims....425, 426
Sewer right of way, Santa Rosa Avenue....600
Sidewalk construction....264

LITIGATION—(Continued) PAGE.
Smith, Peter 275, 460
Southern Pacific Co. enjoining operation of cars on certain streets 208
Spring Valley rate litigation 614, 615
Stanke v. City Street Improvement Co. 607
Stockton Street Tunnel assessment 256, 257
Street openings 560, 561
Telephone merger 196, 197
Tide lands 327-29
United States v. San Francisco 298
Warren v. San Francisco 632
Water rate litigation 614, 615
Weights and Measures Bureau 728-31

LITTER—Street, cans 505-507

LITTORAL PROPRIETORSHIP 466, 468

LLOYD AND SPENGLER—Premiums on bonds 497

LOBOS SQUARE—Use by Exposition Co. 841

LOCAL LAWS—
Charter 59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Constitution 72, 248, 278, 362, 426, 710, 711
Courts upholding municipality 638
State law superseding 843

LOCATION—
Poles, changing 278
Tuberculosis Hospital 625, 629, 630

LOCOMOTIVES—On streets 232

LOCUST AVENUE—Whether open public street 660-63

LODGING HOUSES—
Building permits 708-12
Columbia Realty Co., permit 708, 709
Condemnation, portion of structure 417, 418
License tax 522
Light and air 785
Lighting and ventilation 418
Restrictions upon erection 708
Specifications for construction 709
State Hotel and Lodging House Act 708-10, 784, 785
Time limit, construction work 708
Yard space 784, 785

LOS ANGELES— PAGE.
Brickyards prohibited certain district....531
Charter....516, 750
Franchise, street railway....90
Gas mains....586, 587, 914
In re Russell....136, 586, 587, 913, 914
Industrial and residence districts....145, 554
Laundries, prohibiting certain districts....554
Laundry ordinance....712
Library building in park....841, 961
License ordinances, consolidation....527
Liquor, sale of....482
Opening of streets....413
Penal ordinances....527
Pool rooms....482
Railroad fares, regulation....362
Street improvements....699, 750
Street opening ordinances....99
Street railway litigation....360
Transportation, free....90
Use of streets by railroad....362
Water mains....516, 517

LOSSES—Firemen's personal property, fire in quarters....477

LOTS—
Cemetery lots....398
Changes or alterations in surface....738
Exchange....56, 58, 370-72, 609, 851-56
School lots....399, 893
Surface water, protection from....737, 738
Vacant city lots, exchange of....370-72
Vacant lots....399

LOWER LAND—Redress against owner of higher land....737

LOWER MARKET STREET—Bonds, Municipal Railway....48, 49

LOWEST—Regular bid to be accepted....321, 777, 991

LUBRICATING OIL—Storage....789

LUMBER—Haulage....535

LUMP SUM SETTLEMENT—Compensation, injury or death....821

LYNCH, PATRICK—Killed by asphyxiation....422-26

M

PAGE.

MACDONOUGH ESTATE CO.—Notice of excavation adjoining city property 315, 316

MACHINISTS—
Finn, Joseph E. 286
Fire Department 103, 104, 286, 557, 558
Lane, Franklin K., opinion 103, 104, 557, 558

MACKINLEY, JENNIE G.—Permit, lodging house 708, 709

MACPHEE, ARTHUR F.—Reopening case 815-18

MADSEN, C. W.—Right to employment, Union Street line 836, 837

MAGEE, WILLIAM A.—Partition under decree 275, 328

MAHONEY BROS.—Contracts, Municipal Railway 150-56

MAIER, MINNA—Damages, removal of buildings 734-36

MAIN STREET—Changes of grade 541-43, 968, 969

MAINS—(See Extension of Mains; Gas Mains; Water Mains.)

MAINTENANCE—
Alarm bells 337
Board of Public Works, charge of 486
Bond, maintenance of street work 124-26
Bridge, Islais Creek 798-800
Budget provision 1, 8
Election booths 486, 487, 723
Electroliers 431, 432
Fire houses 486
Health Department 1, 8
Hospitals 314, 350, 438
Hotels 458
Lane, Franklin K., bond for street work 124, 126
Laundries 551
Libraries, Public 305
Light during darkness by railroads 650
Minors 400, 401
Nuisance 386
Parks 500-502
Playgrounds 636
Police Department 133
Police patrol boat 811, 812
Public buildings 305, 486
School houses 385, 486
Stables 393, 394, 462, 552, 553
Street work by contractor, bond 124-26
Tracks, abandoned 386
Waterworks 247
Wires 277

PAGE.

MALLEY, ED.—Mile Rock Tunnel contract 856

MALLOY, MARY—Title, lot Noe Street 171, 173

MANAGEMENT—
Auditorium 883-90, 923, 924
Defined 500
Elections 567, 724
Great Highway 612
Police Department solely a municipal affair 584

MANDAMUS—
Burdens under franchise 651
Compelling—
Performance of duties under franchise 650, 651
Street railway to pave 650
Grading streets 650
Viaduct, construction of 650

MANDONNET, EDOUARD—Quiet title suit, Emmet Place 479, 783, 784, 839

MANUFACTURE—
Home-made goods, preference 580, 581
License tax 484
Soap 846, 847

MANURE—
Ocean Shore Railway Co., loading and unloading 232
Ordinance forbidding hauling in certain district 1013

MAPS—
Act, March 15, 1907 70
Allardt, G. F. 209
Approval by Board of Public Works 70-73
Assessment maps 171, 175
Bernal Rancho 106, 109-111
Biedeman Tract 372, 661
City Engineer, investigation of 72
City Engineer's Map 667
Fairmount Extension Homestead 53
Fairmount Tract 171-75
Filing of 70-73, 416
Forest Hill Court 417
Hayes Tract 662
Hetch Hetchy 495
Hoadley survey 110
Holcomb, Charles H. 171-73

MAPS—(Continued) PAGE.

Humphreys Map 54, 175, 357, 372, 404, 460, 479, 660-62, 667, 692
Mission and 30th Street Homestead Union 171, 173-75
Ocean Shore Railway Co. 27
Official Map 175, 357, 404, 460
O'Neil and Haley Tract 403
Order No. 800 467
Order No. 966 ..... 357, 460
Outside Lands 260, 261, 467
Potter survey 110
Railroads, filing by 27
Recorders' fees for filing 416
San Francisco and San Jose Railroad Co. 209
San Francisco Homestead Union 216
Schofield survey 106, 109
South Beach Water Blocks 460
Southern Pacific Co. 209, 210
Streets, new 71
Subdivisions 70-73
Tilton Map 54, 667, 873
Van Ness Map 276, 660
Von Leicht, F. 115

MARIPOSA STREET—
Franchise rights, Southern Pacific Co. 211, 212
Ocean Shore Railway Co., loading manure 232

MARKET PLACE LOTS—
Exchange 851-56
Rental by Southern Pacific Co. 853, 854, 880-83
Value fixed 881, 882

MARKET STREET—
City's right to lay tracks 944
Extension 311-13
Hauling certain substances prohibited 1013
Jitneys operating on 947-49
Lower Market Street 48, 604
Ocean Shore Railway Co., depot on 226
Open fruit stand, condemnation 433

MARKET STREET RAILWAY CO.—Franchise 681, 832, 906

MARKETS—Brooklyn ordinance 39

MARRIAGES—
Certificates, form of 582
Civil Code sections 581, 582
Persons authorized to solemnize 581, 582

PAGE.

MASON STREET—Electroliers 430-32

MASONIC AVENUE—Track connection, United Railroads 871

MASSACHUSETTS, STATE OF—
Height of buildings 143
Workmen's Compensation Act 905

MASSACHUSETTS BONDING AND INSURANCE CO.—
Bond, fiscal agent 186, 187
Contract, Keystone Construction Co. 323, 324
Mission Viaduct, work done under bond 323, 324
Pacific Gas and Electric Co., installations 597

MASTER AND SERVANT—Relation 133

MATEO STREET—Grades 737

MATERIALS—Cartage portion of cost of 17, 18
Germ infected, destruction 168
Included under heading of "supplies" 17
Mission Viaduct 323-26
Municipality, furnishing to 326
Officers personally interested in sale to city 344-46
Sacramento charter 325

MAXWELL, JOHN R.—Salary, Assistant Chief Engineer, Fire Department 936-39

MAYOR—
Accounting system, uniform, municipal 1004-1006
Additional employees 62, 608, 609, 823
American District Telegraph Co., bond, opening streets 258, 259
Amusement enterprise, Van Ness and Hayes 646-49
Amusement Pier, Ocean Beach 464-70
Appointments—
Procedure 1008
Recommending 62, 63
Assessor, extra employees 823
Blasting bonds 704, 705
Bonds—
Approval 497, 704, 705
Changing denominations 373-80
Conditions in official 219-21
Opening of streets 258, 259
Proceedings 374-79
Bureau of Efficiency 62-64

MAYOR—(Continued) PAGE.

Changing denominations of bonds....373-80
Chief of Police, confidential secretary to....1008-1010
Church Street Railway....944
Concessions....647, 648
Contract violation....253
Denominations of bonds, changing....373-80
Dismissal of litigation....425, 426
Efficiency Committee superintending vacations....288
Efficiency increased by vacations....289
Election Commissioners, appointing....724
Election for acquisition of public utilities....373
Elections, sale of liquor during....679
Employees, additional....62, 608, 609, 823
"Fighting the Flames," amusement, permit....646-49
Fire Commission, regulations....288
Games of chance and skill....647, 648
Gas Inspector, appointment....772
Geary Street, Park and Ocean Railway Co.'s abandoned tracks....385, 386
Golden Gate Park, Municipal railway across....954-62
Interest on bonds....373-79
Klink, Bean & Co., uniform municipal accounting system....1004-1006
Lands, sale of, conveyance to be executed by....340
Leaves of absence, granting....288-90
Lincoln School lot, sign on building....262
Liquor, sale on election days....679
Maier, Minna, damages, removal of buildings....734-36
National Surety Co., bond, street openings....258
Neal v. Rolph....925, 926
Ocean Beach Pier....464-70
Official bonds—
  Approval of....189
  Conditions in....219-21
Opening of streets....258
Panoramas....648
Pier, Ocean Beach....464-70
Positions, creation of....823, 1008-1010
Printing orders, non-contract....675
Proceedings, bond issue....374-79
Public utilities, acquisition of....373
Recommending appointments....62, 63
Relief Home lands, sale....341-43
San Francisco Electric Protective Co., bond, opening streets....258
Schmitz, Eugene....817
Secretary to Chief of Police....1008-1010
Streets, opening of....258

MAYOR—(Continued) PAGE.
Vacations, granting 288-90
Violation of contract 253
Water Inspector, appointment 772
Weights and Measures Bureau, salaries 728
Wooden buildings, alterations 552

McAVOY, EDWARD—Eligible list of policemen 147, 149

McDADE, J. J.—Paving, San Bruno Avenue 655

McDEVITT, E. J.—Civil service standing 391, 392

McENERNEY, GARRET W.—Title, Emmet Place 479

McENERNEY SUITS—(See Quiet Title Suits.)

McEVERS, J. W.—Deputy sealer, writ for salary 728, 730

McGINN, G. W. & Co.—Assessment, Santa Marina Street 864

McHUGH, J. J.—Contract, Stark Street 844

McLAUGHLIN, JOHN P.—Day of rest 132

McWILLIAMS, JANE—Tax deed 171, 173

MEAT—
Australia, shipment from 299-303
Brand, Board of Health 301
Bureau of Pure Foods and Drugs, inspection 299-303
Condemnation 303
Department of Agriculture, inspection 299-303
Deterioration during transit 302
Inspection—
Acceptable to Federal authorities 299-303
On holidays 492, 493
Ordinance No. 1265 (New Series) 300-303
Peddlers' license 638
Pure Food and Drug Act 300, 302
Refrigeration 302
Reinspection 303
Sale, regulations 300-303
Stamping, federal 300-302
Transportation of imported meats 300, 302

MECHANICS—
Elections Department 486
Fire Department 103, 104, 557, 558
Lane, Franklin K., opinion 103, 104, 557, 558
Lien 17

MEDICAL COLLEGES 127

MEDICAL TREATMENT—Injured employees 626, 627, 646, 687, 877-79, 1021, 1022

PAGE.

MEDICINE—Practice of 966

MERCED—Gas litigation 278

MERCED STREET—Title to lots 172, 173

MERCHANDISE—
Broker, license 613, 614
Installment contracts 594

MERCHANTS—
Fresno license ordinance 640
Trading stamps 640

MERGER—Telephone 402

MERIT—Promotions for 75

MERRIMAC STREET—Franchise rights, Southern Pacific Co. 211

MERRITT, EMMA L.—Bulkheads, Great Highway 259

METERS—Free installation of 863

MEXICAN GRANTS 106, 107, 118

MICHELLARI AND LONGO—Permit to repair stable 392-94

MIDDLEMAN—License 613

MILE ROCK TUNNEL—Contract 856-61

MILITARY RESERVATION—Fort Miley, land for 298, 299

MILK—Sale and delivery of 552

MILLER & LUX—Inspection of meat Saturday afternoon 470, 471

MINIMUM WAGE 724, 832-35

MINISTERIAL OFFICERS 394, 510, 930

MINNESOTA STATUTE 33, 828

MINORS—
Aliens, minor children of 702
Citizenship 701-703
Maintenance of, law 400
Ordinance regulating labor 989, 990
Residence of, legal 703
State Board of Control, refunds 401
Workmen's Compensation Act 584

MISLEADING ADVERTISEMENTS 932

MISSION AND THIRTIETH STREET HOMESTEAD UNION
MAP 171, 173-75

MISSION CREEK— PAGE.
Rights, Southern Pacific Co. 215
Sale of lands 58, 854

MISSION DISTRICT—Right of Southern Pacific Co. to lay tracks 207, 210, 214-18

MISSION PARK—
Bonds 840
Municipal Railway in 840-42

MISSION POLITICAL IMPROVEMENT ASSOCIATION—Street assessment 916

MISSION STREET—
Acceptance, crossing of Ninth Street 94
Franchise rights, Southern Pacific Co. 216
Ocean Shore Railway Co. tracks 28, 943
Sidewalks, Health Department building 591
Sutter Street Railroad Co., franchise 86
Viaduct and approaches 322-24

MISSION VIADUCT—
Charter provisions not complied with 325
Contracts 322-25
Failure of contractor 323
Obligation to make re-fill 323
Payment for fill 322-26
Surety company completing contract 323
United Railroads contribution and work done 322-26

MODESTO—
Ordinance 555
Tax levy to pay bonds 374

MODIFICATION—
Contract 253, 254
Ordinances 250
Permits 248

MONEY—
Assessment, in litigation 614, 971
Court, possession of 614
Garnishment 536
Impounded moneys, assessment 614, 615
In custody of court 536
Kind of, bonds payable in 375, 377
Taxes, payment of 631
Under heading of "supplies" 17

MONOPOLY—
Advertising, refuse cans 507
Charter provision 358
Long term contracts creating 291
Patent rights 453
State no right to create 34
Use of streets 247

MONTGOMERY STREET— PAGE.
Acceptance 177
Bonnett v. San Francisco 264
Obligation for moving back curbs and paving additional roadway 178
Sidewalk construction 264
Sidewalks, reducing width of 176-78

MONTICELLO STREET—Opening 845

MONUMENTS—
Freeman v. Belgarde 112, 115
Jurisdiction over 680
Native Sons' Monument, drinking cups 680
Subdivisions, laying out 72

MOORE AND SCOTT IRON WORKS—Bid, fire boats 795, 796

MORAGA STREET—Appeal from street assessment 1002, 1003

MORIARTY, JOHN J.—Salary during sickness 582

MOSS, J. MORA, JR.—Mortgage 106-108

MOTHERS' PENSIONS—
Law 400, 401
Nesfield, Margaret, appointment of 400
Political Code amendments 400, 401
State Board of Control, refunds 401

MOTOR VEHICLES—
Automobiles—(See Automobiles.)
Buses, permit 520, 521
Motor Vehicles Act 488-90, 493, 910, 940, 942

MOTORCYCLE RACKS—On sidewalks 85

MOTORMEN—
Bonds, liability, charter requirement 497
Grant, Harry E., injured 877-79
Municipal Railway, bonds 189
Premiums on bonds 497, 498

MOTORS—Telephone, installation 601-603

MOUNTAIN LAKE PARK—Control 467

MOVING—
Cattle 30, 39-42
Furniture, etc., keeping record 563

MOVING PICTURES— PAGE.
Advisory Committee 932, 1011
Aisles or passages, standing or sitting in 331, 332
Alterations 514, 515
Amendments to ordinance 931, 932
Audience, limiting to seating capacity 331, 332
Building Law 331, 332, 511-15
Censorship 932, 1011
Church, near 398-400, 569
Globe Theatre 509-16
Laurelle v. Bush 482
Obstructing aisles, etc. 331, 332
Ordinances regulating 331, 332, 398-400, 511-15, 876, 1011-13
Panama-Pacific Exposition 793
Permits, Police Commission 482, 1011-13
Race prejudice inciting 876, 932
Rejection of films 932
School, near 398-400, 569
Seating capacity 331, 332, 511, 512
Unlawful construction 512

MUNICIPAL ACCOUNTING SYSTEM 1004-1006, 1016-19

MUNICIPAL ASPHALT PLANT—
Employee sick 582
Light and power 762-65
Spur tracks 550

MUNICIPAL BAND—Leader 8

MUNICIPAL LIGHT AND POWER CO.—Rights in streets 243

MUNICIPAL OWNERSHIP—
Charter provisions 605, 606
Constitutional amendment, 1911 ..... 241, 409
"Dillon on Municipal Corporations" 247
Expiration of franchises 205, 206
Extensions of water mains 516-19
Funds, public utility 605, 606
Hetch Hetchy water supply 494-96
Integral part, existing utility, acquisition of 779, 789
Jenkins, Judge 247
Presidio and Ferries Railway 205
Problems 51
Resolution No. 9846 (New Series) 205
Street railway 205, 206
Water Works—(See Municipal Water Works.)

MUNICIPAL RAILWAY— PAGE.

Acceptance of cars 157-59
Advertising in cars 290-92, 543-46
Alien, employment 836, 837
Apparatus for cars 442
Bonds 48, 49, 497, 498
Bonus, Mahoney Brothers 150, 153, 156
Car barn, Seventeenth Street, removal of buildings 734-36
Cars—
Advertising in 290-92, 543-46
Delivery of 159, 160
Haulage by United Railroads 159, 160
Number used 544
Patent royalties 718-21
Charter amendment, employees 463
Charter procedure 49-51
Church Street 604, 840-42, 925, 943
Conductor, reinstatement of 996, 997
Conductors, bonds 189, 497, 498
Conduits and pipes of public service corporations interfering with construction 154, 155
Construction between tracks 50
Darby, Samuel E., patent royalties 719, 720
Delays, contract for construction 150-56
Delivery of cars 158-60
Election, bonds 48, 49
Electrolysis caused by construction 50
Employees, preference 463, 464
Employees, vacations 984
Estimates, Board of Public Works 49, 51
Extension of time, car contract 157-59
Extensions 604, 954
Franchise not necessary 191
Franchises, corporations, expiration 205, 206
Funds, transfer of 51, 603-606, 993
Geary Street, Park and Ocean Railroad Company's employees, preference for employment 463
Geary Street Railway bonds 48, 49
Geary Street system, number of cars 544
Golden Gate Park 954-62
Grading of street made necessary through construction, 49-51
Grant, Harry E., motorman, injured 877-79
Haulage, cars, by United Railroads 159, 160
Holman, W. L., contract 157-60, 442
Intention of City and County to operate 206
Jewett Car Co., patent royalties 718-21
Lloyd and Spengler, premiums on bonds 497
Lower Market Street bonds 48, 49
Madsen, C. W., appointment, formerly alien 836, 837
Mahoney Brothers, bonus 150, 153, 156

MUNICIPAL RAILWAY—(Continued) PAGE.

Maier, Minna, damages, removal of buildings....734-36
Mission Park....840-42
Motormen, bonds....189, 497, 498
O'Day, Daniel Co., contract, Seventeenth Street car barn....734, 735
Ordinances....604
Patent royalties on cars....718-21
Per diem employees....984
Peterson, James E., reinstatement as conductor....996, 997
Preference, former employees of railway companies....463, 836, 837
Preferred runs....463, 464
Premiums on bonds....497, 498
Prepayment Sales Car Co., patent royalties....719, 720
Presidio and Ferries Railway, acquisition....205
Procedure, construction....51
Public interest and convenience demanding construction, 958
Reconstruction work caused by....49-51
Reserve Fund, transfer to General Fund....606
Ross & McDonald, royalties....718
Seventeenth Street car barn, buildings removed....734-36
Stockton Street Tunnel, transfer of funds....603-606, 993
Street work made necessary through construction....49-51
Superintendent—
Bond....189
Discretion....464
Transfer of funds....51, 603, 605, 606, 993
Union Street Line—
Number of cars....544
Surplus....605, 606
Transfer from funds....603, 605, 606
United Railroads hauling cars....159, 160
United Railroads, use of tracks....943
Vacations for employees....984
Van Ness Avenue....190-92
Voters, prime object of....51
Westinghouse Electric Manufacturing Co., claim....442

MUNICIPAL RAILWAY BONDS—

Election....48, 49
Funds, Charter and ordinances....51, 52
Lines authorized....604
Objects and purposes....604
Ordinances....48, 49, 604
Proceeds to be expended as per proceedings....604
Transfer, Stockton Street Tunnel assessment....603, 604

"MUNICIPAL RECORD"— PAGE.
Official advertising 777, 778
Publicity pamphlets 590, 591

MUNICIPAL WASTE CANS—Advertising on 505-507

MUNICIPAL WATER WORKS—
Constitution of California 241
County Line Water Works 863
Extensions of water mains 516-19
Integral part of existing utility, acquisition as part of 779, 780
Legislative authority necessary 247
Object of city in conducting 517
Profit to city not sought 517

MUNICIPALITY—
Abatement of nuisances 449
"Abbott on Municipal Corporations" 246, 247
Acceptance of Streets 264, 265, 270
Accounting system, uniform, municipal 1004, 1018, 1019
Acts of official outside his authority, not liable for 735, 736
Aliens, employment prohibited 902
Ambiguity in franchise to be construed in favor of 26, 87
Area walls, liability for reconstruction 265
Bill boards, right to limit height 140
Bodies, disinterment of 395-97
Bonded indebtedness not incurred until actual sale and delivery 59
Business, regulation of 32, 37, 38
Cemetery removals, power, to order 395-97
Charge, use of streets 240
Charter—
Controls 584
Guide in all municipal matters 71
Powers under 278
Conditions, power to prescribe 413
Constitution, powers under 72, 248, 278, 426
Constitutional amendment 1911 21
Control of streets 367
Contracts 17, 81, 290-92, 504
Courts upholding local regulations 638
Defective condition, public work 424
Dereliction of officers 689
"Dillon on Municipal Corporations" 191, 246, 363
Drawbridges across streams, authorizing construction 800
Employees, contractual relations with 345
Enacting ordinances and resolutions 245
Exceeding power under Constitution 38

MUNICIPALITY—(Continued) PAGE.

Exhumation of bodies, power to order....395-97
Fee in streets, ownership of....246
Fine, imposing on....133
Fire limits, province to define....184
Forfeiture of franchise....230

Franchises—

Ambiguity in, to be construed in favor of....26, 87
Power to grant....246-48, 367

Free passes, authority to provide....364
"Freund on Police Power"....247
General laws control except in municipal affairs....584, 750
Governmental functions....362, 363, 367
Health, protection of....32
Hospital, maintenance of, a discretionary governmental function....314
Hospitals maintained by....585
Injuries, liability for....424
Insuring against fire, power....306
Interests of to be protected....81, 82
Invasion of private rights....37
Laws, making and enforcing....72, 248, 278, 426, 564, 710, 711
Legislative authority....367, 413, 889

Liability—

Escaping....125
For injuries through defective construction....424
For negligence of officers....315, 689, 965, 972

Local laws, making....72, 248, 278, 426, 564, 638, 710, 711
Materials furnished to....326
"McQuillin on Municipal Corporations"....843
Motor Vehicle Act, exemptions under....489, 493
Moving pictures, power to regulate....876
Municipal Corporation Act, 1883....361, 363, 365
Note answerable for negligence of its officers....314, 315, 689, 965, 972
Nuisance, power to abate....40, 185, 449

Officers—

Interested in contracts with....17
Negligence of....315, 689, 965, 972

Organic law....404
Ownership of public utilities....241
Police laws, making....72, 248, 278, 426, 564, 710, 711
Police maintenance a public or governmental duty....133
Police officers, relation to....133
Police power....184, 201, 277, 278, 458

MUNICIPALITY—(Continued) PAGE.

Powers—

Conferred by Constitution or Statutes....366
Judge Jenkins 247
Measured by grant from State....368
Measured by organic law....360
Only those expressly granted or fairly to be implied 246, 247
Prevention of erection of wooden buildings....146
Under Charter 278
Under Constitution 72, 248, 278, 426, 710, 711
Whence derived 191

Prohibition through arbitrary power to deny permission....37
Protection from surface water 737
Public utilities, regulation of....241
Railroads using streets 359-68
Rates, regulation 758-61
Remissness of officers 689
Repair of streets 265
Right to determine conduct of business....145
Sale to, officer interested in 344
Safety, promotion of 32
Sewer construction 501
Shacks, power to tear down 184
Sidewalks, liability for 264, 270
Sovereign power of State, portion delegated to....314

State—

Delegation of powers 367
Police regulations, subject to....488, 489

Statute, 1883 ....361, 363, 365
Street railway, intention to operate 205, 206

Streets—

Charge for use of 239, 240
Control of 97, 367, 409-14
Liability 270
Opening permits 201
Ownership of fee in 246
Repair and reconstruction 265

Tide lands, use of 275
"Tiedeman on Municipal Corporations" 363
Torts in discharge of duties, not liable for....314
Tracks, etc., street railway, ownership 206, 207
Undertaking business, regulation of 32
Use of streets 240, 360-64
Water mains, laying of....516
Wires, power over laying of....277, 278
(See also City and County; San Francisco.)

MURASKY, JUDGE— PAGE.
Blasting by Gray Bros. 478
Inspectors, Department of Electricity 380, 381
Pensions 706

MURDER—Law of 354

MURPHY, JOSEPH A.—Secretary to Chief of Police....1007-10

MURPHY, THOMAS R.—Chief Engineer, Fire Department, removal from office 746-55

MUSEUMS—
Anatomical museums 593, 594
Golden Gate Park 841
Laurelle v. Bush....482
License 648
Ordinances regulating 593, 594, 648
Permits, Police Commission....482

MUSICAL INSTRUMENTS—Installment contracts 594

MUTUAL ELECTRIC LIGHT CO.—Franchise rights....244

MUZZLING OF DOGS 436

N

NAMES OF STREETS—Changes in 72, 264, 565, 692

NAPA, CITY OF—Charter 745

NAPA STREET—Franchise rights, Southern Pacific Co....211

NARROWING SIDEWALKS 264, 265

NATIONAL SURETY CO.—
Bond, fiscal agent 186, 187
Bond, street openings 258

NATIVE SONS' MONUMENT—Drinking cups 680

NATURALIZATION—
Laws 680
Right to governmental employment 902

NAVY VETERANS—Exemption from taxation 472

NEGLIGENCE—
Defective condition of street 690
Duty 815, 816
Employer furnishing medical treatment 627, 646
Fireworks, discharge of 705
Installation 618

NEGLIGENCE—(Continued) PAGE.
Municipality not answerable for negligence of its officers 315, 689, 965, 972
Sewer cleaning, deaths from 424
Street sweeper injured 616
Workmen's Compensation Act....616

NEIGHBORS—Annoying 60

NELSON, E. C.—Patent chimney 651-55

NESFIELD, MARGARET—Appointment 400

NET RETURN—Rate of 474

NEVADA STREET—Franchise rights, Southern Pacific Co....211

NEW HAVEN, CONN.—Tearing down buildings....185

NEW YORK CITY—
Examination, liquor tax agents 147, 148
Fiscal agent 375
License, exhibitions 532
Milk, sale and delivery of....552
Parks 841
Police officer, resignation 255
Street railway franchise, repair of streets....89
Tunnels 706

NEW YORK STATE—
Billboard regulation 142
Civil Service Act 147, 148
Removal of public officers 809
Statute 447

NEWBURGH, A. S.—Protest, salary, secretary to Chief of Police 1008, 1009

NEWELL-MURDOCK CO.—
Opening street through Relief Home Tract....272-74
Water service, Forest Hill....122, 123

NEWHALL, GEORGE A., land for widening Geary Street....835, 836

NEWSPAPERS—
License, Alameda 639
Official 340, 491, 492, 743, 744, 777-79

NICKELODEONS—
Aisles or passages, standing or sitting in....331, 332
Alterations 514, 515
Audience, limiting to seating capacity 331, 332
Building Law 331, 332, 511-15
Church, near 398-400, 569

NICKELODEONS—(Continued) PAGE.
Globe Theatre 509-16
Laurelle v. Bush 482
Obstructing aisles, etc. 331, 332
Ordinances regulating 331, 332, 398-400, 511-15
Permits, Police Commission 482
School, near 398-400, 569
Seating capacity 331, 332, 511, 512
Unlawful construction 512

NIGHT—Prohibiting business during 570-72

NINETEENTH AVENUE—Lot for playground 685-87

NINETEENTH STREET—Land for opening 326

NINTH STREET—
Acceptance by city 94
Basalt blocks 93-95
Street railway company keeping in repair 88, 89, 91
Street railway franchise, expiration 88
Sutter Street Railroad Co., franchise 86
United Railroads keeping in repair 86-89, 91, 93-96

NOBLE, JAMES CO.—Pump, Relief Home tract 123

NOE STREET—
Lines of 173, 175
Location of 175
Maps, shown on 175
Title to lots 171-75

NOISES—
Garages 574
Streets adjoining hospitals 307

NON-CITIZENS—Employment 836, 902

NON-COMPLIANCE—Charter provisions 325

NON-CONTRACT—Printing and stationery, great necessity, 675, 994

NON-RESIDENT LEADER—Municipal Band 8

NON-USER—
Acts, construed from 421
Cable franchise by United Railroads 421
Ocean Shore Railway Co., franchise 230
Tracks 229, 230, 386

NORFOLK STREET—Order No. 966 357

NORTH PETER SMITH TRACT—Judgment 274, 707

NORTH POINT STREET—Dore v. Truett 276

PAGE.

NORTON, PATRICK—Laborer, claim, medical expenses 626, 627, 645, 646

NOTICES—
Accident to employee 688, 742, 743, 1021
Alleyway rights, subsequent purchaser 319
Bond elections 49, 50, 373-79
Burials 397
Cemetery removals 397
Certification, civil service 405
Civil service 252, 491
Code of Civil Procedure 167
Elections 373-79
Encroachments on street, removal 844
Excavation, adjoining lot 315
Expiration of franchise 206
Injury to employee 688, 742, 743, 1021
Laws, contracting parties charged with notice of 504
Macdonough Estate Co., excavation adjoining city property 315
Materials from condemned buildings, removal 168
Nuisances 185
Official newspaper 491, 492
Openings in streets 200
Paving, etc., Arguello Boulevard 180
Posting of 167
Relief Home lands, sale 343
Sale of lands 343
Sale of property, delinquent tunnel assessment 166-68
Service, where a favor 185
Sidewalk repair 533
Street work proposals 180-83, 695
Supplies, contracts 540
Telegraphic, recording 369, 370
Vacancies 813, 814
Violation of contract 253

NUISANCES—
Abandoned 386
Abatement of 40, 184, 185, 386, 417, 433, 448-50, 513
Action to abate 450
Actual obstruction of a public right 845
Buildings 184, 185, 417, 418, 433
Cattle, moving and grazing 39, 42
Cemeteries 395, 475, 476
Charter provisions 448
City Attorney bringing action to abate 450
Civil Code 448, 450
Damages, recovery of 449
Decisions 185, 386, 395, 449

NUISANCES—(Continued) PAGE.

Declaration as 449
Dogs 435, 436
Dust, forbidding hauling of substances giving off....1013, 1014
Geary Street, Park and Ocean Railway Co., tracks....386
Globe Theatre 512-14
Hauling certain substances 1013
Insanitary buildings 417, 418, 433
Interdiction by law 40
Interment of bodies 475, 476
Laundries not 554
Manure, haulage of 232
Misdemeanor 450
Municipal officers, authority to abate 449
Notice to abate 185
Obstructions on street....845
Ocean Shore Railway Co. 232
Ordinances 448, 449
Penal Code 450
Portion of structure, insanitary 417, 418
Power of Supervisors to abate....448
Purpresture 956
Rooms unfit for occupancy 417, 418
Slaughter houses 40
Stables 393, 462
Street railway across park 955, 956
Structures, insanitary 417, 418, 433
Tracks, abandoned 386
What constitutes, power to declare 40

NURSES—

Civil service classification 451
Eight-hour day 388
Tobin, Agnes, contracting typhoid fever....903-906

O

OBLIGATION—

Assignment of franchise, under 88
Civil Code sections 293, 295
Corporations furnishing service 293
Employer's liability ....
424, 526, 583, 616, 626, 645, 663, 687, 742, 782, 787, 820, 1021
Excavation, adjoining property 315
Extensions of mains 295, 296
Franchise—
Assignment 88
Under 650, 651

OBLIGATION—(Continued) PAGE.

Lights at excavations, placing 690
Mandamus to compel performance of....650, 651
Ocean Shore Railway Co., repair of streets 233
Official obligation becoming personal liability 536
Paving by railroads 335, 336, 358, 650
Public utilities 888
Railroads repairing streets....335, 336, 358, 650
Refill, Mission Viaduct 323
Repair of streets 88-95, 233, 265, 335, 336, 358, 650
Sidewalk construction 264, 270
Southern Pacific Co., paving....335
Spring Valley Water Co. to extend mains....295, 296
Street railways, repair of streets..88-95, 233, 650, 681, 832, 833
Sutter Street Railroad Co., repair of streets....86-89, 93-96
Tenant to repair 590
Unauthorized, imposing 504
United Railroads, repair of streets 88-95, 681
(See also Liability.)

OBSTRUCTIONS—

Abutting property owners inconvenienced 480
Amusement places, aisles, exits, etc....331, 332
Authorized obstructions 84, 85
Beacon Street 478
Bluxome Street 459, 460
Capp Street 357
Decisions 386
Emmet Place 479, 480
Entrances and exits, amusement places 331, 332
Flow of surface water 738
Gasoline pumps 84, 85
Geary Street, Park and Ocean Railway Co.'s tracks....386
Moving picture shows, standing or sitting in aisles, etc. 331, 332
Nerio v. Maestretti 844
Ordinance No. 916 ....84, 85
Passageways, amusement places 331, 332
Railway across park 956
Removal by Board of Public Works 386, 478-80, 668, 845
Restricting use of street 480
Stairways, amusement places 331, 332
Stark Street 844, 845
Tracks, Geary Street, Park and Ocean Railway Co....386
Webb Place 667

OCCUPATION, OCCUPANCY—

Buildings 513
Confining to certain limits 145
Diseases, occupational 664

OCCUPATION, OCCUPANCY—(Continued) PAGE.

Hotels 709
Interdiction by law 40
Laundries 554
Lawful, pursuing 554
Lawful, useful and necessary 31-37
Legislature, interference with 36
Licensing 797
Lodging house 709
Public highways 247
Restrictions on pursuit of lawful 35
Right to engage in lawful 31-37
Sickness contracted through duties, compensation 664

Streets—
By railroads 228, 229
Encroachments 845
Under constitutional provision 250

Tenement houses 538
Tide lands 274, 275, 327
Unsafe structures 513

OCEAN AVENUE—
Abandonment of franchise by United Railroads 906-909
Viaduct 650

OCEAN FRONT—
Access to 466, 467
Amusement pier 464-70
Boulevard 612

Control—
Board of Public Works 612
Park Commission 468

Esplanade 612
Political Code section 466
Wharfing-out privileges 468, 470

OCEAN PIER AMUSEMENT CO.—Petition, pier 464

OCEAN SHORE RAILWAY CO—
Abandonment, tracks, Twenty-fifth Street 229, 230
Ambiguity in franchise to be construed against 26
Bridge 650, 651
Bunkers 25, 28
Cars of other railroads, hauling 105
Civil Code, rights under 105
Contracts with other railroads 105

Crossings—
Right to construct track on 229
Street 25

OCEAN SHORE RAILWAY CO.—(Continued) PAGE.

East Mission Improvement Club, complaint 231
Electric railway, franchise 229
Extension of tracks 227, 228
Failure to complete construction, penalty 230
Forfeiture of franchise 230, 231
Franchise grants 24-28, 226-35
Freight, hauling of 105
Journal Resolution No. 396 105
Leasing of its property 105
Light weight tracks 235
Locomotives on Potrero Avenue 232
Manure, loading and unloading of 232
Map filed with Supervisors 27
Non-user, franchise 230
Ocean Avenue, viaduct 650, 651
Ordinances granting rights 226, 227, 229, 230, 233, 234
Paving, Potrero Avenue 232
Poles, character 234, 235
Potrero Avenue, rights in 226-29
Pushing of trains along streets 233, 234
Rapid running of cars over Potrero Avenue 233
Resolution No. 4009 (New Series) 227
Roadbed construction 233
Sewer right of way, tracks on 227, 228
Sprinkling, Potrero Avenue 232
Spur tracks 24-28, 231, 232
Stone, E. B. & A. L. Co., spur track 24-28
Street work 233, 235

Tracks—

Authorized by franchise 27
Character of 235
Extension of 28
Rearrangement, Twelfth and Mission Streets 943

Twelfth Street, spur track 24-28
Twenty-fifth Street, rights in 229-31
Unused tracks 231, 232
Viaduct, Ocean Avenue 650

O'DAY, DANIEL CO.—Contract, Seventeenth Street car barn 734, 735

ODD FELLOWS CEMETERY 395, 564, 829

O'DONNELL, J. W.—Street Sweeper injured 1021, 1022

O'DONNELL, PATRICK—Injury 615-17

O'FARRELL STREET—

Repaving by United Railroads 681, 682
Street railway franchise 681

OFFICE— PAGE.

Auditorium, municipal department maintaining in 986, 987
Badge of 165, 166
Closing on holidays 492
Closing, Saturday afternoon 471
Creation by Act of Legislature 455
Forfeiture of 345
Relinquishment of 297
Removal from 747-55, 809
Tenure of 748-50
Term of 747-50

Vacant—
Declaring 746
When becoming 816, 817

OFFICERS—

Abatement of nuisances 448-50
Additional county officers, creation by Legislature....455
Appointments, unauthorized 503, 504

Automobiles—
Rented to city 445-47
Using their own....487

Badge of office 165, 166
Bannerman v. Boyle 22
Bonds—(See also Surety Bonds) 189, 219-21, 497, 498
Books, etc., surrender upon expiration of term....220, 221
Constitutional amendment, 1911 ....21, 22

Contracts—
Extending beyond term of office 290
Personal interest in 17, 344-46, 445-47, 487

Damages, liability for 168
Debarred from election 345
"Dillon on Municipal Corporations"....445, 446
Discretion 483
Dismissals 684
Duties 504
Education, Board of 21
Election officers 721-25
Expenditures under two hundred dollars....675, 994
Fireman an employee, not an officer....165
Forfeiture of office....345
Franchise grant, personal interest in....345

Interest—
For private benefit in City business....445-47
Personal, in contracts with city....17, 344-46

Jurisdiction under charter amendment....694
Lease to city, personal interest in....344
Leave of absence not severing relationship with city....345

OFFICERS—(Continued) PAGE

Legislature; creation of additional 455
Liable under official bond for acts and omissions of deputies, etc. 220, 221
Liability, personal, officers making appointments....503, 504
Ministerial 394, 510, 930
Municipality—
Not answerable for negligence of....315
Not liable for acts of officials not within scope of their authority 735, 736
Murphy, Thomas R., Chief Engineer, Fire Department 746-55
Negligence of 315, 689
New York statute 809
Policemen 133
Political Code 23
Powers 504
Printing, non-contract, orders 675
Prohibited from being interested in city contracts....17, 344-46
Rank, reduction in 754, 755
Removal from office 21, 747-55
Renting automobiles to city 445-47
Resignation 320
Salaries payable monthly 713, 714
Sale to city, interested in....344
Sealer, Weights and Measures 455
Severance of relations with city, how effected....345, 346
Special and limited jurisdiction 147
Street work, seeing properly done 125
Suspensions 676, 693
Tax sales, personal interest in....344
Teachers, public schools 23
Teams, own, using on public work....17
Tenure of office during pleasure of appointing authority 748-50
Term of office 747-50
Transportation allowance 445
Transportation, free 90
Unauthorized appointments 503, 504

OFFICIAL ADVERTISING—(See Advertising.)

OFFICIAL MAP—

Adoption 175, 357
Approval, date of 357
Humphreys Map 175, 404, 460, 479
Order No. 966....174, 175, 357, 460

OFFICIAL NEWSPAPER— PAGE.
Bids 777-79
Charter provisions 340, 491, 492, 744
Civil service examinations, notice 491, 492

OKLAHOMA—Constitution 887

OLD SAN JOSE ROAD—
Deed, San Francisco Homestead Union 216
Southern Pacific crossings 210

O'LEARY, FRANK—Assistant Gas and Water Inspector 772

OLYMPIC CLUB—Pier 469
Omissions of employees 220, 221

O'NEIL AND HALEY TRACT—Filing of map 403

OPEN PUBLIC STREETS—
Beacon Street 478
Blackwood Street 658, 872
Bluxome Street 459, 460
Buchanan Street, northerly from Lewis 328
Capp Street, Twenty-sixth to Serpentine 357
Charter provisions 499
Clement Street, west of Thirty-third Avenue 298, 299
Comerford Street 309, 319, 320
Consolidation Act 404
Decisions 404, 405
Dore v. Truett 328, 329
Emmet Place 479, 783, 784, 839
Forty-eighth Avenue 299
Great Highway 499
Havelock Street 691-93
Hemlock Street 372, 373
Japan Street 460
Jefferson Street, from Larkin to Van Ness 327-29
Juno Street 322
Laguna Street, northerly from Lewis 328
Leroy Place 978, 979
Lewis Street 329
Locust Avenue 660-63
Polk Street 329
Procedure 707
Proof of dedication and acceptance 660, 661
Randall Street 725-27
Redwood Street 660-63
Santa Rosa Avenue 599-601
Silver Avenue 403-405
Tonquin Street 329

OPEN PUBLIC STREETS—(Continued) PAGE.

User right 404

Van Ness Avenue—
From Jefferson to Lewis 327-29
Northerly from Beach Street 707

Webb Place 667, 668
Width for dedication 309, 320

OPENING OF STREETS—

Absence of charter or ordinance provision forbidding 413
American District Telegraph Co. 258
Anglo-American Land Co. 326
Arch Street 845
Arrearage in deposits 641-44
Arrests, corporation employees 415, 986
Beverly Street 845
Bixby Street 845
Bloom, J. W. 19
Board of Public Works 19, 20, 135, 163, 164, 176, 200-204, 239-44, 258, 270, 271, 402, 559-62, 575, 576, 619, 642-44
Board of Supervisors 96-98, 134-39, 163, 164, 195, 239-50, 277, 408-14, 523-25, 619
Bonds 258, 259
Bright Street 845
Brooklyn, parkway 959-61
Buchanan Street, northerly 328
California Electric Light Co. 244
Charter framers, intent 411, 412
Charter provisions 98, 135-38, 195, 278, 410, 411
Chief of Police 414, 415
City Electric Co. 195, 415
City Land Association Tract 845
Constitutional amendment, 1911 ..... 96, 134-37, 176, 195, 196, 200-203, 240-43, 250, 293, 295, 402, 408, 409, 411, 412, 415, 523, 524, 587, 597, 619, 642-44
Constitutional amendment limiting rights in streets 293, 409, 410, 415, 524, 597, 598
Constitutional privilege prior to 1911 amendment 97, 137, 176, 200-203, 240-43, 249, 293-96, 409-12, 415, 523, 524, 587, 597, 598, 619, 642-44
Control over permitted by State 367
Decisions 135-37, 201, 239, 240, 243, 293, 402, 409-11, 586, 587, 597, 598, 642-44
Delinquent assessments 845
Department of Electricity, permits 164, 292-94, 586-88, 597, 598, 913-16, 985, 986
Deposits 200, 559-62, 641-44
Elliott and Keppelmann, habeas corpus 402, 597, 598

OPENING OF STREETS—(Continued) PAGE.

Erection of poles....98, 134-39, 163, 164, 176, 239-41, 244, 245, 248, 277, 278, 293, 294, 409-12, 415, 523-25, 586-88, 597, 598
Excavation Fund 561
Exposition grounds 523-25
Failure to fill openings 258
Fees, street openings 643
Franchise rights 96-98, 134-39, 163, 164, 176, 195, 200-204, 239-50, 258, 277-79, 293-96, 402, 408-15, 523-25, 575, 576, 586-88, 597, 598, 618, 619, 642-44
Head Street 845
Heat mains 619
Hillcrest 19
Independent Light and Power Co....244
Ingleside Terraces 845
Injuries to pavements 560, 618, 643
Inspection 560, 561, 643
Invalid ordinance, permits....195, 197, 201, 204
Jefferson Street, easterly 328
Juno Street 322
Keppelmann, In re 402, 560, 597, 598, 642
Laguna Street, northerly 328
Laying of pipes 96-98, 137, 200-204, 241, 249, 293-96, 409-14, 523-25, 575, 576, 586-88
Lighting companies 96-98, 135-37, 163, 164, 201, 202, 241 249, 409-12, 415, 523-25, 559-62, 575, 576, 586-88, 597, 598, 619, 642-44
Lights, placing 690
Limiting to one block in length 643
Litigation 561
Los Angeles 362, 413, 586, 587
Monticello Street 845
Municipal Light and Power Co....243
Mutual Electric Light Co....244
Nineteenth Street 326
Ordinance—
To be construed as a whole....643
Validity 642
Ordinances 97, 135, 195, 200, 202-204, 248, 249, 258, 259, 270, 271, 277, 402, 523-25, 559-62, 575, 576, 597, 598, 619, 642-44
Organic law 410
Overhead construction..98, 134-39, 163, 164, 176, 239-41, 244, 245, 277, 278, 293, 294, 409-12, 415, 523-25, 586-88, 597, 598
Pacific Gas and Electric Co. 162-64, 200, 244-50, 559-62, 596-99, 641-44
Pacific Telephone and Telegraph Co....196, 201, 402
Permits....200-204, 248, 294, 402, 409, 415, 523-25, 575, 576, 586-88, 597, 598, 619, 642-44

OPENING OF STREETS—(Continued) PAGE.

Pipes, laying of....96-98, 137, 200-204, 241, 249, 293-96, 409-14, 523-25, 575, 576, 586-88

Poles, erection of....98, 134-39, 163, 164, 176, 239-41, 244, 245, 248, 277, 278, 293, 294, 409-12, 415, 523-25, 586-88

Police, Chief of....414, 415

Power companies....135, 136, 175, 176, 523-25, 985, 986

Protests....203

Public service corporations, rights....96-98, 134-39, 163, 164, 176, 195, 200-204, 239-50, 258, 277-79, 293-96, 402, 408-15, 523-25, 559-62, 575, 576, 586-88, 597, 598, 618, 619, 642-44

Ralston Street....845

Ramsell Street....845

Refusal of permission....409

Relief Home Tract, through....272-74

Russell, In re..136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913

San Francisco Electric Protective Co....258

San Francisco Gas and Electric Co....201

Seward Street....326

Sierra and San Francisco Power Co....134-39, 175, 176, 523-25

Spring Valley Water Co....200, 201, 296

Steam heat mains....619

Supreme Court of United States....913-15

Supreme Court on....201, 293, 561, 586, 587, 597, 598, 642

Telephone systems, connection between....402

Tide lands, Fort Mason....328

Universal Electric and Gas Co....408, 414

Vernon Street....845

Victoria Street....845

Water companies....97, 98, 137, 201, 202, 241, 295, 296, 409, 410, 516-19, 587

Wires, installation of..98, 134-39, 163, 164, 176, 239-41, 244, 245, 277, 278, 293, 294, 409-12, 415, 523-25, 586, 587, 597, 598

OPERA HOUSE—Condemning rights of donors....484, 485

OPERATION—

Abandoned franchise, under....421

Action to enjoin....208

Asphalt plant, municipal, spur tracks....550

Cars....368

Cars, Municipal Railway....544

Concessions....647

Failure to comply, code section, railroad....229, 230

"Fighting the Flames" amusement enterprise....647-49

Hotel....458

Islais Creek Bridge....798-800

Laws....555

Motor buses....520, 521

Municipal Asphalt Plant spur tracks....550

OPERATION—(Continued) PAGE.

Ordinances 555
Police power to regulate 233
Prospective, not retrospective 272
Public utilities 545
Public utility, municipal 605, 606
Railroads 229, 230
Sanitary Reduction Works 998
Spur tracks 550
Statute 272, 427
Street railway by municipality 205, 206
Uniform operation of law 427
Waterworks 247

OPERATORS—

Automobiles 489, 490
Elevator operators, City Hall 988
Motor Vehicle Act 489, 490
To Chief, Fire Department 346-49

ORAL CONTRACTS 72

ORANGE ALLEY—Franchise rights, Southern Pacific Co. 216

ORDERS—

California Academy of Sciences, conveyance 686
California Electric Light Co. 244
Central Pacific Railroad Co., tracks 211, 213, 214
Changes in names of streets 565, 692
Citations (See front of volume).
Districts, underground 277
Eighteenth Street 565
Fairmount Tract streets 174

Franchises—

California Electric Light Co. 244
Central Pacific Railroad Co. 211, 213, 214
Market Street Railway Co. 681, 832, 906
Park and Ocean Railway 469
Presidio and Ferries Railroad Co. 205, 206
Southern Pacific Railroad Co. 211-14
Sutter Street Railroad Co. 86-88, 95
United Railroads 170, 420, 421

Golden Gate Park 468
Great Highway 260, 499
Henry Street 692
Humphreys Map 175, 357, 460
Japan Street 460
Land Titles 260
Map, official 175, 357, 460

ORDERS—(Continued) PAGE.

Map, Outside Lands....260
Market Street Railway Co., franchise....681, 832, 906
Norfolk Street....357
Official Map....175, 357, 460
Olympic Club pier....469
Outside Lands....260
Park and Ocean Railway, franchise....469
Parks....468
Presidio and Ferries Railroad Co., franchises....205, 206
Pueblo lands....686
Quieting titles....260
Railroads paving....832, 833
Southern Pacific Railroad Co., tracks....211-14
Sutter Street Railroad Co., franchise....86-88, 95
Titles, land above high water mark....260
Underground wires....277
United Railroads, franchises....170, 420, 421
Wires, underground....278

ORDINANCES—

Abandonment of cemeteries....475
Abandonment of franchise....906-909
Absence, leaves of....288-90
Additional employees....822, 823, 898

Advertising—

In street cars....639
Of ordinances....744
On refuse cans....506

Advisory Committee, moving pictures....1011
Alameda....639
Alarm bells, fire....337
Alterations to buildings....652, 666
Amusement license....532
Amusement places....331, 332, 398-400, 482, 511-15
Anatomical museums....593, 594
Animals, destruction of....42
Animals, running at large....39, 42

Apartment houses—

Garage in....529
License....522, 537

Appointments, unauthorized....503, 504
Arcata, City of....364
Architectural competitions, public buildings....338
Army Street, improvement....732
Asphalt, paving with....629
Assessments, street improvements....628, 629, 1002, 1003
Assessor, extra employees....822, 823
Atchison, Topeka and Santa Fe Railway Co., franchise....212

ORDINANCES—(Continued) PAGE.

Audience, limiting to seating capacity....331, 332
Auditorium management 885

Automobile—
Horn blowing near hospitals....307
Reporting repairs in 928, 929
Supply stations, permit....788-91

Ball room license....508
Ball throwing games, license....648
Basalt blocks, paving with....629
Bemis Street, improvement 868
Bill boards, limiting height of....140-42
Boarding house, license 522

Bonds—
Contractors' 596
Elections 373, 374
Geary Street Railway....48, 49
Library 57
Municipal Railway....48, 49, 603, 604
Municipal Railway employees....189, 497
Opening of streets....258, 259

Boulevards, declaring certain streets to be....191
Boxing exhibitions....757
Brickyards 531
Brokers, commission 613
Brooklyn, N. Y....39
Bubonic plague cases, removal 848
Budget 609, 892
Buffalo 142
Building Law 102, 251, 265, 271, 272, 349, 350, 392-94, 461-63, 596, 649, 652, 654, 666
Building permits 652-54, 804
Buildings 666
Insanitary....433, 434, 448, 449
Limiting height of....271, 272
Bureau of Efficiency....62-64
Buses 520, 521

Business—
Licensing 638-40
Regulation of....481-84
Restrictions on, Supervisors' power to pass....36

Butcher business in markets....39
Cable lines, electrification of....421
Cane racks, license....648
Cans, refuse....505
Cars, advertising in....639
Caterers, license 522
Cattle, moving of....39, 42

ORDINANCES—(Continued) PAGE.

Cement, forbidding hauling in certain district....1013, 1014
Cemeteries, abandonment of....475
Cemetery removals....396, 397
Censorship, moving pictures....1011
Central Pacific Railroad Co., franchise....335
Certified copy, recording....340, 341

Charter—
Equal dignity with....812
Subject embraced in title....535

Chico, City of....638
Chief of Police, Secretary to....1008-1010
Chimneys, patent....653, 654
Cholera cases, removal....848

Church—
Garage near....573-75
Kinetoscope parlor near....398-400, 569
Saloon near....568, 569, 577

Chutes, license....648
Citations (See front of volume).
Closing time, pawn shops, etc....570-72
Coal, forbidding hauling in certain district....1013, 1014
Commission brokers....613
Common law, harmonizing with....362
Competition, plans, public buildings....338
Concert license....532
Concessions....665
Condemnation, portion of structure....417, 418
Condemned building, demolition of....448
Conductors, Municipal Railway, bonds....189, 497
Consolidation, license ordinances....527
Construction of buildings....652

Contagious diseases—
Isolating....770, 848
Removal....807, 808

Contractors' bonds....596
County Jail buildings, alterations....999
Courts, review by....38

Cycloramas—
License....648
Permits....482

Dance hall licenses....637-41

Dances—
Classification of....637
Licenses....508

Decisions....362
Delivery companies, license....535

ORDINANCES—(Continued) PAGE.

Demolition of buildings....184, 448, 449
Deposits, street openings....200, 559-62
Destroying, structure or part....417, 418
Destruction of animals.... 42
Detective agencies....842, 843
Detroit, street railway.... 90
Diphtheria germ carriers....848-51
Director, Bureau of Efficiency....63, 64
Diseases, contagious....770, 807, 808, 848
District Attorney, assistants....823

Districts—
Forbidding hauling of certain substances....1013, 1014
Industrial and residential....145, 554

Dogs in flats....434-37
Drawbridge, Islais Creek....799
Effective under all conditions....574
Efficiency, Bureau of....62-64

Elections—
Bond issue....373, 374
Geary Street Railway bonds....48, 49
Primary, a holiday....314

Electric—
Motor installation, reporting....601-603
Rates....473, 474
Service installations....596, 598, 985

Electricians, licenses....598
Electrification of cable lines....421
Embalming establishments....30, 31, 38, 42

Employees—
Assessor....822, 823
Bonds for....497

Enact, power to....245
Entertainments, license....532, 533
Entrances, amusement places, obstructing....331, 332

Excavations in streets....
....97, 135, 195, 200-203, 248, 249, 258, 259, 270, 271, 277, 402, 523-25, 559-62, 575, 576, 586, 588, 597, 598, 619, 642-44

Exits, amusement places, obstructing....331, 332

Exposition—
Buildings....666
Fire protection....781
Moving picture shows....793

Expressmen reporting removals of trunks, etc....563
Extensions of services..97, 195, 248, 275, 576, 586, 588, 597, 598
Extra territorial force....362
Females employed in certain restaurants....426

ORDINANCES—(Continued) PAGE.

Fences....61, 142
Fever cases, removal....848
Final passage....339-41
Fire alarm charges....337
Fire limits....184-86, 552
Fireplaces....653, 654
Fish peddlers, license....638
Flats, keeping dogs in....434-37
Frame buildings, tearing down....184, 185

Franchises—

Abandonment....906, 909
Atchison, Topeka and Santa Fe Railway Co....212
Central Pacific Railroad Co....335
Ocean Shore Railway Co....24-28
Presidio and Ferries Railroad Co....205, 206
Public utility: when going into effect....317
San Francisco and San Joaquin Valley Railway Co. 317, 798, 799
Southern Pacific Co....211-14, 317, 318, 335, 336

Fresno....640
Fruit peddlers, license....638
Game peddlers, license....638
Games of chance, license....648
Garages....529-31, 573-75, 634
Gas rates....473, 474
Gasoline storage....634, 789, 790
Gasoline supply stations, permits....788-91
Geary Street Railway Bonds, election....48, 49
General laws, conflicting with....849-51
General laws, harmonizing with....362
Harrison Street, grading....440, 441, 826, 950
Hauling certain substances in certain district, forbidding 1013, 1014
Hawthorne Street, grade....950

Height—

Bill boards....140-42
Buildings, limiting....271, 272

Hetch Hetchy grant, accepting....494
Holiday, election day....314
Hospitals....307, 349-51, 438

Hotel—

Garage in....529
License....522, 556

Industrial districts....145, 250, 251, 554
Initiative provisions of charter, enacted under....569
Insanitary buildings....417, 418, 433, 434, 448

ORDINANCES—(Continued) PAGE.

Inspection—
Electrical work 598
Meat 300-303

Installation, electric work 596, 598, 601-603, 985
Installments, street assessments 1003
Intoxicants, sale of 481-84

Invalid—
No. 16 (New Series) 31
No. 1958 (New Series) 63
No. 2109 (New Series) 195, 197, 201, 204, 270, 271
Building Law section 393, 461, 462, 552, 556
If taking away powers of commission 481
Obnoxious before being 638
Only where fundamental rights or personal privileges invaded 553
Where subject not expressed in title 535

Islais Creek drawbridge 799
Itinerant vendors 1014-16
Jail buildings, alterations 999
Jitney buses 947
Junk dealers, closing time 570-72
Kansas City 142
Kansas Street, improvement 732
Kinetoscope parlors 398-400, 482, 569, 648, 1011-13
Labor of minors 989

Lands—
Relief Home, sale 339-44
Sale of 339-41

Laundries 161, 551-56
Laying of pipes 97
Leaves of absence 288-90, 387, 997, 980, 984
Liability, personal, officers 503, 504
Library Bonds 57
License ordinances, consolidation 527
Licenses 482-84, 522, 528, 532, 535, 537, 556, 557, 598, 613, 614, 637-41, 648, 653, 654, 665, 824, 1011-13
Lighting poles, control over 717, 718
Lime, forbidding hauling in certain district 1013, 1014
Limitations upon 362
Limiting height of buildings 271, 272
Liquor 482-84

Lodging houses—
Garage in 529
License 522

Los Angeles 99, 145, 482, 527, 531, 554, 712
Lower Market Street, Municipal Railway bonds 48, 49

ORDINANCES—(Continued) PAGE.

Main Street, change of grade....541-43
Market Place lots....851, 852, 880

Meat—
Inspection and sale....300-303
Peddlers, license....638

Merchandise brokers, license....613, 614
Merchants, license....640
Milk, sale and delivery of....552
Minors, labor of....989
Mission Park....840
Modesto....374, 555
Modification of....250
Montgomery Street, acceptance....177
Motor Buses....520, 521
Motormen, Municipal Railway, bonds....189, 497
Moving pictures....331, 332, 398-400, 482, 511-15, 793, 876, 931-33, 1011-13
Moving trunks, etc., record of....563

Municipal Railway—
Bonds....48, 49, 604
Employees, bonds....189, 497

Murphy, Joseph A., secretary to Chief of Police....1007-10

Museums—
Anatomical....593, 594
License....648
Permits....482

New York City....552
Nickelodeons....331, 332, 398-400, 482, 511-15
Nineteenth Street, land for opening....326
Ninth Street, acceptance....94
Noises on streets, prohibiting....307
Not to be subjected to influences beyond control of legislative body....574
Nuisances....417, 418, 448, 449
Number of votes for passage....700

Obstructions—
Aisles, etc., amusement places....331, 332
Sidewalks....84, 85

Ocean Avenue, abandonment of franchise....906-909
Ocean Avenue, viaduct....650
Ocean Shore Railway Co....24-28, 105, 226, 227, 229, 230, 233, 234, 650, 651

Officers—
Bonds....497
Personal liability....503, 504

ORDINANCES—(Continued) PAGE.

Official newspaper only, publication in....744

Openings in streets....97, 200-203, 248, 249, 258, 259, 270, 271, 277, 402, 523-25, 559-62, 575, 576, 586, 588, 597, 598, 619, 642-44

Operating prospectively and not retrospectively....272

Outdoor park....665

Panama-Pacific International Exposition....456-59, 781, 793

Panorama, permit....482, 648

Passage—

By majority of board....609

Necessary votes....64

To print....179, 339-41

Passages, amusement places, obstructing....331, 332

Patent chimneys....653, 654

Paving by railroads....335, 336

Pawn shops, closing time....570-72

Pawnbrokers reporting to police....928

Peddlers, license....638

Penal ordinances, Los Angeles....527

Personal liability of officers....503, 504

Phonograph parlors....482, 648

Pipes, laying of....97, 200-203, 523-25, 575, 576

Plague cases, removal....848

Plans, public buildings....338

Plumbers....909

Poles—

Erection of....135, 248, 249, 523-25, 586, 588, 597, 598, 717, 718

Ocean Shore Railway Co....234, 235

Police—

Chief, Secretary to....1008-10

Commission, permit to sell liquor....481-84

Patrol boat, engineers....812

Political Code, conflict with....849

Pool rooms, permits....482

Portion of structure, destroying....418

Potrero Avenue, use by Ocean Shore Railway Co....226

Poultry peddlers, license....638

Pound, public....42

Premiums on bonds....497, 498

Presidio and Ferries Railroad Co., franchises....205, 206

Primary election day a holiday....314

Private detectives....842, 843

Produce Exchange lots....851, 852, 880

Progressive payments on contracts....999

Property, restrictions on use of, Supervisors' power to pass....36

Prospectively, operating....272

ORDINANCES—(Continued) PAGE.

Provisions having same effect as Charter provisions.....135
Public Library bonds..... 57
Public service corporations, street openings.....
.....97, 135, 195, 200-203, 258, 270, 271, 277,
402, 523-25, 559-62, 575, 576, 586, 588, 597, 598, 619, 642-44
Public utilities—
Acquisition of.....373, 374
Franchise goes into effect after sixty days.....317
Publication of—
Five days 339
Supervisors ordering 743-46
Quarantining contagious diseases.....770
Railway tracks, street..... 90
Real estate dealers.....528
Reconstruction of buildings.....652, 666
Recorder's copyists, vacations 977
Recording certified copy.....340, 341
Referendum provisions, charter.....414
Refreshment places, license.....522, 556
Refuse cans 505
Regulation of business.....481-84
Relief Home lands, sale.....339-44
Removal—
Cemeteries 396, 397
Contagious diseases 770, 807, 808, 848
Rendering tallow 847
Rent collectors, license tax.....528
Repairs to buildings.....652
Repealed by state act 709, 711
Residence districts 145, 250, 554
Restaurants—
Employment of females in.....426
License 522, 556
Retrospectively, not operating.....272
Review by the courts, subject to..... 38
Revolving wheels, license.....648
Ring throwing games.....648
Roller skating rinks, license.....648
Sacramento 553
Sale—
Lands 339-41
Liquor 481-84
Relief Home lands 339-44
Saloon within 150 feet of church or school.....568, 569, 577
San Francisco and San Joaquin Valley Railway Co.,
franchise.....317, 798, 799

ORDINANCES—(Continued) PAGE.

Sanitarium, permit for....349-51
Santa Barbara....378
Santa Rosa....374
Scalpers, ticket, license....929-31

School—

Garage near....573-75
Kinetoscope parlor near....398-400, 569
Saloon near....568, 569, 577

Sealer, Weights and Measures....454
Seating capacity, amusement places....331, 332
Secondhand dealers....570-72, 824
Secretary to Chief of Police....1008-10
Service connections....195, 576, 642
Seward Street, land for opening....326
Shacks, tearing down....184, 185
Side tracks....335, 336
Sidewalks, obstructions on....84, 85
Sierra and San Francisco Power Co....523-25
Signs, height of....142

Sixty days after passage—

Effective....414
Public utility franchise....317

Skating rinks, license....648
Slaughter houses....39-42
Slides, toboggan, license....648
South Pasadena....362

Southern Pacific Co.—

Franchises....211-14, 309, 317, 318, 335

Special election....373, 374
Special ordinances: power of Supervisors to pass....457
Speed, street railway cars....233, 234
Spite fences....61
Spur tracks....211-14, 335, 336
St. Louis....505, 552
Stables....250, 251, 461-63, 919, 920
Stairs, amusement places, obstructing....331, 332
Stanley Place, grading....440, 950
State act repealing....709, 711
State law superseding....843
Steam heat mains....619
Stockton....555
Street cans....505

Street railways—

Cars, limiting speed....233
Tracks....90

ORDINANCES—(Continued) PAGE.

Streets—
Assessments 628, 1002, 1003
Improvements 700
Obstructions 84, 85
Openings in 97, 135, 195, 200-203, 248, 249, 258, 259, 270, 271, 277, 402, 523-25, 559-62, 575, 576, 586, 588, 597, 598, 619, 642-44
Street improvement ordinance 440, 441, 655, 656, 864-71, 917

Structures—
Insanitary 433
Portion of, condemnation 417, 418

Subject, embraced in title 535
Superintendent, Municipal Railway, bond 189
Superintendent of Schools, traveling expenses 1026
Supervisors ordering publication of 743-46
Supply stations, permit 788-91
Tallow, rendering 847
Tearing down of buildings 184, 448-50
Telegraphs, service and poles 204, 717
Telephone service and poles 204, 717
Temporary buildings, tearing down 184, 185
Tenement houses, license 522, 537
Theatres 331, 332, 398-400, 482, 511-15
Ticket peddlers, license 929
Title embracing subject 535
Toboggan slides, license 648

Tracks—
Doubling of 90
Ocean Shore Railway Co. 234, 235
Street railway 90

Trading stamps given by merchants, higher license 640
Traffic 947
Transfer companies, license 535
Tunnel Procedure Ordinance 166
Twenty-fifth Street, Ocean Shore Railway Co., tracks 229
Unauthorized appointments 503, 504
Underground conduits 277, 523-25, 586, 588, 597, 598, 619, 642-44
Underground conduits, changing overhead to 523-25
Undertaking establishments 30, 31, 38, 42

Uniform—
Integrity of 574
Operation of 555

Universal Electric and Gas Co. 408, 414
Use of Streets 97, 135, 195, 200-203, 248, 249, 258, 259, 270, 271, 277, 402

ORDINANCES—(Continued) PAGE.
Vacations 288-90, 387, 862, 977, 980-84
Van drivers....564
Van Ness Avenue—
A boulevard 190
Municipal Railway on....190-92
Van Ness ordinance....547, 548, 661, 662
Vassar Place, grading 826, 950
Vegetable peddlers, license....638
Vermont Street, improvement 732
Votes necessary for passage....64, 339-41, 501, 700
Wash houses 161
Waste cans....505
Weights and Measures Bureau....454, 729
Wheels, revolving, license....648
Whistle blowing near hospital....307
Wholesale liquor dealers....482
Wiring buildings 596, 598
Wooden structures....184, 185, 552
Working minors, regulating 989
Zones, industrial and residential....145

O'REILLY, PATRICK J.—Refund, erroneous taxes 657-59, 969, 970

ORGANIC LAW—
Charter....72, 136, 360, 410, 694, 778
Consolidation Act 404
Powers of municipality 360

ORIENTAL WAREHOUSE—Encroachment, Bluxome Street..459, 460

ORIENTALS—Discrimination against 552

ORPHANS—Maintenance of 400

OSAGE ALLEY—Franchise rights, Southern Pacific Co....216

O'SHAUGHNESSY, M. M.—Demand....120, 121.

OTIS STREET—Spur track 25

OTTOFY, L. F.—Patents, street flushers....333, 334

OUTDOOR ART LEAGUE—Removal of cemeteries....475, 476

OUTDOOR PARK—Permit 665-67

OUTSIDE LANDS—
Committee, Golden Gate Park....468
Map....260, 261
Order No. 800....260

OVERHEAD CONSTRUCTION— PAGE.
Changing to underground....523-25
Charter framers, intent....411, 412
Charter provisions....98, 136-38, 410, 411, 525, 717
Chinatown....596
Constitutional privilege....587, 597, 598
Decisions..135-37, 239, 240, 278, 293, 409-11, 586, 587, 597, 598
Department of Electricity, permits....245, 586-88
Franchises....239-41, 244, 245, 277, 293, 294, 409-12, 415, 523-25, 575, 576, 586-88, 597, 598
Independent Light and Power Co....244, 245
Inspection fees....598
Mutual Electric Light Co....244, 245
Pacific Gas and Electric Co....245, 596-99
Panama-Pacific Exposition grounds....523-25
Permits....163, 164, 248, 294, 409, 415, 523-25, 575, 576, 586-88, 597, 598
Reporting installation....601-603
Sierra and San Francisco Power Co....523-25
Temporary permits, Board of Public Works....415

OVERLAPPING FRANCHISES....420-22

OWNER—
Damages, recovery of....449
Definition....854
Discontinuing use of property....712
Higher lot, liability to owner of lower lot....737
Repairs at expense of....590
Subdivision....528
Teams, insuring drivers....797, 818, 819

OWNERSHIP—
Dogs....435
Fee in streets....246
Jefferson Square....548, 549
Patented pavement....453, 454
Pipes through city property....123
Property below level of street....737
Rails....206
Tide lands....466
Tracks....206

P

PAGE.

PACIFIC AVENUE—Street railway franchise....86, 88

PACIFIC FIRE EXTINGUISHER CO.—Bid....321

PACIFIC GAS AND ELECTRIC COMPANY—

- Arrearage, street opening deposits....641-44
- Asphalt Plant, light and power....762-65
- Bonds, electric installations....596
- Buildings, installations....596
- California Electric Light Co., franchise....244
- Chinatown, wire installations....596
- Commercial use of poles for additional street lights....162, 163
- Contract, light and power....162, 431, 432, 762-65
- Defects in installations....596, 598
- Department of Electricity, approval....245
- Deposits, street openings....559-62, 641-44
- Electroliers on Polk and Mason Streets....430-32
- Enjoining rate ordinances....474
- Excess rates charged....473, 474
- Franchise rights....244-50
- Independent Light and Power Co., franchise....244
- Inspection fees....598
- Keppelmann, In re....560, 597, 598, 642
- Mason Street, electroliers....430-32
- Mutual Electric Light Co., franchise....244
- Openings in streets....200
- Overhead construction....245, 596-99
- Polk Street, electroliers....430-32
- Predecessors' franchise rights....244
- Public buildings, light, heat and power contract....622-24
- Rights acquired from other companies....245
- Right to charge rates they please....474
- Service wires....596
- Streets—
  - Light bids....622
  - Rights in....162-164, 200, 244-50, 559-62, 596-99, 641-44
- Vested rights....598
- Wiring buildings....596

PACIFIC TAXIMETER CAB CO.—Garage....529

PACIFIC TELEPHONE AND TELEGRAPH COMPANY—

- Connection with Home system....196, 197, 402
- Electric motors installed....601-603
- Fire alarm installation, exempted from charges....337
- Inspection of work....602
- Merger....402
- Rights in streets....196, 201, 402
- Western Electric Co., installing motors....601-603

PAINTERS—Fire Department....557

PANAMA-PACIFIC INTERNATIONAL EXPOSITION— PAGE.
Auditorium 885, 987
Changing power wires overhead to underground 523-25
Charter provision 457
Concessions, operation of 456-58
Constitution of California 457
Fire protection 781
Golden Gate Park, use of 841
Hotel, operation of 458, 459
Injuries to firemen 780-83
Inside Inn 456-59
Lobos Square, use of 841
Moving picture shows 793
Organization 457
Powers 457
Rights and privileges 458

PANORAMAS—
"Fighting the Flames" 648
License 648
Ordinances regulating 648
Permits, Police Commission 482, 648

PARAMOUNT—Charter 926

PARENTS—Pensioning of 352, 356

PARK AND OCEAN RAILWAY CO.—Franchise 469, 955, 956

PARK STREET—Rights of Southern Pacific Co. 215, 216

PARKING STATION FOR AUTOMOBILES—Permit 633-35

PARKS, PARK COMMISSION—
Act of Legislature 957
Alum Rock Park 841
Assessments, levying of 502
Authority under Consolidation Act 470
Brooklyn 959, 960
Buena Vista Park, control 467
Buildings, Great Highway 499
Buildings in parks, supervision 468, 469
Cahill, John, thumb injured 742, 743
California Academy of Sciences, museum 841
Cemeteries 475, 476
Changing use of 549
Charter provisions 546, 775, 776
Chicago 501, 502
Commission, jurisdiction 259-61, 467, 468, 499-501, 957-61
Control under Charter 467, 468
Decisions, powers, etc., of 500-502
Employees—
Salaries 755, 756
Vacations 984

PARKS, PARK COMMISSION—(Continued) PAGE.

Exposition 841
Funds 468, 776, 892
Geary Street, formerly under jurisdiction 794

Golden Gate Park—
Employees, salaries twice a month 755, 756
Jurisdiction over 467, 468
Municipal Railway across 954-62
Museum 841
Use for exposition 841

Great Highway—
Grading 259
Jurisdiction over 259-61, 467, 468, 499-501, 941
State highway tax on automobiles for improvement of 940-42

Hamilton Square, transfer to Playground Commission 546, 547
Illinois statute 502
Injury to employees 742, 743
Jefferson Square, fire alarm station 548, 549
Lands, jurisdiction over 500
Leasing 469, 841
Lighting 500, 501
Limited franchise 500
Lobos Square 841
Los Angeles 841, 961
Mission Park 840-42

Municipal Railway—
Across Golden Gate Park 954-62
Across Mission Park 840

Museum 841
Native Sons' Monument, replenishment of drinking cups 680
New York 841
Ocean Front, control 468
Panama-Pacific Exposition Co., use of portion 841
Park and Ocean Railway Co. 469, 955, 956
Pay day twice a month 755, 756
Playground Commission, transfer to 546, 547
Playgrounds, set apart 546
Point Lobos Avenue, formerly under jurisdiction 794
Powers 546
Pueblo grant 547, 548
Railroad in 842
Right to use limited 841
Sewer construction 500-503
Structures, erection of 499-502
Structures in parks, supervision 468, 469
Tax levy 1028
Tax levy exceeding seven cents 775, 776, 941

PARKS, PARK COMMISSION—(Continued) PAGE.
Title of City and County 466
Transfer, city property, one department to another....546, 547
Vacations 984
Van Ness ordinance 547
West Chicago Park Commissioners....501, 502

PASADENA—
Railroad fares, regulation 362
Use of streets 137

PASSAGE—
Bills 340
Budget 609
Charter provision 179
Final passage 73
Ordinances....64, 179, 339-41, 609, 700
Public utility franchise 317
Resolutions....178, 179, 340
Special ordinances 457
Votes required 64, 339-41, 700

PASSAGEWAYS—Theatres, obstructing 331, 332

PASSENGERS—
Belt-line Railroad, use for transporting 279-81
Facilities, franchise condition 368
Fares 361-64
Motor buses 520, 521

PASSES—Free 364

PATENTS—
Benjamin, L. M., infringement of rights....334
Bernal Rancho 106, 107, 118
Bitulithic pavement 453, 454
Cars, Municipal Railway, royalties....718-21
Charter 453
Chimney 651-55
City and County of San Francisco, pueblo lands....115, 116
Competitive bidding 991, 992
Darby, Samuel E., royalties 719, 720
Decision, U. S. Circuit Court of Appeals....333
Edwards, Sager and Wooster 333
Eminent domain, subject to 485
Harris Automatic Stop Signal....991
Infringement....333, 334
Injunction, sale of Machines 333
Jewett Car Co., royalties on cars....718-21
Monopoly, prevention of 453

PATENTS—(Continued) PAGE.

Ottofy, L. F. 333, 334
Pavement 453, 454
Prepayment Sales Car Co., royalties....719, 720
Pueblo land grant to San Francisco....115, 116, 276, 547
Rancho Rincon de las Salinas y Potrero Viejo....106, 107, 118
Ratican, William 333, 334
Ross and McDonald, royalties 718
Sanitary Street Flushing Machine Co. 333, 334
Specifications clause protecting city 718
St. Louis Street Flushing Machine Co....333
Street flushers 333, 334
Transfer of rights to city 453, 454

PATTIANI, A.—Permit, lodging house 708, 709

PAVING, PAVEMENTS—

Abutting property owners, liability....335, 336
Additional, due to narrowing sidewalks....178
Arguello Boulevard 180
Asphalt, certain gradient 629

Assessments—

Separate for each different kind....629
Uniform rate per front foot 629

Basalt blocks, certain gradient 629

Between rails and on each side thereof....
....86, 91, 335, 336, 681, 682

Bitulithic pavement 453, 454
Charter provisions 453
Chicago, street railway 92
City Street Improvement Co....180, 198, 199
Civil Code 832
Clover Street 628
Cost, contract 628
Crossings 233

Damaged by public service corporations....
....409, 560, 618, 643

Decisions....89-92, 181-83
Fairmount Street 866
Geary Street 835
Injury to....409, 560, 618, 643
King Street 335, 336
Mandamus compelling street railway....650
Montgomery Street 178
Obligation on street railways....92, 233, 650, 681
Ocean Shore Railway Co....232, 233, 235
O'Farrell Street 681, 682
Order No. 1514 832
Patented 453, 454

PAVING, PAVEMENTS—(Continued) PAGE.
Philadelphia, street railway 91, 92
Property owners, liability 336
Railroads, obligations 90-92, 335, 336, 358, 681, 832
Randall Street 866
Resolution of intention 655-57
San Bruno Avenue 607
Santa Rosa Avenue 599
Southern Pacific Co. 335, 336
Street railways, obligations 92, 233, 650, 681
Unit prices, contract 198, 199
United Railroads 91, 93-95, 681, 682
Whitney Street 866

PAWN SHOPS—
Ordinance regulating 570-72
Reporting to police 928

PAY CHECKS 121, 122

PAY ROLLS—
Approval—
Auditor and Treasurer 673
Civil Service Commission 672-74, 939
Board of Public Works 980
Fire Department 713-15
Teamsters' separate Saturday pay rolls 805-807
Twice a month 713-15, 755, 756, 805-807

PAYMENT—
Bonds, kind of money 375, 377
Interest on bonds 374-379
Voluntary 632

PEACHY, ARCHIBALD C.—Mortgage 107

PECKHAM, JUSTICE—Height of buildings 144

PEDDLERS 506, 638, 929-31

PENAL CODE—
Amendments 757
Bail, forfeiture of 562, 563, 589
Barbers open Sundays 572
Boxing 757
Citations—(See front of volume).
Election day, sale of liquor on 679
Grand Jury, employment of expert 407
Invalid section 572
Liquor, sale of 679
Nuisances 450

PENALTIES— PAGE.
Delays on contract 194
Delinquent taxes 630-32
Domestic meat mixed with imported, shipment....300
Employee entering into contractual relationship with city 345
Escaping taxation 614, 615
Service, refusal to furnish 293

PENNSYLVANIA STATUTE 17

PENSIONS—
Arata, Guiseppe and Rosa, deceased fireman....351-56
Attachments, exempted from....706
Baker vs. Board of Fire Pension Fund Commissioners....352
Brophy, Josephine 266
Canty, Mary 443, 444
Ceasing when disability ceases....130, 580
Charter amendment 443, 444
Charter framers, intent 131, 585
Charter provisions 443, 444, 578, 580, 584, 585
Civil Code section 706
Commissioners—
Finding final and conclusive 266
No power to grant 621
Conlon, James, family of....423-26
Death from injuries 352-56, 584
Deceased benefiting during lifetime 443, 444, 621
Decisions 352-55, 444, 706
Deductions from pay....578, 579
Disability 129, 354, 579, 580, 584, 585, 620
Dolan, M. J. 128, 129
Dougherty, Susan E....266, 620, 621
Edwards v. Sweigert 353-55, 444
Execution, exempted from 706
Exempted from assignment 706
Families—
Receiving pension 443, 584
Sewer Department employees killed....423-26
Injuries in discharge of duties 351-56, 443, 444
Insane through injuries 352, 353, 356
Intent of charter framers 131, 585
Interval between injuries and death....353-55
Jones, Robert J., hoseman 837, 838
Kavanaugh vs. Board of Police Pension Fund Commissioners 355
Killed in discharge of duties 352, 354, 584
Lane, Franklin K., opinion 131, 579

PENSIONS—(Continued) PAGE.

Length of service 132
Lifetime, received during 354
Lynch, Patrick, family of 423-26
Mothers' Pension Law 400, 401
Murasky, Judge, decision 706
Parents, deceased sole support of 352, 356
Police Relief and Pension Fund 579
Rank and salary governing 128, 129, 579, 580, 620
Rescinding of 266, 267
Retirement pension 620
Retiring age 579
Salary, one half of 128, 578, 579, 620
Setting aside Commission's finding 266, 267
Sewer Department employees, families of 423-26
Substitute teachers 566, 567
Suicide 352, 353, 356
Teachers 566, 567

Time Limit—
Between injuries and death 354, 355
Death after injury 443, 444

Van Keuren, Mary 266

Widow not entitled if husband benefitted during lifetime 620, 621

Widows' Pension Law 400, 401

PERCENTAGE—Rate of return, gas and electricity 474

PERCENTAGE OF RECEIPTS—

Charter provision 98, 411
Dolge, William, United Railroads 419-22
Motor bus line 520, 521
St. Louis, advertising contract 505
United Railroads 419-22

PER DIEM EMPLOYEES—

Board of Public Works 980-83
Judge Crothers, decision 980, 984
Municipal Railway employees 984
Salaries twice a month 756, 807
Teamsters 807
Vacations 862, 980-84

PERFORMANCES—

Building Law 511, 512
Obstructing aisles, etc. 331, 332

PERISHABLE PROPERTY—Sale on execution 167

PERMITS— PAGE.

Absence, legislative authority 711
Addition to building 429
Advertising on municipal waste cans 505-07
Alterations to buildings 272, 649, 652, 666
Amusement places 482, 646-49
Anatomical museums 593, 594
Automobile—
Parking station 633-35
Supply stations 633-35, 788-91
Blasting 704-706, 803, 804
Board of Public Works 164, 200-204, 415, 575, 576, 619, 642-44, 649, 652-54, 666
Board of Supervisors 28, 294, 415, 523-25, 530, 619, 789, 790
Building Law 265, 393, 652
Building permits 272, 350, 394, 649, 652-54
Cans, refuse, advertising on 505-507
Cars, running of 28, 361, 363, 365, 368
Change, overhead construction to underground 523-25
Chimney, patent 651-55
City Electric Co., opening streets 195, 415
Clinics 437-39
Columbia Realty Co., construction, lodging house 708, 709
Concessions 647, 648
Constitutional amendment, invalidated by 415
Construction of buildings 649, 652, 666
Cow stable 552
Cycloramas 482, 648
Dairy stable 552
Decisions 393, 394, 462, 482-83, 505-507
Demolition of buildings 649
Department of Electricity 164, 415, 586-88
"Dillon on Municipal Corporations" 790
Discretion in Board of Supervisors to issue 789, 790
District, necessary some, unnecessary others 461
Dog hospital 30
Duke, Robert D., advertising on waste cans 505-507
Electric conduits 576
Embalming 30-33, 38, 42
Erection of buildings 649
Extension of service 294, 409, 415, 575, 576, 586-88, 597, 598
"Fighting the Flames," 646-49, 665-67
Fire Wardens, alterations 552
Fireworks, discharge of 705
Garages 529-31, 573-75, 634
Garbage cans, advertising on 505-507
Gas mains 576
Gasoline supply stations 633-35, 788-91
Globe Theatre, alterations 509
Grading 825, 826

PERMITS—(Continued) PAGE.

Gray Brothers 803, 804
Hospitals 349-51, 437-39
Hotels 458
In re Dondero 393, 461, 462
In re Keppelmann 402, 560, 596, 597, 598, 642
Invalid—
Building Law section 393, 394, 461, 462
Ordinance, street opening permits 195, 197, 201, 204
Jitney buses 520, 521
Kinetoscope parlors 398-400, 482, 569, 1011-13
Lapier, L. B. 525
Laundries 160-62, 461-63
Laurelle v. Bush 482
Legislative authority, absence of 711
Liquor, sale of 481-84
Lodging houses, construction 708-12
Los Angeles ordinances 482
Michellari and Longo, reconstruction of stable 392-94
Modification of 248
Motor buses 520, 521
Moving pictures 398-400, 482, 1011-13
Museums 482, 593, 594
Nickelodeons 398-400, 482
Not necessary for laundry or stable 394, 463
Obstructions on sidewalks 85
Ocean Shore Railway Co. 27, 28
Opening of streets 164, 195, 200-204, 248, 294, 359-64, 402, 409, 415, 523-25, 575, 576, 586-88, 597, 598, 619, 642-44
Opening street through Relief Home Tract 273, 274
Outdoor park 646-49, 665-67
Overhead construction 164, 248, 294, 409, 415, 523-25, 586-88, 597, 598
Panoramas 482, 648
Parking station for automobiles 633-35
Patent chimney 651-55
Phonograph parlors 482, 1011-13
Pipes, laying of 200-204, 294, 409, 523-25, 575, 576, 586, 587
Poles, erection of 134, 135, 164, 248, 294, 409, 415, 523-25, 586-88, 597, 598
Police Commission 481-84, 648, 824
Pool rooms 482
Power lines 588
Public utilities, establishing and operating 413
Railroads using streets 359-64
Reconstruction of buildings 160, 162, 392-94, 652, 666
Refuse cans, advertising on 505-507
Refusal of 32
Removal of buildings 649

PERMITS—(Continued) PAGE.

Repairs to buildings 649, 652, 666
Revocable permits 195, 550, 619
Revocation of 804
Saloons 481-84, 568, 569, 577
Sanitariums 349, 350
Second-hand stores 824
Service connections 576
Service extensions 294
Side tracks 28, 550

Sidewalks—

Obstructions 85
Space below, use of 265

Sierra and San Francisco Power Co. 523-25
Sign on building, Lincoln School lot 262
Soap manufacture 846
Spur tracks 28, 550

Stable—

No law requiring permit for 394, 463
Reconstruction of 392-94

Stables 461-63, 552, 553, 919, 920
State Hotel and Lodging House Act 710, 711
Steam heat mains 619

Street openings 164, 195, 200-204, 248, 294, 359-64, 402, 409, 415, 523-25, 575, 576, 586-88, 592, 598, 619, 642-44

Street through Relief Home Tract 273
Sidewalk areas 265
Supply stations 633-35, 788-91
Telephone lines 588
Telephone systems, connection 402
Temporary 248, 415, 525
Theatres 1011-13
Track along sewer right of way 228
Tracks, laying of 361, 363, 365, 368
Tunnel construction 706
Underground conduits 523-25, 586-88, 597, 598, 619, 642-44
Undertaking establishments 30-33, 38, 42

Use of streets 164, 195, 200-204, 248, 294, 359-64, 402, 409, 415, 523-25, 575, 576, 586-88, 592, 598, 619, 642-44

Waste cans, advertising on 505-507
Water Front Realty Co., building 429, 430
Wires 294, 409, 415, 523-25, 586-88, 597, 598

PERSONAL LIABILITY OF OFFICERS 503, 504

PERSONAL PROPERTY—

Eminent domain, subject to 485
Moving of, reporting 563, 564
Sale on execution 167

PAGE.

PETERSON, JAMES E.—Reinstatement as conductor, Municipal Railway 996, 997

PHARMACY—Practice of 965, 966

PHILADELPHIA—Franchise, street railway 91, 92

PHONOGRAPH PARLORS—
- Laurelle v. Bush 482
- License 648
- Ordinances regulating 648, 1011-13
- Permits, Police Commission 482, 1011-13

PHYSICAL FITNESS—Examinations 148

PHYSICIANS—
- Dr. G. F. Brackett, County Jail 966
- Misleading advertising 932

PIANOS—Installment contracts 594

PIERS—
- Ocean Beach 464, 465, 470
- Olympic Club 469

PIOCHE AND ROBINSON—Islais Creek 113

PIOCHE, FRANCIS L. A.—Judgment 119

PIPES, LAYING OF—
- Before acceptance of street 918
- Bloom, J. W. 19, 20
- Brooklyn 959
- Charter amendment 98
- Charter framers, intent 411, 412
- Charter provisions 410
- Constitutional amendment, 1911 ..... 96, 241, 293-95, 409, 411, 412, 523, 524, 587
- Constitutional prerogative prior to amendment 409
- Decisions 201, 243, 293, 295, 409-11, 586, 587, 642
- Elliott and Keppelmann, habeas corpus 402
- Exclusive privileges 410, 414
- Exposition grounds 523-25
- Extension of mains—(See Extension of Service.)
- Franchises 241, 249, 293-96, 409-14, 523-25, 575, 576, 586, 587
- Geary Street 154
- Hillcrest 19, 20

PIPES, LAYING OF—(Continued) PAGE.
In re Johnston 249
In re Keppelmann 402, 560, 596, 597, 598, 642
In re Russell 96, 97, 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
Location of public service conduits 154
Ordinance No. 658 (New Series) 97
Ownership of, running through city property 123
Panama-Pacific Exposition grounds, power underground 523-25
Pasadena, litigation 137
Permits 200-204, 294, 409, 523-25, 575, 576, 586, 587
Relief Home tract 123
Sierra and San Francisco Power Co. 523-25
Supervisors, control over 98
Universal Electric and Gas Co. 408, 414

PLAGUE CASES—Removal of 848

PLANS—
Competition 338, 339
Hotels and lodging houses 709
Tuberculosis building, San Francisco Hospital 338

PLATFORM—A structure 434

PLAYGROUNDS, PLAYGROUND COMMISSION—
Accident to visitor, liability 611, 612
Appropriation fixing salaries 7
Automobile, purchase of 635, 636
Bids, calling for 636
Charter provisions 546, 635, 636
Contracts, letting of 636
Control, charter section 468
Demands, approval by Supervisors 740
Disbursements by 635, 636
Eighteenth Avenue, transfer of lot 685-87
Exchange, unoccupied land 370-72
Exclusive management of own funds 740
Hamilton Square, transfer to 546, 547
Liability for damage to passing vehicles 439
Obsolete, portion of land purchases 370
Parks, setting apart in 546
Powers 636
Sale, unoccupied land 370-72
Setting apart 546
Seventh and Bryant Streets 370-72
Shifting of population 370
South of Market Playground, exchange or sale 370-72
Squares, setting apart in 546
Transfer of lot 685-87
Visitor on, accident to 611, 612

PAGE.

PLUMBERS' SIGNS 909, 910

PLUMBING INSPECTOR—Suspension 861

POINT LOBOS AVENUE—Jurisdiction 794

POLES, ERECTION OF—

Additional street lights 163
Arrests, corporation employees 415
Board of Public Works, supervision 234, 235
California Electric Light Co. 244
Changing location of 278
Charter framers, intent 411, 412
Charter provision 98, 135, 137, 410, 411, 717
City Electric Co. 414, 415
Civil Code 240
Commercial use 163, 912
Constitutional amendment, 1911 ..... 135-37, 176, 240, 241, 293, 294, 409, 411, 412, 415, 523, 524, 597
Decisions 135-37, 239, 240, 278, 293, 409-11, 586, 587, 597, 598
Department of Electricity approving 245
Department of Electricity, permits 586-88
Exposition grounds 523-25
Franchises 163, 176, 239-41, 244-45, 248, 277, 293, 294, 409-12, 415, 523-25, 586-88, 597, 598
"Freund on Police Power" 247
Independent Light and Power Co. 244
Journal resolution authorizing 163
Merced Falls Gas case 278
Mutual Electric Light Co. 244
No organic law prohibiting 134
Ocean Shore Railway Co. 234, 235
Ordinances 135, 204, 234, 248, 717, 718
Pacific Gas and Electric Co., franchises 163, 244, 245
Panama-Pacific Exposition grounds 523-25
Permits 134, 135, 164, 248, 294, 409, 415, 523-25, 586-88, 597, 598
Police power 278
Power wires 163, 277, 912
Russell, In re 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
Russell decision not affecting power or telephone service, 587
Sierra and San Francisco Power Co. 134-38, 175, 176, 523-25, 912
Temporary permits 248, 415
United Railroads 912
Unused poles 232

POLICE COURTS—Bail money 508

POLICE DEPARTMENT— PAGE.

Absence from city 251, 252
Additional officers 812
Advisory committee, moving pictures 1011
Amusement places, permits 482
Appeals from dismissals 682-85
Appell, George, protest, salary, secretary to Chief of Police 1008, 1009
Automobiles congesting streets 634
Automobiles, reporting repairs on 928, 929
Boat patrol, salaries and maintenance 811, 812
Buildings, construction and repairs 486
Certification, civil service 333
Chief—
  Confidential secretary to 1007-10
  Power to suspend 683
Chief Clerk to the Chief 1009, 1010
Church—
  Kinetoscope parlor near 398-400, 569
  Saloon within 150 feet of 568, 569
City Electric Co., right to put up poles and wires 414, 415
Civil Service Commission—
  Appeals from dismissals 682-85
  Certification 333
Coercion of members 255
Commissioners—
  Discretionary power 482, 483
  Dismissals, powers 683
  Permit to sell liquor 481-84
  Powers of 481-84
Composition of 812
Confidential secretary to Chief 1007-10
Construction of buildings 486
Convicted officers, reinstating 815-18
Cook, Walter, protest, salary, secretary to Chief 1007
Credits for service 715-17
Cycloramas, permit for 482, 648
Day of rest 132
Delay bar to reinstatement 766, 767
Detective agencies 842, 843
Disability 579, 580, 584, 585
Disability ceasing, reinstatement on 580
Discretionary power of commission 482, 483
Dismissals 682-85, 816
Dodge vs. Police Commission 767
Duties 483
Eight-hour day exceeded 132
Elections, sale of liquor during 678, 679

POLICE DEPARTMENT—(Continued) PAGE.

Eligible list—
Civil service 251-53
Number of names from 268
Removal from 147, 149

Employers' liability 583-85
Esola, Frank W., withdrawal of resignation 255
Expressmen reporting removals of trunks, etc 563
Farrell v. Board of Police Commissioners 133, 767
Felony, office becoming vacant 817
Franchise necessary, extensions of service 415
Free transportation, special police officers 218, 219
Grant, Senator, recall election, sale of liquor 678, 679
Greer and Trau, saloon permit 568
Haverhill, Mass. 289
Health officers acting as police officers 808
Hours of labor 132
Indicted officers 815
Ingham, Richard L., reinstatement 254-56
Injury to officers 255
Intoxicants, sale during election 678, 679
Jitney buses 947-49
Johnson, Samuel W. 251-53
Jones v. Police Commission 766

Kinetoscope parlors—
Near church or school 398-400, 569
Permits 482, 1011-13

Knights of Pythias Hall, religious services 577, 578
Kubey, Samuel, permit, kinetoscope parlor 399
Laches barring reinstatement 767
Lane, Franklin K., opinions 683, 716

Laws, making 59, 72
98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711

Licenses, retail liquor dealers 482-84

Liquor, sale of—
During elections 678, 679
Permits 481-84

Los Angeles 482
Macphee, Arthur F., reopening case 815-18
Maintenance a public or governmental duty 133
Market Street, jitney buses on 947-49
McAvoy, Edward 147, 149

Members—
Not laborers or employees 133
Relation of master and servant not applying to 133

Motor Vehicle Act, exemptions ..... 489 ,493
Moving picture house near school or church 398-400
Moving pictures, permits 482, 1011-13

POLICE DEPARTMENT—(Continued) PAGE.

Moving trunks, etc., recording 563, 564
Murphy, Joseph A., secretary to Chief of Police 1007-10
Museums, permits 482
Neglect of duty 815, 816
New York Courts, John W. Goodman 255
Newburgh, A. S., protest, salary, secretary to Chief of Police 1008, 1009
Nickelodeon near school or church 398-400
Nickelodeons, permits 482
Occupancy of buildings 513

Officers—

Entitled only to credit since reappointment 716, 717
Injured in discharge of duty 255
Not employees 133
Special, free transportation 218, 219
Working Saturday afternoon 471

Ordinance invalid if taking away powers of Commission, 481
Overhead construction, permits 415
Panoramas, permit for 482, 648
Patrol boat, salaries and maintenance 811, 812
Pawnbrokers reporting to 928
Pensions—(See Police Pensions.)

Permits—

Laurelle v. Bush, 17 Cal. App., 409 482
Nickelodeons 482, 1011-13
Sale of liquor 481-84
Use of streets 415

Phonograph parlors, permits 482, 1011-13
Poles, erection of 414, 415
Pool rooms, permits 482
Powers of commission 481-84
Presidio, permit for second-hand store adjacent to 824
Primary election, sale of liquor during 679
Private detectives 842, 843
Probationers 131, 149
Promotions 268, 715
Public service corporations, use of streets 415
Rank 579, 580
Recall election, sale of liquor during 678, 679
Reinstatements 255, 766, 815-18
Repairs to automobiles, reports on 928
Repairs to stations, charge 486
Residence in city 252
Resignation, withdrawal of 255, 256
Retail liquor dealers, licenses 482-84
Retiring age 579
Salaries payable monthly 713, 714

POLICE DEPARTMENT—(Continued) PAGE.

Sale of liquor—
During elections 678, 679
Permits 481-84

Saloon—
Licenses 482-84
Within 150 feet of church or school....399, 568, 569, 577

School—
Kinetoscope parlor near 398-400, 569
Saloon within 150 feet of....399, 568, 569, 577

Second Church of Christ, Scientist....577, 578
Second-hand store, permit 824, 825
Secretary to Chief of Police....1007-10
Seniority of service 715, 716
Special election day, sale of liquor during....678, 679
Special police officers, free transportation....218, 219
Stations, construction and repair 486

Streets—
Congestion by automobiles 634
Use of 415

Suspensions 683
Taylor, Charles H., reopening case 815-18
Teutenberg, Frank J., credits for service 715-17
Theatres 1011-13
Traffic 947, 948

Transportation—
Free, for police officers 90
Free, special police officers 218, 219

Trials of officers 683
Uniforms 988
Use of streets 415
Vacations 289
Van drivers reporting moving of goods....564
Wires, installation of 414, 415
Withdrawal of resignation 255, 256
Wittman v. Police Commission 809
Workmen's Compensation Act not applying....583-85

POLICE LAWS—

Charter....59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Constitution 72, 248, 278, 362, 426, 710, 711

POLICE PENSIONS—

Brophy, Josephine 266
Ceasing when disability ceases....580
Charter framers, intent 131, 585
Charter provisions 578, 580, 584, 585

POLICE PENSIONS—(Continued) PAGE.

Death from injuries 354, 584
Decisions 353-55
Deductions from pay 578, 579
Disability 354, 579, 580, 584, 585
Edwards v. Sweigert 353-55
Family, pension to 584
Injuries in discharge of duties 354
Interval between injuries and death 354
Kavanaugh v. Board of Police Pension Fund Commissioners 355
Killed—
In discharge of duties 584
Statute meaning 354
Lane, Franklin K., opinion 131, 579
Length of service 132
Lifetime, received during 354
Relief and Pension Fund 579, 811
Retiring age 579
Salary, half of 578, 579
Time limit between injuries and death 354
Van Keuren, Mary 266

POLICE POWER—

Animals 435, 436
Arbitrary use of 36
Bodies, removal of 395
Buildings, tearing down 184
Burials 40
Business—
Arbitrary interference with 36
Carrying on at certain hours 570
Regulation of 32-38, 530, 531, 712
Cars, operation of 233
Cemeteries, removal of 395-97, 475
Changing location of poles and wires 278
Charter 59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Cloak for arbitrary interference 36
Co-extensive with necessities 60
Constitution 72, 247, 248, 278, 362, 426, 710, 711
Contagious diseases 770
Courts, review by, on action of legislature 36
Dances 640
Decisions 33-37, 139-42, 278, 435, 462, 463
Demolition of buildings 184
"Dillon on Municipal Corporations" 501
Discrimination in exercise of 462
Diseases, contagious 770
Dogs 435, 436

POLICE POWER—(Continued) PAGE.

Elliott and Keppelmann, habeas corpus....402
Embalming business....32, 33
Ends for which power exists....145
Fences....60

Franchises—

Granting under....246-48
Held subject to....201

"Freund on Police Power"....247
Garbage disposal....1021
Gasoline, storage of....789, 790
Hotel, operation....458
In re San Chung....553
Intoxicants, sale of....481-84
Isolating contagious cases....770
Junk dealers....570
Laundries....553, 554, 570

Laws, making....59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711

Legislature; determination not final or conclusive....36
Limitations, not subject to any definite....60
Limitations upon....140
Limiting use of property....60
Liquor business, conduct of....145
Liquor, sale of....481-84
Lubricating oil, storage....789
Massachusetts Legislature....143
Meat inspection....493
Merced Falls Gas case....278
Moving pictures....931
New York Appellate Court....142
Night, business during....570, 571
Nuisance, abatement of....185
Openings in streets....201, 202, 402
Operation of trains and cars....233
Pawn shops....570
Permits, obtaining....483
Personal use of....37
Pipes, laying of....402
Poles, changing location....278
Powder, deposit of....40
Prohibiting lawful business....34, 37

Property—

Abandoned or unclaimed....33, 34
Holding of....712
Limiting use of....60
Value of, diminishing....60

Public service corporations....233
Quarantining contagious diseases....770

POLICE POWER—(Continued) PAGE.

Restrictions on business 34
Sale of liquor 481-84
Saloons 570
Second-hand dealers 570
Sewer construction 501
Shacks, tearing down 184
Slaughter houses 40, 41
Spite fences 60
State 34, 488, 489
Steam to propel cars 40
Storage business 33
Street openings 201, 202, 240, 402
Streets 246-48
Supervisors 469, 501
Supervisors invested with entire police power within limits of city 564
Tearing down buildings 184
Temporary buildings 184
Trains, operation of 233
Undertaking business 32, 33
Unwholesome trades 40
Use of property, limiting 60
Use of streets 240, 420
Value of property, diminishing 60
Warehouse regulation 33
Wires—
Change in position 278
Placing underground 277
Removal of 278

POLICY—Advising on matters of 944

POLITICAL CODE—

Accounting system, uniform 1005
Acknowledgments, taking 519
Aliens 702
Amendments 400, 416
Assessment roll 472
Assessments—
Correction of 611
Double year after taxation escaped 610, 611, 615
Erroneous 611, 631, 658
Irregular 174
Money and property in litigation 614, 971
Banks, impounded moneys, assessment 614
Births, registration of 330
Boundaries, San Francisco 466
Bridges 800

POLITICAL CODE—(Continued) PAGE.

Bureau of Vital Statistics 330
Citations—(See front of volume.)
Citizens 702
City and County of San Francisco boundaries 466
Contagious diseases 848, 849
Contracts, interest of official in 447
Deeds, tax 19, 174, 973-75
Drawbridges 800
Duplicate payment of taxes 658, 659
Eighteenth Street 565

Elections—
- Commission 722, 724
- Control of 567
- Officers, compensation 721, 722
- Precincts 722

Embarcadero 382-84, 534
Erroneous assessments 611, 631, 658
Exemption from taxation 174, 472, 473
Extension of streets 382
Fees, recording 9, 10, 416
Harbor Commission, tracks 280
High school taxes 798
Impounded moneys, assessment 614, 615
Interest, taxes illegally levied 659
Maps, filing of 416
Money in litigation, assessment 614, 971
Mothers' Pension Law 400, 401
Ocean Shore 466
Office becoming vacant 817
Officers, residence of 23
Ordinance conflicting with 849
Penalties, taxes, refund 631
Poll tax 304
Precincts, election 722, 723
Property in litigation, assessment 614, 971
Public offices, uniform accounting system 1005
Quarantine 849
Recordation of instruments 369, 769
Recorder taking acknowledgments 519
Recording fees 9, 10, 416
Redemption, tax sales 19
Refund of taxes 631, 970
Register of voters 724
Residence, determining of 14, 15, 702, 703
Residence of officers 23
Sale for delinquent taxes 174
Schools, tax 384, 385, 798
Sewers, water front 382
Solvent credits 594

POLITICAL CODE—(Continued) PAGE

State Board of Equalization, rules....473
State Board of Health....848, 849
State Harbor Commissioners....382-84, 565

Streets—
Extension of....382
Repair of....382, 384
Water front....382-84

Superintendent of Schools, expenses....1007
Superintendent of Streets....656

Taxes—
Deeds....19, 174, 973-75
Exemption from....472, 473
Payment in lawful money....631
Refunds....631, 970
Sales....174, 657-59, 973-75
Schools....384, 385, 798

Teachers, residence of....23
Tide lands....565
Tracks on water front....280
Uniform system of accounting....1005
Vacant office....817
Water front streets....382-84, 534
Water front, tracks on....280
Widows' Pension Law....400, 401

POLK STREET—
Dore v. Truett....329
Electroliers, lighting....430-32
Sutter Street Railroad Co., Franchise....86

POLL TAX—From seamen....304

POLYCLINIC—San Francisco....126-28

POOL ROOMS—Permits....482

POPLAR STREET—Franchise rights, Southern Pacific Co....216

POPULATION—Shifting of....370

POSITIONS—
Assignments to....390, 391
Budget cannot create....608
Change in....896-901
Charter amendments, affected by....389-92
Charter provisions, re filling....130
Civil Service Commission, control over....673
Created through operation of Eight-hour Law....388

POSITIONS—(Continued) PAGE.
Creating....63, 823, 824, 921, 924, 1008-10, 1018, 1019
Exempt from operation of civil service, charter amendment....389
Fire Department....284
Levy, Louis, Manager, Auditorium....923
Losing through bidding on public work....344
Mayor investigating and recommending....608, 609
New positions—
Charter method....608, 609
Necessity for creating....823, 824
Poles, changing....278
Tenure during pleasure of appointing authority....748-50
Two positions, salary for....447
Unlawfully created....924
Vacant....75, 813, 814, 816, 817

POSSESSION—
Court, money or property....614
Estate....610
Goods on commission....613, 614

POTRERO AVENUE—
Locomotives running on....232
Manure, hauling of....232
Ocean Shore Railway Co., rights in....226-29
Ordinance No. 40 (New Series)....226
Paving, Ocean Shore Railway Co....232
Resolution No. 4009 (New Series)....227, 228
Sprinkling....232
Spur track....231, 232

POTTER SURVEY....110

POULTRY—Peddlers' license....638

POUND—Public....42

POWDER—Deposit of....40

POWER—
Arrests, corporation employees....986
Asphalt plant....762-65
Bay Street....524
California Electric Light Co., franchise....244
Charter provisions....717
Chestnut Street....524, 525
City Electric Co., bid....622-24, 762-65
Constitutional privilege....587
Contract....162, 762-65

POWER—(Continued) PAGE

Corporation Yard 762-65
Department of Electricity, complaint 985, 986
Department of Electricity, permits 586-88
Franchises 244, 277, 525, 575, 576, 586-88, 597, 598
High tension pole leads parallel to low voltage 586
Keppelmann, In re 597, 598
Lobos Square 524
Municipal Light and Power Co. 243
Pacific Gas and Electric Co.—
Bids 622-24
Contract 762-65
Franchises 244
Panama-Pacific Exposition grounds 523-25
Permits 576, 586-88, 597, 598
Public safety and welfare, wires underground 277
Rates and service 431, 432, 618
Russell decision not affecting power service 587
Sierra and San Francisco Power Co. 523-25, 912
Street railway poles and wires, use for commercial power 912
Streets, use of 98, 135, 136, 912, 916
Supervisors—
Fixing rates 758-62
Regulation 717
Underground, placing power wires 277
United Railroads 277, 278, 912
Universal Electric and Gas Co. 408, 414
Vested rights of corporations 597, 598
Violations of ordinance 985
Webster Street 524

POWER OF ATTORNEY—Recording 369, 370

POWERS—
"Abbott on Municipal Corporations" 246, 247
Appointing authority 748-50
Attorney General 231
Board of Control 1005
Board of Public Works 121, 193, 194, 386, 394, 695-701
Board of Supervisors 1, 6, 59, 72, 98, 139, 190, 191, 248, 278, 289, 358, 362, 367, 368, 410, 411, 426, 427, 564, 617, 618, 619, 695-701, 710, 711
Board, public 383
Budget preparation 1, 4, 5
Business, regulation of 483
Cemeteries, removal of 395-97
Charter 59, 98, 139, 191, 278, 289, 410, 411, 426, 427, 564, 710

POWERS—(Continued) PAGE.

Charter paramount 926
City, by constitution 72, 248, 278, 366, 426, 710, 711
Civil Service Commission 224, 405
Closing of streets 310
Consolidated City and County 455
Consolidation Act, under 245, 246
Constitution 72, 248, 278, 362, 426, 710, 711
Constitutional amendment, 1911 241
Delegation of 314, 367, 395
"Dillon on Municipal Corporations" 191, 246
Disease, preventing spread of 848-51
Election Commission 253, 254, 486, 724
Enacting ordinances and resolutions 245
Exceeding of 194
Exhumation of bodies 395-97
Expressly granted 246, 247
Finance Committee 884
Fire Commission 267, 268, 288, 683
Fire Pension Fund Commissioners 266

Franchise—
Granting 190, 310, 359-68
Writing certain conditions in 358, 367, 368

Grade, changes of 440, 441
Health Department 3, 4, 6
Implication 246, 247
Investigation 170
Jenkins, Judge 247
Lands, over 500
Lane, Franklin K., opinion 288, 289
Legislature, from 455, 488
Legislative, surrender of 291
Library Trustees 304-306

Municipality—
Charter 278
Constitution 72, 248, 278, 366, 426, 710, 711
Expressly granted 246-48
Measured by organic law 360
State, from 368
Streets, over 278
Whence derived 191

Obligations, unauthorized, imposing 504
Obstructions, removal of 386
Officers 504
Ordinance invalid if taking away 481
Panama-Pacific International Exposition Co. 457
Park Commission 467-70, 500-02, 546
Playground Commission 636
Police Commission 481-84, 683
Political subdivisions of State, from Legislature 488

POWERS—(Continued) PAGE.
Public Board 383
Public buildings, bids 622-24
Railroad Commission 759-61
Railroads 227, 358
Rate regulation 617, 618, 758-61
Registrar of Voters 724
Reinstatements 405
Removal from office 749-53
Restraint on 291
Salaries, fixing of 121
Sealer, Weights and Measures 455
Service regulation 618
State, delegation of 314, 367, 395
State Harbor Commissioners 382, 383
Streets—
By municipality 278, 695-701
Closing of 310
Openings 202
Water front, extension 382
Succeeding boards, restraint on 291

PREFERENCE—
Eligible for appointment 148
Fire Department, holders of positions before reorganization 284, 287
Former employees, Municipal Railway 463, 464, 836, 837
Locally manufactured goods 580, 581
Resigned, employee who 451

PREMIUMS—
Bonds, Municipal Railway employees 497, 498
Insurance, public library 304-306
Official bonds 189

PREPAYMENT SALES CAR CO.—Patent Royalties 719, 720

PRESCRIPTIVE USE OF STREET 404

PRESIDIO—Permit for second-hand store adjacent to 824

PRESIDIO AND FERRIES RAIROAD CO.—Franchises 205, 206

PRIMARY ELECTION DAYS—
Holidays 314
Sale of liquor on 679

PRINTING—
Bids 777-79
Election days 313, 314
Great necessity, non-contract orders 675
Neal v. Rolph 925, 926

PRINTING—(Continued) PAGE.
Schools, circulars 1006
Tourists' Association, literature 591, 592
Under heading of "supplies" 17
Union label 926
(See also Advertising.)

PRISONS—Supplies for 539-41

PRIVATE—
Detectives 842, 843
Street contracts 736, 866, 867, 945

PRIVATE PROPERTY—
Alleyway through center of block 308, 319
Beach Street 275
Bernal Rancho 120
Chenery Street 54, 55
Comerford Street 307-309, 319
Constitutional prohibition against taking 485
Donors' rights, opera house 485
Dore v. Truett 707
Exchange for city real estate 609
Hetch Hetchy rights of way 496
Islais Creek 120
Not to be taken or damaged for public use without compensation 738
Protection 450
Redwood Street 662, 663

PRIVILEGES—
Enjoyer of, suffers burdens 88
Exclusive 247, 410, 414, 525
Opera house, donors 484, 485
Panama-Pacific Exposition 458
Special, granting of 34, 36
Visiting San Francisco Hospital 126-28

PROBATION OFFICER—Minors becoming citizens 701-703

PROBATIONERS—
Appointments 83
Assignments 801
Charter provision 130
Civil Service Act, New York Legislature 147, 148
Discharge 130
Duties 131
Fire Department 129-32, 801, 802, 813, 814
Limitations upon 131

PROBATIONERS—(Continued) PAGE.
Police Department 131, 149
Removal during probation 149
Rules 813
Status 130, 131

PROBLEMS—Municipal ownership 51

PROCEDURE, PROCEEDINGS—
Abatement of nuisances 386, 417
Additional employees 608, 609
Appeal, street assessment 1003
Appointments 1008
Assessments, levying 628
Bond issue 374-79
Cemetery removals 395-98
Change in 374-79
Closing of streets 565
Compromise of litigation 425
Contracts, letting by the Board of Public Works 699
Defect in 374
Extensions of time 179
Extensions of water mains 516-19
Forfeiture of franchise 230, 231
Geary Street Railway bonds 48
Grade changes 440, 441, 969
Hetch Hetchy project 494-96
Industrial zones, creation 461
Irregularities, bond issue 377, 378
Municipal Railway construction 49-51
Open public street 707
Public utility, acquisition of 49
Purchase of bonds, regularity 376, 377
Regrading 440, 441
Relief Home lands, sale 339-41
Removal of obstructions 844, 845
Sale—
Delinquent tunnel assessment 166, 167
Lands 339-41
Street improvements 51, 66, 67, 181-83, 656, 695, 700
Tax sales 973

PRODUCE EXCHANGE LOTS—
Exchange 851-56
Rental by Southern Pacific Co. 853, 854, 880-83
Value 881, 882

PROFESSION—Estate acquired in 34

PROGRAM—Architectural competition 338, 339

PROGRESSIVE PAYMENTS—Contracts 999

PROHIBITION— PAGE.

Aliens in governmental employ....902
Amateur boxing exhibitions....757
Anatomical museums....593
Businesses, certain....34, 570, 712, 1013
Condemning without compensation....485
Distinction, regulation....32, 37
Dogs kept in tenement houses....434
Dust, hauling of substances giving off....1013, 1014
Employees, compensation, own automobiles....487
Garage—
In hotel....529-31
Near church or school....573
Jitney buses on Market Street....947
Kinetoscope parlor near church or school....398, 399, 569
Laundries....551, 554, 555
Leasing, portion of parks....841
License tax, public service corporations....597
Moving pictures, certain....876, 932, 1011
Night, business during....570, 571
Noises near hospitals....307
Officials interested in contracts....17, 445-47
Police power....34, 37
Regulation, compared with....37
Regulations not allowed to be enforced....279
Saloon near church or school....568, 569, 577
Slaughter houses....40

PROMOTION—

Appointive power to select parties for....268
Barry, David A....900, 901
Battalion chiefs....74-76
Captains, Fire Department....74-76
Charter provisions....75, 76, 405, 716
Civil Service Commission, rules....405
Corporal to sergeant....715
Efficiency....288, 289, 801, 862, 977, 980
Examination, standing upon....75
Fire Department....74-76, 268
Highest standing in next lower rank....75, 83
Lieutenant, hoseman appointed as....282-85
Merit, basis of....75
Police Department....268, 579, 580, 715
Position holder retired on pension....580
Safety....32
Seniority in service....75, 716
Supervisors, assistant clerk....900, 901
Vacancies filled by....75

PROOF—Burden of....395

PROPERTY— PAGE.

Abandoned or unclaimed 33, 34
Access to 506
Below level of street 737
Contracts, held to be 485
Court, possession of 614
Deprivation of 32
Destruction of 450
Eminent domain, subject to right of 485
Litigated, assessment 614, 971
Protection 436
Police regulations 60
Restrictions in use of 140
Sale on execution 167
State laws protecting 303
Supervisors, power to restrict use of 36
Use of 140
Limiting 60
Obstructions restricting 480
Without injury to neighbors 40
Value, diminishing 60

PROPERTY OWNERS—

Abutting, rights and obligations 336, 480, 501
Alleyway used by purchasers of lots 308, 319
Appeals from assessments 864-70, 1002, 1003
Application for service 292
Area walls, reconstruction of 265
Assessment, resisting 313
Blasting 478
Burden on title imposed by former owner 308, 309, 319
Cemetery lots 396-98
Consolidation Act 245, 246
Courts guard interests of 183
Damages—
Main Street, change of grade 542, 543
Recovery of 449
Electroliers, Polk and Mason Streets 431
Embarcadero, sidewalks, liability 533-35
Excavation, adjoining lot, notice 315
Extensions of water mains 516-19
Free and unobstructed passage to property 506, 784
Interests prejudiced, where proceedings, street work irregular 183
Materials from condemned buildings 168, 169
Montgomery Street, paving 177, 178
Obstructions inconveniencing 480
Officials liable for damages to 168

PROPERTY OWNERS—(Continued) PAGE.

Paving—
Additional, due to narrowing sidewalks 178
Obligations 629

Private street contracts 736, 866, 867, 945
Recording building contract 9
Retaining walls 237

Rights—
Erection of structures 140
Height of buildings 143
Ingress and egress 784

Sewer construction at expense of 501-503
Sidewalks, liability 270,533-35
Street work maintenance bond increased burden on, 124, 125
Subdivisions, legal requirements 70

PROPOSALS—
Locally manufactured goods, preference 580, 581
Street improvements 695
Supplies 539-41
Typewritten signature 668, 669
(Also see Bids.)

PROSECUTION—Public nuisance 450

PROSPECTIVELY, OPERATING—
Building Law 514
Ordinance 514, 515
Statute 272

PROTECTION—
Billboards 140
Building Law 350
Cemeteries, removal of 475
City property, excavation, adjoining property 315

Constitution—
California 427
United States 427

Contracts, making 81
Destruction of property 449
Disease 303
Females against discrimination 427
Hospital construction 350
Law, equal protection of 427
Lights at excavations, placing 690
Lives, limbs, etc 40
Police power of municipality 40, 201
Private rights 450

PROTECTION—(Continued) PAGE.
Property 40
Public health 32, 848-51
State rights 303
Street openings 201
Surface water, from 737

PROTESTS—
Acquiescence, without protest 405
Applications to open streets 203
Kinetoscope parlor near church or school 399
San Bruno Avenue, street work 607
Stanford Medical clinic 437

PROXIMITY—
Garage near church or school 573
Kinetoscope parlor to church or school 569
Saloon to church or school 568, 569, 577
Stock pens to slaughter houses 30, 41, 42

PUBLIC—
Assemblages 332
Convenience and necessity, construction of Municipal Railway 958
Free passage along streets, entitled to 506
Health 461, 808, 848-51
Health, Department of (See Health Department).
Institutions, supplies 539-41
Interest and convenience 310
Interest, street improvements 66
Lands, withdrawal of 496
Library Trustees (See Libraries).
Morals 33
Necessity 142
Office (See Office).
Officers (See Officers).
Parks (See Parks).
Performances 331, 332
School Teachers (See Teachers).
Schools (See Schools).
Streets (See Streets, Open Public Streets).

PUBLIC BUILDINGS—
Architect's fee, allowance by ordinance 338
Board of Public Works, charge of 486, 885-886
Charter provisions 486
City Electric Co., bid 622-24
Competition, plans, public buildings 338
Construction of 486
Defective condition 424

PUBLIC BUILDINGS—(Continued) PAGE.

Electric current, rate for....431, 432
Electricity, bids 622
Fire houses 486
Fire, insuring against....305, 306
Gas, bids 622
Heating, bids 622-24
Janitors, appointment 885
Law v. San Francisco, 144 Cal., 391.... 22
Libraries 304-306
Lighting contract....431, 432, 622-24
Maintenance of 486
Pacific Gas and Electric Co., bid....622-24
Power, bids 622-24
Power to erect....306
Repairs to 486
San Francisco Hospital, Tuberculosis Group....338
Schools....384, 385, 486
Seat in, condemning 485
Steam heat, bids 622-24

PUBLIC PROPERTY—

Disposal of 340
Exchange 609

PUBLIC SAFETY 141, 461

Hazard to 791
Promotion of 32
Street repairs 697
Wires underground 277

PUBLIC SERVICE CORPORATIONS—

Acceptance of franchise involves performance of duties....651
Arrearage, street opening deposits....641-44
Arrests of employees....415, 986
Bonds, opening streets 258, 259
Charter regulation....98, 135, 195, 278, 410, 411, 525, 717
Civil Code section, furnishing of service....292-94, 295
Conduits and pipes, location of....154
Constitutional amendment, 1911....
....19, 96, 135-37, 176, 195, 196, 200-203, 240-43, 250, 293, 295, 402, 409, 411, 412, 415, 523, 524, 587, 597, 619, 642, 913
Constitutional amendment limiting rights in streets....
....293, 409, 410, 415, 524, 597, 598
Constitutional privilege prior to 1911 amendment....
....19, 20, 97, 136, 137, 176, 200-203, 240-43, 249, 293-96, 402, 409-12, 415, 523, 524, 587, 597, 598, 619, 642
Damages to pavements 409
Denial of rights, regulation....279

PUBLIC SERVICE CORPORATIONS—(Continued) PAGE.

Department of Electricity, permits 586-88
Department of Electricity, violation of ordinance.... 985, 986
Deposits, street openings..... 200, 559-62, 641-44
Duties under franchise; performance compelled by mandamus 650, 651
Duty bound to serve whole public..... 295
Elliott and Keppelmann, habeas corpus..... 402
Exemption from taxes and licenses..... 597
Extensions of service.....
..... 195, 241, 293-96, 409-15, 575, 576, 586-88, 597, 598
Failure to fill openings in streets..... 258
Franchises..... 228, 229, 239-50, 277, 293, 294, 359-68, 402, 409-15, 523-25, 575, 576, 586-88, 597, 598, 616, 618, 619, 642
Inspection fees 598
Keppelmann, In re..... 402, 560, 597, 598, 642
License tax prohibited..... 597
Lukrawka v. Spring Valley Water Co..... 295
Obligation to furnish service..... 293
Obligations under franchises..... 650, 651, 888
Ordinances, opening streets.....
.... 97, 135, 195, 200, 202-204, 248, 249, 258, 270, 271, 277, 402, 523-25, 559-62, 575, 576, 586, 588, 597, 598, 619, 642-44
Police power, subject to..... 233
Railroad Commission regulating..... 758-61, 863
Rates, regulation 525, 758-62
Reasonable rate of return..... 474
Rights in streets..... 19, 96-98, 134-39, 163, 164, 176, 195, 200-204, 239-50, 228, 229, 258, 277, 293-96, 359-68, 402, 408-15, 523-25, 559-62, 575, 576, 586-88, 597, 598, 618, 619, 642-44, 913
Right to charge rates they please..... 474
Russell, In re.....
..... 96, 97, 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
Service—
Connections at own expense..... 863
Furnishing within hundred feet of mains..... 292-94
Refusal to furnish..... 292, 293
Steam heat..... 618
Supreme Court on rights in streets..... 201, 913-15
Vested rights in streets.....
..... 97, 200-203, 241, 277, 293, 409, 597, 598, 914, 915
(See also Opening of Streets; Pipes, Laying of; Poles, Erection of.)

PUBLIC USE—
Condemnation for 485
Parks 501
Private property taken or damaged for..... 738
Road or highway..... 240

PUBLIC UTILITIES— PAGE.

Acquisition....49, 373, 887
Act, public utilities....759
Board of Public Works, charge of....545, 886
Board of Supervisors, functions....545, 758-62
Bonded indebtedness.... 49
Character of service....888
Charter provisions....
....98, 135, 195, 278, 373, 410, 411, 525, 545, 618, 717, 886-89
City real estate, rights of way across....954
Condemning portion of existing utility....779, 780
Constitutional amendment 409, 758-62
Constitutional privilege....408-409, 412
Construction 518
Decisions....886, 887
Election for acquisition....373
Estimates of cost....888
Extensions of service, procuring of franchise necessary..415
Fire department a public utility....886

Franchise—

Charter referendum provision....414
Ordinance going into effect after sixty days....317

Integral part, existing utility, acquisition of....779, 780
Municipal ownership 241
Municipal water works.... 77
Obligations....650, 651, 888
Oklahoma cases....886, 887
Ordinance granting franchise, going into effect....317
Park a public utility....887
Procedure for acquisition.... 49
Railroad Commission regulating....758-61, 863
Rate fixing....617, 618, 758-62
Reference provisions, franchise ordinance....414
Regulation of service....135, 618
Service connections installed free....863
Sewer a public utility....887
Surplus from municipal operation....605, 606
Water supply, Hetch Hetchy....494-96

PUBLIC WELFARE—

Billboard regulation 142
Business, restrictions on....33, 34, 35
Cemeteries 398
Power of State to provide for.... 35
Removal of cemeteries....475
Stable 393
Wires underground 277

PUBLIC WORK— PAGE.

Aliens, barring from employment....925
Authorization by Supervisors....999-1001
By contract, compelling....1001, 1002
Competitive bidding....927
Control of Supervisors....1001
Defective condition....424
Employee bidding on....344, 345
Officers using own teams on....17
Residents and citizens only to be employed on....925

PUBLIC WORKS, BOARD OF—

Abandoned tracks a nuisance....386
Abandonment of position by employee....222
Abatement of nuisances....184, 185, 386, 513

Abutting owners—
Liability for paving....336
Obstructions inconveniencing....480
Sewer construction at expense of....501

Acceptance—
Cars, Municipal Railway....157-59
Street, legislative acts sufficient....405

Actual service, pay for....583
Addition, building....429
Administrative authority....203, 643

Advertising—
Municipal Railway cars....543-45
Street improvement....181-83

Aisles, amusement places, obstructing....331, 332
Alemany Avenue, sewer right of way....600
Alleys, open public streets....499

Alterations—
Buildings....102, 103, 271, 272, 509-14, 649, 652, 666
Globe Theatre....509-16
Stable building....392-94
Theatres....514, 515

Amusement places—
Alterations....511-15
Obstructing aisles, exits, etc....331, 332

Anza Street, paving....180
Apartment house, conversion of building into....271, 272
Apparatus, Municipal Railway cars....442
Appeals, street assessments....865-68
Approval, subdivision map....70-73
Arch Street....845
Architect, consulting, demands....47
Architectural competitions, public buildings....338

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Arguello Boulevard—
Assessment of cemetery property....827-29
Street work....179, 180

Army Street—
Improvement....731, 732

Arrearage, street opening deposits....641-44
Asphalt, paving with....629

Asphalt Plant—
Employee sick....582
Light and power....762-65
Spur tracks....550

Asphyxiation, deaths from....422-26

Assessments—
Appeals from....865-68
Fifty per cent of value....1002, 1003
Installment payments....1003
Main Street change of grade....542, 543
Method of levying....628
Paving, King Street....335
Separate for each kind of improvement....628, 629
Sewer....502-503
Street work....628, 629, 865-68, 917, 1003
Uniform rate per front foot....629

Atchison, Topeka and Santa Fe Railway Co., bridge, Islais Creek....798-800

Audience, limiting to seating capacity....331, 332
Auditorium....883-90

Authorization of public work by Supervisors first necessary....999-1001

Automobiles—
Colliding with steam roller....689-91
Damaged, unguarded hole in street....791

Avoidable delays, contracts....153, 193, 194
Baker's Beach Outfall Sewer....856-61
Balboa Street, paving, etc....180
Barber Asphalt Paving Co., contract....866, 867
Barley for Hetch Hetchy....1022-25
Barnett, Benjamin, teamster injured....787, 788
Basalt blocks, paving with....629
Beach Street, status of....274-76
Beacon Street, obstructions....478
Bemis Street....736-39, 868
Bernal, J. C., condemnation, sewer right of way....600, 601
Between rails, paving....335, 336, 832, 833
Beverly Street, opening....845

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Bids—
Advertising, Municipal Railway cars....543-45
Arguello Boulevard, street work....180-84
Calling for new....543
Lowest regular to be accepted....321
Omitting portion of work....180, 182, 183
Rejection....543
Relief Home boilers....321
Substitution....545
Withdrawal....545

Biturine Co., maintenance bonds....124
Bixby Street, opening....845
Blackwood Street, open public street....872
Blasting, city's liability for damage....704-706
Bloom, J. W., extending water system....19, 20
Bluxome Street, whether open public street....459, 460
Boilers, Relief Home, bids....321

Bonds—
Commissioners....697
Employees....189, 497
Maintenance of streets....124-126
Municipal Railway employees....497

Bonus, contract, Mahoney Bros....150, 153, 156
Booths, election, maintenance of....486, 487
Boulevard, Ocean Front....612, 613

Bridge—
Islais Creek....798-800
Seal Rocks....261

Bright Street, opening....845
Buchanan Street....275, 276
Buggies, hiring....934, 935

Building law....
....102, 331, 332, 448, 449, 511-15, 649, 652, 654, 666

Building permits....350, 394, 510-14, 652-54, 666, 708-12

Buildings—
Alterations to....272, 511-15, 652, 666
Construction....394, 448-50, 511, 652, 666, 710, 711
Conversion into apartment house....271, 272
Demolition....448-50, 649
Encroaching on Embarcadero....429
Enlargement....652
Razed, materials from....168
Removal....102, 103, 649
Repairs....666
Supervision....448-50, 511, 649, 666, 710, 711
Unsafe, tearing down....448-50

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Bulkheads, Great Highway 259

Bush Street, protection from excavation adjoining city property 315

Capacity, seating, amusement places 331, 332, 511, 512

Capp Street, Twenty-sixth to Serpentine, open public street 356, 357

Carbarn, Seventeenth Street, removal of buildings 734-36

Cars—
- Municipal Railway 157-59, 543-45, 718-21
- Routing 170

Cement dust, employee incapacitated 664

Cemetery property, assessment for street work 827-29

Central Pacific Railroad Co., franchise 335

Certificates of registration, chimney builders 653, 654

Change of grades 440, 441

Changes, names of streets 692

Charge for use of streets 240

Charges, hearing of 693, 694

Charter provisions not complied with 325

Chimneys—
- Builders, registration 653, 654
- Patent, permit 651-55

Church Street railway 840, 925

Citizens only to be employed on public work 925

City Electric Co., light and power 762-65

City Engineer's salary 121

City Land Association Tract, extension of streets 845

City property, protection, excavation, adjoining property 315

City Street Improvement Co.—
- Bid irregular 180-84
- Contract, Lincoln Way 198, 199

Civic Center, paving streets 695

Civil Service Commission, appeals to 694

Clay Street sewer, employees asphyxiated 423, 424

Clement Street, west of Thirty-third Avenue, open public street 298, 299

Cliff House 259, 261

Clover Street, assessment, street work 628, 629

Collision, automobile with steam roller 689-91

Columbia Realty Co., lodging house 708, 709

Commissioners, responsibility under bonds 697

Compelling by mandamus 650

Competition—
- Destroying 183
- Plans, public buildings 338

Concerts, entrances, etc., obstructed 332

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Conductors, Municipal Railway....497, 996
Conlon, James, Sewer Department employee, killed....422-26
Connection, telephone systems....402
Consolidation Act....404

Construction—
Buildings....394, 448-50, 511-15, 652, 666, 710, 711
Delays in....150-56
Globe Theatre....509-16
Public buildings....486, 487
Supervision....448, 511, 649, 666, 710, 711
Theatres....514, 515
Unlawful....512

Consulting architect, demands....46, 47
Continuation, new contract, basis of unit prices old job....198, 199

Contractors—
Bond, maintenance of street....124-126
Extensions of time to....179

Contracts—
Changes in work....181-83
Entering into....325
Lincoln Way....198, 199
Local goods, preference....580, 581
Municipal Railway construction....150-56
Public work....999-1002
Supplies....935
Total absence of official action on part of....325
Written....696-99

Control—
Great Highway....612
Mapping of subdivisions....72
Ocean Front....612
Public buildings....486
Public utilities....545
Streets....135, 203, 262

Conversion of building into apartment house....271, 272
Cornwall, Bruce, credits for grading....825
Corporation yard, light and power....762-65
County Jail buildings, alterations....999, 1000
County Line Municipal Water Works, deposits for connections....863
Croke Street, sewer right of way....600
Cronin, Ann, improvement, Army Street....732, 733
Crossings, railroads grading....650
Culvert, falling into....691

Day labor—
Ordinance not authorizing....999-1002
Repairs to streets....696, 699-701

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Deaths by sewer gas....422-26
Dedication of streets....404
Defective condition of streets....690, 691

Delays—
Contract for construction, Municipal Railway....150-56
Power to waive contract provision....193, 194

Delinquent sales, opening of streets....845, 846
Delivery of cars, Municipal Railway....158-60

Demolition—
Shacks....184-86, 649
Unsafe buildings....448-50

Dennis, Charles B., removal from civil service list....221-25

Deposits—
Ordinance No. 2109 (New Series)....270, 271
Service connections....863
Street openings....200, 270, 271, 559-62, 641-44

Dereliction of officers, liability for....689
Discharge of surface water....737
Discretion, street improvements....699, 700
Dismissed employees, vacation....403
Dore v. Truett, decree....274, 707

Dow, Burritt N., compensation, treatment, street sweeper....1021, 1022

Drawbridge, Islais Creek....799
Drinking cups, Native Sons' Monument, replacement....680
Drivers of teams, owners insuring....797, 818, 819

Dunn, James H., injured, horse frightened by paving machine....670-72

Duties....181, 203, 545
Eddy Street, shacks....184-86
Edward Street, paving....180
Election booths, construction and repair....486, 487
Elliott and Keppelmann, habeas corpus, street openings....402
Ellison, Edward, assistant gas and water inspector....771-75

Embarcadero—
Building encroaching on....429
Jurisdiction....382, 383
Sidewalks, liability....533-35
Sewer across....382-84

Emergency Hospital, injured employee treated....687
Emmet Place....479, 480, 839

Employees—
Abandoning position....222
Asphyxiated, claims of families....422-26
Bonds....189, 497
Injured....787, 788, 1021
Pay for actual service only....583

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Employers' liability..616, 626, 627, 645, 646, 663, 664, 687, 688

Encroachments—
- Army Street 732
- Bluxome Street 459, 460
- Capp Street 357
- Embarcadero 429
- Removal 386, 478-80, 668, 844, 845
- Stark Street 844, 845

Entrances, amusement places, obstructing 331, 332

Erection—
- Buildings, permits 649
- Poles 135, 164, 176, 239-41, 244, 415, 717

Esplanade, Ocean Shore 612
Estimates, public work 700

Excavations—
- Adjoining city property 315, 316
- Deposits 270, 271
- Falling into 690
- In streets 19, 135, 164, 176, 200-204, 239-44, 258, 270, 271, 402, 559-62, 575, 576, 619, 642-44

Exhibition, obstructing passageways, etc. 331, 332
Exits, amusement places, obstructing 331, 332
Extension of service 135, 200-204, 241, 575, 576

Extensions—
- Railroad lines 650
- Sewer across water front 382-84
- Streets, water front 382, 383
- Time to contractors 157-59, 179, 193, 856-61

Eyes, street sweeper, injured, bill for treatment 1021, 1022
Failure of contractor 194, 323
Fairmount Street, assessment 866-68
Fay Improvement Co., contract, Army Street 732
Federal Construction Co., paving bid 655
Federal franchise 239-43
Fees, inspection, street openings 643
Field assistants, vacation 403
Fifth Avenue, tearing up tracks 385, 386
"Fighting the Flames," amusement enterprise 647, 649
Fill, Mission Viaduct 322-26
Finn, John, credits for grading 825-27
Fire houses, construction and repair 486
Fire limits, shacks within 184
Fireplaces, construction and repair 653, 654
Fires delaying construction 153
First Street, paving 459
Flinn and Treacy, contract 867
Florida Street, reconstruction of stable 392-94

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Forcada, Frank, reinstatement....693, 694
Former employees, vacation....403

Forty-eighth Avenue—
Extension....299
Sewer....498

Frame buildings—
Conversion....271
Regulations....271, 272

Franchises—
Acceptance involves performance of obligations....651
Central Pacific Railroad Co....335
Federal....239-43
Mandamus enforcing obligations....650, 651
Market Street Railway Co....681, 832
Municipal Light and Power Co....243
Rights in streets....135, 164, 176, 200-204, 239-44, 402, 559-62, 575, 576, 642-44
San Francisco and San Joaquin Valley Railway Co. 798, 799
Sierra and San Francisco Power Co....175, 176
Southern Pacific Railroad Co....335, 336
Western Union Telegraph Co....239-43

Functions....545
Garbage Incinerator, Islais Creek....192-94
Gas and water inspectors....771-75
Gas mains, laying of....576

Geary Street—
Assessment, street work....794
Jurisdiction....794

Geary Street, Park and Ocean Railway Co., tracks....385, 386

Geary Street Railway—
Cars, apparatus....442
Construction work....154
Estimates, cost of construction....49, 51

Globe Theatre, alterations....509-16

Golden Gate Park Federation of Improvement Clubs, sewage, Seal Rock House....498

Grade, changes of....440, 441, 541-43
Grading, permits....825, 826
Grant Avenue, sidewalks....269, 270
Great Highway, jurisdiction....259-62, 499-501, 612, 613
Haight Street, track connection, United Railroads....871
Hampton, Robert W., gas and water inspector....771-75
Hannon, John, street sweeper, injured....687, 688
Harrison Street, regrading....440, 441, 825-27, 950
Haulage, cars, Municipal Railway....159, 160

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Havelock Street, at Southern Pacific crossing....691-93
Hawthorne Street, grades....950
Hayes Street, regrade....831-35
Head Street, opening....845
Healy-Tibbitts Construction Co., contract....322-24
Hearing—
Charges against employees....693, 694
Street opening applications....203
Height of buildings....271, 272
Hemlock Street, open public street....372, 373
Henry Street....692
Hetch Hetchy, barley for....1022-25
Hillcrest, opening streets for water pipes....19
Hiring of horses and buggies....934, 935
Hole in street, automobile damaged....791
Holman, W. L., contract, cars....157-60, 442
Home Industry, preference to....580, 581
Home Telephone system, connection by Pacific Telephone Company....196, 402
Horse frightened by paving machine, driver injured....670-72
Horse shoeing....934-36
Horses, hiring....934
Hospital building, existing....995
Hospital treatment, employees injured....626, 627, 645, 646, 687
Hotel and Lodging House Act....708-10
Howard, John Galen, demands....47
Howard Street sewer, extension....381-84, 534
Humphreys Map....357, 404, 460, 479, 667, 692
Illness, salary during....582, 583
Improvement, street, included sewer construction....499
Ingleside Sheet Metal Works, patent chimney....652-54
Ingleside Terraces, extension of streets....845
Injured employees..626, 627, 645, 646, 687, 787, 788, 805, 1021
Injury to pavement....643
Inspection—
Blasting....705
Street openings....560, 561, 643
Inspectors, gas and water....771-75
Installments, street assessments....1003
Insuring drivers of teams....797, 818, 819
Intention, resolution of....181-83, 655-57
Irregular bid....180-84
Islais Creek Bridge, expense of operating....798-800
Islais Creek Incinerator....192-94, 792
Jail buildings, alterations....999, 1000
Janitors, appointment....885

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Japan Street 460
Jarnac Street, sewer right of way....600
Jefferson Street 275, 276
Jewett Car Co., patent royalties....718-21

Jurisdiction—
Great Highway 259-261
State Harbor Commissioners....382, 383, 429, 430
Urgent repairs to streets....697

Kansas Street—
Grading 182
Improvement 731

Kentucky Street, drawbridge....798-800
Keystone Construction Co., contract, Mission Viaduct..322, 323
King Street, paving....335, 336
Labor Day delaying construction....156
Laidley Street, landslide....736-39
Lane, Franklin K., administrative authority....203
Lapachet, Camille L., Leroy Place....978
Laying of pipes....19, 200-204, 241, 575, 576
Lead poisoning, compensation....664
Leahy, Dennis, laborer, compensation....663, 664
Lectures, obstructing entrances, aisles, etc....331, 332

Legislative—
Acts sufficient acceptance of street....405
Authority, absence, ordinance repealed by state law..711

Legislature, no power to legislate on building construction 710
Leroy Place....978, 979
Levy, Louis, Manager, Auditorium....883-90, 923
Lewis Street 276

Liability—
City for sidewalk construction....270
Defective condition of street....690, 691
Sidewalks, property owners....533-35
State Harbor Commissioners....384

Liberty Theatre, encroaching on Stark Street....873, 874
Lichtig, A. J., automobile damaged, hole in street....791
Light, Asphalt Plant 762-65
Lights at excavation, placing....690

Limiting—
Audience to seating capacity....331, 332
Height of buildings....271, 272

Lincoln School lot, sign on building....262, 263
Lincoln Way, contract, street work....197-99
Locally manufactured goods, preference....580, 581

Lodging houses—
Permits for construction....708-12
Yard space 784, 785

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Lots, surface of 738
Lowest regular bid to be accepted 321
Lynch, Patrick, Sewer Department employee, killed 422-26
Macdonough Estate Co., excavation adjoining city property 315, 316
Mackinley, Jennie G., permit, lodging house 708, 709
Mahoney Bros., Municipal Railway contract 150-56
Maier, Minna, damages, removal of building 734-36
Main Street, change of grade 541-43
Maintenance—
Public buildings 486
Streets, bonds 124-126
Mandamus compelling performance of duties 650, 651
Mandonnet v. All Persons 479, 839
Maps—
Humphreys 357, 404, 460, 479, 667, 692
Official 357, 460
Subdivisions, approval 70-73
Market Street Railway Co., franchise 681, 832
Masonic Avenue, track connection, United Railroads 871
Massachusetts Bonding and Insurance Co., work done under bond 323
Mateo Street, grades 737
Materials—
Furnished to municipality 326
Mission Viaduct 323-26
McDade, J. J., paving, San Bruno Avenue 655
McHugh, J. J., contract, Stark Street 844
Medical treatment, employee injured 626, 627, 645, 646, 687, 1021, 1022
Merritt, Emma L., bulkheads, Great Highway 259
Meters, installation by public utility without charge 863
Michellari and Longo, permit to repair stable 392-94
Mile Rock Tunnel 856-61
Minimum wage 832-35
Ministerial body 394
Mission Park, Municipal Railway in 840
Mission Viaduct, payment for fill 322-26
Monticello Street, opening 845
Moriarty, John J., salary during sickness 582
Motormen, Municipal Railway, bonds 497
Moving picture houses—
Alterations 511-15
Obstruction of aisles, exits, etc 331, 332
Municipal Asphalt Plant—
Employee sick 582
Light and power 762-65
Spur tracks 550

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Municipal Light and Power Co., rights in streets....243

Municipal Railway—
Advertising in cars....543-45

Cars—
Acceptance....157-59
Apparatus for....442
Haulage....159, 160
Number in operation....544
Patent royalties....718-21

Employees, bonds....497
Estimates, cost of construction....49, 51
Mahoney contract....150-56
Reinstatement of conductor....996

Municipality—
Materials furnished to....326
Not liable for unauthorized acts of boards or officials....735, 736

Native Sons' Monument, drinking cups....680
Nelson, E. C., patent chimney....651-55
Nerio v. Maestretti....844
Nevada Street....357

Nickelodeons—
Alterations....511-15
Obstruction of aisles, exits, etc....331, 332

Non-compliance, charter provisions....325
Norfolk Street....357
North Peter Smith Tract, streets....276
North Point Street....276

Norton, Patrick, laborer, claim, medical expenses....626, 627, 645, 646

Notices—
Injury to employees....1021
Inviting sealed proposals....180-83

Nuisances, abatement of....184, 185, 386, 513

Obstructions—
Abutting property owners inconvenienced....480
Aisles, etc., amusement places....331, 332
Beacon Street....478
Bluxome Street....459, 460
Capp Street....357
Embarcadero....429
Emmet Place....479, 480
Removal of....386, 478-80, 668, 844, 845
Sidewalks....85
Stark Street....844, 845

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Occupational diseases, compensation....664
Ocean Avenue, viaduct over....650

Ocean Shore Railway Co.—
Permit....27, 28
Tracks....235
Viaduct, Ocean Avenue....650, 651

Occupancy—
Buildings....513
Unsafe structures....513

O'Donnell, J. W., street sweeper, injured....1021, 1022
O'Donnell, Patrick, street sweeper, injured....616
O'Farrell Street, repaving by United Railroads....681, 682
Official Map....357, 460
O'Neil and Haley Tract, map of....403
Open public streets, charter provision....499
Opening of streets....19, 135, 164, 176, 200-204, 239-244, 258, 270, 271, 402, 415, 559-62, 575, 576, 619, 642-44

Ordinance—
Operating prospectively....272
Repealed by State law....711

Oriental Warehouse, encroachment....459, 460
O'Shaughnessy, M. M., salary....121
Outdoor park....666
Overhead construction, permits....415, 717

Pacific Gas and Electric Co.—
Asphalt Plant, light and power....762-65
Street openings....200, 641-44

Pacific Telephone and Telegraph Co., connection with Home system....196, 402
Park Commission, powers....500-502
Parks, sewers across....502
Passageways, amusement places, obstructing....331, 332
Patent chimney, permit....651-55
Patent royalties, cars, Municipal Railway....718-21
Patent to San Francisco....276
Pattiani, A., permit, lodging house....708, 709

Paving—
Assessing separately for each different....628, 629
Between rails and on each side thereof....335, 336, 832, 833
King Street....335, 336
Railroads....335, 336
Street railways....650

Pavements—
Injured, street openings....560, 643

Pay rolls oftener than once a month....805-807
Per diem employees....807, 980-83

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Performances, obstructing aisles, etc.....331, 332

Permits—
Absence of legislative authority 711
Alterations to building.....272, 509-16
Blasting 704-706
Buildings.....350, 394, 510-14, 652-54, 666, 708-12
Globe Theatre, alterations.....509-16
Grading 825, 826
Reconstruction 392-94, 511-15
Revocable 550
Steam heat mains.....619
Street openings..164, 200-204, 402, 415, 575, 576, 619, 642-44
Use of space below sidewalks.....265

Peterson, James E., reinstatement as conductor, Municipal Railway 996

Pipes, laying of.....200-204, 241, 575, 576
Plans, public buildings 338
Point Lobos Avenue, jurisdiction 794

Poles—
Erection of.....135, 164, 176, 239-41, 244, 415, 717
Ocean Shore Railway Co.....234, 235

Police power, buildings.....184
Power, Asphalt Plant.....762-65

Powers—
Building construction, supervising.....448-50, 511, 649, 666, 710, 711
Exceeding 194
Obstructions, removing 386
Salaries, fixing 121
Sewer construction, ordering.....502
Street improvements 695-701
Tearing down unsafe buildings.....448, 449, 513-16

Preference, local goods 580, 581
Prepayment Sales Car Co., patent royalties.....719, 720
Prescriptive use of street.....404
Private contracts.....736, 739, 866, 867
Private property taken or damaged for public use.....738

Procedure—
Abatement of nuisance 386
Levying assessments 628
Street improvements 181-83, 656, 695, 700

Progressive payments on contracts.....999
Property below level of street.....737

Property owners—
Liability for paving 336
Liability for sidewalks 533-35

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Prospectively, ordinance operating....272
Protection from surface water....737
Protests, street opening applications....203

Public buildings—
Architectural competition....338
Cleaning....885
Construction and repair....486, 487

Public Service Corporations—
Duties under franchise, performance compelled by mandamus....650, 651
Street openings....135, 163, 164, 176, 200-204, 239-44, 258, 270, 271, 402, 415, 559-62, 575, 576, 619, 642-44

Public Utilities—
Charge of....545
Charter provisions....545

Public work—
By contract, compelling....1001, 1002
Employment, citizens and residents only on....925
Supervisors ordering....999-1002

Publication, street proceedings....181-83
Pumping works construction, charter....501
Railroad Commission order, service connections....863

Railroads—
Compelling by mandamus....650, 651
Constructing viaduct....650
Extension of lines....650
Paving and repair to streets....335, 336

Rails, property of railroad....385
Rain delaying construction....155, 156
Ralston Street, opening....845
Ramsell Street, opening....845
Randall Street, assessment....865-68, 945
Razed buildings....168

Receipts from scavengers, use of Islais Creek Incinerator....792

Recommendation, street improvement....656

Reconstruction—
Buildings....102, 511-15, 666
Globe Theatre....509-16
Stable....392-94
Streets....696-700
Theatres....514, 515

Refund, street opening deposits....271
Rejection of bids....543
Relief Home, boilers....321
Remission of penalty for delays....194

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Remissness of municipal officers, liability for....689

Removal—
Buildings....102, 103, 649, 734-36
Obstructions....386, 478-80, 668, 844, 845

Repair—
Public buildings....486, 649, 652, 666
Sidewalks....264
Streets....382-84, 697, 829
Urgent, to streets....695-701

Reservoir construction, charter....501
Residents only, employment on public work....925
Resolution of intention....181-83, 655-57
Retrospectively, ordinance not operating....272
Reversionary interest of State in streets....276
Revocable permits....550, 619

Rights of corporations in streets....19, 135, 163, 164, 176, 200-204, 239-44, 258, 402, 559-62, 575, 576, 619, 642-44

Roanoke Street, grades....737
Ross and McDonald, patent royalties....718
Russell, J. E., foot injured by steam roller....805

Salaries—
City Engineer....121
During sickness....582, 583
Only for actual service....583
Power to fix....121
Twice a month....807

San Bruno Avenue, paving....655-57

San Francisco and San Joaquin Valley Railway Co., franchise....798, 799

San Francisco and San Jose Railroad Co....692

San Francisco Hospital, Tuberculosis Group, competition for plans....338

San Jose Avenue, sewer right of way....600
Santa Marina Street, assessment....864, 865
Santa Rosa Avenue, portion not open public street....599-601
Saturday full pay for teamsters....805-807

Scavengers, receipts from use of Islais Creek Incinerator....792

School houses, construction and repair....486
School houses, new....952
Scott, Magner and Miller, barley for Hetch Hetchy....1022-25
Scott, R. C., Advertising Co., bid....544, 545
Seal Rock House, sewage system....498
Seal Rocks....260, 261
Sealed proposals....180-83
Seating capacity, moving picture houses....331, 332, 511, 512
Seawall, bulkhead....381

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Service connections, installation by public utility free....863
Service connections, length of 576
Seventeenth Street car barn, buildings removed....734-36
Servitudes, city lots 738
Sewer right of way, Santa Rosa Avenue....600, 601
Sewage system, Seal Rock House....498

Sewers—
Assessment 502, 503
Construction 499, 501
Employees, asphyxiated 422-26
Howard Street 381-84
Water front, extension 382-84

Shacks—
Eddy Street 184-86
Tearing down 184-86

Shows, obstructing aisles, etc....331, 332

Sickness—
Employee, cement dust, compensation....664
Salary due 582, 583

Side tracks—
Charter provision 550
Ordinances regulating 335, 336
Southern Pacific Co....335, 336

Sidewalks—
Embarcadero 534
Grant Avenue 269, 270
Liability, property owners....533-35
Obstructions 85
Use of space below 265

Sierra and San Francisco Power Co., franchise rights....
....175, 176

Silver Avenue, open public street....403-405
Sitting in aisles, etc., amusement places....331
Smith, Peter, judgment 460
South Beach Water Blocks 460

Southern Pacific Co.—
Bluxome Street, title 459
Bridge, Islais Creek 798-800
Fence, Havelock Street 691-93
Paving 335, 336

Southern Pacific Railroad Co., franchise....335, 336
Spring Valley Water Co., street openings....200

Spur tracks—
Charter provision 550
Municipal Asphalt Plant 550
Ordinances regulating 335, 336
Southern Pacific Co....335, 336

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Squares, sewers across 502

Stable—
Eddy Street, shacks 184
Reconstruction of 392-94

Stairways, amusement places, obstructing....331, 332
Standing in aisles, etc., amusement places....331
Stanley Place, grading 440, 950
Stark Street, obstructions....844, 845, 873, 874

State—
Harbor Commissioners, jurisdiction....382, 383, 429, 430, 533, 534
Hotel and Lodging House Act....708-10, 784, 785
Interest in streets 276
Law repealing ordinance 711
Tenement House Act 712

Statutes operating prospectively 272
Steam railroads, paving and repair to streets....335, 336

Steam roller—
Automobile colliding with 689
Claim for foot injured 805
Horse frightened by, driver injured....671

Stenographer-typewriter, removal from civil service list 221-25

Sterling Street, regrading....440, 441
Stockton Street, stairway to Emmet Place....839
Stockton Street Tunnel 480
Storms delaying construction 153
Storrie, R. C. & Co., extensions of time on contracts..856-61

Street railways—
Compelling by mandamus....650, 651
Paving obligations 650

Street sweepers injured....651, 687, 688, 1021, 1022

Streets—
Assessments....865-68, 917, 1003
Completion to satisfaction....918
Control of....135, 203, 262, 382, 383
Defective condition 690, 691
Definition 499
Discretion 699, 700
Expenditures under five hundred dollars....695-98,701
Extensions, delinquent sales....845
Improvement ordinance....440, 441, 917
Names, duplication 72
New, map showing 71
North Peter Smith Tract 276
Open public streets, requirements....499
Openings, deposits....270, 271, 641-44

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Streets—
Proceedings 181-83, 656, 695, 700
Repair by railroads 335, 336
Reversionary interest of State in 276
Urgent repairs 695-97, 701, 829
Use of 19, 135, 164, 176, 200-204, 239-44, 258, 270, 271, 402, 415, 559-62, 575, 576, 619, 642-44
Water front 382, 383, 534

Structures, public, construction and repair 486
Subdivision map, approval 70-73
Superintendent of Public Streets, Highways and Squares, successors to 181, 656, 689, 690
Supervision, building construction 448-50, 511, 649, 666, 710, 711
Supervisors, public work by contract 1001, 1002
Supplies 935
Surety bonds, employees 189
Surety company completing contract 323
Surface water, protection from 737
Surveyors' field assistants, vacation 403
Susskind, S. H., automobile damaged colliding with steam roller 689-91
Sutro Baths 259, 261

Teams—
Driver injured 787, 788
Owners insuring drivers 797, 818, 819
Separate Saturday pay rolls 805-807

Tearing down—
Shacks 184-86
Unsafe buildings 448-50

Tearing up tracks 385, 386
Telegraph poles and service 717

Telephones—
Connection between two systems 402
Merger 196
Poles and service 717

Temporary—
Appointments 771
Buildings, tearing down 184
Permits, poles and wires 415

Tenement House Act 712

Theatres—
Alterations 511-15
Obstruction of aisles, exits, etc 331, 332

Tide lands, title to 271
Tonquin Street 276

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Tracks—
Expense of removing 386
Ocean Shore Railway Co. 234, 235
Tearing up 385, 386

Treatment, injured employees 626, 627, 645, 646, 687
Tuberculosis Building, San Francisco Hospital, competition for plans 338
Twenty-fifth Street, opening 196
Twice a month salaries 807
Unavoidable delays, contracts 153
Unguarded hole in street, automobile damaged 791
Unit prices, Lincoln Way paving 198, 199

United Railroads—
Contribution, Mission Viaduct 322-26
Hauling cars, Municipal Railway 159, 160
Paving, O'Farrell Street 681, 682
Track connection, Masonic Avenue at Haight 871

Unlawful construction 512
Unsafe structures 448-50, 513
Urgent repairs to streets 695-701, 829
Use of streets 19, 135, 164, 176, 200-204, 239-44, 258, 270, 271, 402, 415, 559-62, 575, 576, 619, 642-44
Vacation pay, per diem men 980-83
Vacations to former employees 403
Van Ness Avenue, northerly from Beach Street, open public street 707
Vassar Place, grading 825-27, 950
Vermont Street, improvement 731
Vernon Street, opening 845
Viaduct, mandamus compelling construction of 650
Victoria Street, opening 845
Vrooman Act 689, 690
Waiving of contract provision 193, 194
Walnut Avenue, open public street 372
Water and gas inspectors 771-75

Water Front—
Sidewalks 534
Streets 382, 383

Water Front Realty Co., permit to erect building 429, 430
Webb Place, public street 667, 668
Western Union Telegraph Co., franchise rights 239-43
Westinghouse Electric Manufacturing Co., claim 442
Wetmore, Manuel and Wetmore, grading contract 440
Whitney Street, assessment 865-67, 945
Wires, installation of 135, 164, 176, 239-41, 244, 415, 619
Wooden buildings 185, 271, 272

PUBLIC WORKS, BOARD OF—(Continued) PAGE.

Workmen's Compensation Act
616, 626, 627, 646, 663, 664, 687, 688, 797

Written contract—
Necessary for city to be liable 735, 736
Public work 1001
Repairs to streets 696-99

Yard space, lodging houses 784, 785

PUBLICATION—

Bills 179, 339, 340, 744
Cemetery removal ordinance 397
Charter provisions 179, 339, 340, 491, 492, 743, 744
Civil service examinations, notice of 491, 492
Consolidation Act 540
Contracts, letting 743, 744

Delinquent—
Assessments 168
Taxes 744

Election days 313, 314
Extensions of time to contractors 179
Lands, sale of, ordinance 339-41
"Municipal Record" 592, 593
Napa charter 745
Notices, sealed proposals 181-83
Official newspaper 491, 492, 744
Ordinances 179, 339-41, 743-46
Passage to print 178, 179
Period of 339-41
Resolution of intention 181-83
Resolutions 178, 179, 340, 743-46

Sale—
Lands, ordinance 339-41
Property on execution 167

Street names, pamphlet 264
Street work 181-83
Summons at law 397
Supplies, contracts for 540
Tax sale 167
Tunnel delinquent assessments 168

PUBLICITY CAMPAIGN—Appropriation for literature 591-93

PUEBLO LANDS—California Academy of Sciences, conveyance 686
Decree, Judge Field 116, 117
Grant by Congress 117, 547, 548
Order No. 800 686
Patent from United States 115, 116, 276
Title of City of San Francisco 466

PUMPS— PAGE.
Construction, charter provision....501
Forty-eighth Avenue and Fulton Street....498
Gasoline....84, 85
Relief Home....273

PURCHASE—
Daniel Webster School, land....891
Geary Street widening....835, 836
Integral part, existing utility....779
Lands for tunnels....311
Mission Park, lands for....840
Sanitary Reduction Works....997, 998
School lands....810
Supplies....988
Taxes, property sold for....973

PURE FOOD AND DRUG ACT....300, 302

PURPRESTURE—Railway in park....956

PUSHING OF TRAINS....233

Q

QUALIFICATIONS....71

QUALITY—Food, public institutions....540, 541

QUARANTINE AGAINST DISEASE....303, 770, 849

QUIET TITLE—
Act of Congress, 1866....117
Act, State Legislature....260
Army Street and San Bruno Avenue....733
Beacon Street....478
Bernal Rancho....119
Chestnut Street lot....786
Cronin, Ann....733
Emmet Place....479, 783, 784, 839
Franchise to railroad....317
Locust Avenue....662
Mandonnet v. All Persons....479, 783, 784, 839
Norton, John, v. City and County of San Francisco....172
Order No. 800....260
O'Reilly, Patrick J....657
Pueblo lands, San Francisco....117
Redwood Street....662
Stark Street....874

QUIGLEY, THOMAS D.—Appeal, street assessment, Moraga Street....1002, 1003

R

PAGE.

RACE PREJUDICE—Moving pictures inciting, prohibited....876, 932

RACKS—Bicycle 85

RAILROAD COMMISSION—

Constitutional amendment, fixing rates.....758-61
Election transferring powers to.....759
Public utilities installing meters and service connections without charge 863

RAILROADS—

Acceptance of franchise involves performance of obligations 651
Cities and towns passing through 360
City attempting to regulate beyond city limits.....362
Civil Code sections.....27, 227, 229, 230, 358, 359, 361, 363
Consolidation 208
Constitution of California 362
Construction—
Code section 229, 230
Powers 358
Preceding laying out of streets.....210
Time requirement 230
Crossings, grading 650
Decisions.....82-92, 228, 359-67, 650, 651
"Dillon on Municipal Corporations".....228, 229
Discrimination by 362
Eminent domain proceedings 207
Enjoining operation of cars on streets.....208
Entry to City 226, 317, 358
Exclusive rights forbidden 358
Extension of tracks 229, 650
Forfeiture of uncompleted portion.....229
Franchises.....310, 360, 367, 368
Free pass 364
Grading streets at crossings 650
Incorporations 208, 209
Legislative grant to 227
Lights, maintaining during darkness 650
Maps, filing of 27
Ocean Shore Railway Co.....24-28, 225-35
Operation, code section.....229, 231
Passing through cities and towns.....228
Paving, obligation on.....
.....50, 86, 91, 335, 336, 358, 681, 682, 832, 833
Powers under Civil Code.....227
Rails property of company.....385
Repair of streets.....358
South Pasadena, litigation.....360-64

RAILROADS—(Continued) PAGE.
Southern Pacific Co.....207-18
State—
Encouragement by 359
Restricting control by city.....367
Street repairs 335, 336, 358
Street work, lien upon 89, 90
Streets, use of 358-68
Tracks, removal of 385, 386
Viaduct, compelling construction of.....650
Voluntary act, bound by 366, 368
Water front, running cars to.....317

RAILS—
Abandoned 386
Geary Street, Park and Ocean Railway Co.....385
Mission District streets.....207, 210, 214-18
Ordinance No. 547 (New Series).....206
Ownership by City and County.....206, 207
Ownership of 206
Presidio and Ferries Railroad Co.....206
Property of railroad.....385
Tearing up 385, 586
Unused 232

RAINS—
Delaying construction 155, 156
Landslide, damage 736, 737

RAKER ACT—Hetch Hetchy grant 494, 495

RALSTON STREET—Opening 845

RAMSELL STREET—Opening 845

RANCHO RINCON DE LAS SALINAS Y POTRERO VIEJO—
Grant and history 106-109, 118-120

RANDALL STREET—
Assessment 865-68, 945, 946
Improvement 725-27

RANK—
Captain discharging duties of operator.....347-49
Fire Department 75, 76, 282-85, 557, 558
Hosemen 557, 558
Lieutenant in reorganized Fire Department corresponding to fireman of chemical company.....282
Pension based on.....128, 129, 579, 580, 620
Police Officers 579, 580
Reduction in 348, 754, 755, 768
Salary, attaching to 347-49

PAGE.

RAPID RUNNING OF TRAINS 232

RATE FIXING—
- Charter provisions 410, 411
- Constitutional amendment 758-62
- Electric 474
- Gas 474
- Legislative function, not judicial 474
- Railroad Commission 758-61
- Reasonableness of rates 474
- Supervisors' powers 410, 758-61

RATE LITIGATION—
- Electric 474
- Gas 474
- Impounded moneys 614, 615
- Reasonable rate of return 474
- Spring Valley Water Co. 614, 615

RATES—
- Charter provisions 410, 411, 618
- Confiscatory 474
- Constitutional amendment 409
- Discrimination 362
- Electric 431, 432, 473, 474
- Electrolier service 432
- Excess charged 473, 474
- Fixing 409-11, 525, 617, 618
- Gas 473, 474
- Interest on bonds 373-79
- Lighting 431, 432
- Net return 474
- Pacific Gas and Electric Co. 473, 474
- Passenger fares, fixing 361-64
- Reasonable rate of return 474
- Right of corporations to charge rates they please 474
- Steam heat 617, 618
- Tax 472

RATICAN, WILLIAM—Patent rights 333, 334

RAZED BUILDINGS—Materials from 168, 169

REAL ESTATE—(See Lands.)

REASONABLENESS OF RATES 474

RECALL—
- Constitutional amendment 21, 22, 751
- Grant, Senator, election 678, 679

RECEIPTS— PAGE.
Accounting system, uniform 1005
Islais Creek Incinerator, from scavengers 792
Percentage of 411, 419-22
Public utility municipally owned 605
United Railroads 419-22

RECEIVER—Assessment, property in hands of 971

RECEPTACLES—Street litter 505-507

RECOMMENDATION—
Appointments 62, 63, 608, 609, 823
Change of grades 440, 441
Dismissal of litigation 425, 426
Extensions of time to contractors 857, 859
Street improvements 656, 700

RECONSTRUCTION—
Amusement places 511-15
Apartment house, frame building converted into 271, 272
Area walls 264, 265
Board of Public Works 394, 666
Building law 102, 511-15, 652
Decisions 552
Fire Wardens, consent 552
Globe Theatre 509-16
Laundry premises 160-62
Moving picture houses 511-15
Permits 272, 652, 666
Public utility, municipal 605, 606
Stable building 392-94
Streets 696-700
Theatres 511-15
Wooden buildings 552

RECORDER, RECORDING—
Acknowledgments, taking 519
Act purely ministerial 769
Agreement executed by two parties, but acknowledged by only one 621
Building contract, fee for filing 9, 10
Burials 397
Certified copy of ordinance 340, 341
Certificate of ordination 769
Chief Deputy 389
Civil Code sections 369, 769
Code of Civil Procedure 9
Compulsory 9, 10, 769
Copyists 977

RECORDER, RECORDING—(Continued) PAGE.
Delay, recording without....18, 19, 369
Employees brought under civil service....389, 390, 771, 803, 830
Expressmen reporting removals of trunks etc....563
Fees—
Amount of....9, 10
Filing maps....416, 417
Forest Hill Court, filing map....416, 417
Indexing under both names to agreement....621
Indorsement on instrument....369
Maintenance of minors....401
Maps, filing....70-73, 416
Marriage certificates....581, 582
Moving trunks, etc....563
O'Neil and Haley Tract map....403
Political Code sections....9, 10, 369, 769
Power of attorney....369, 370
Refusal to record....369, 370
Removal of bodies....397
Stoltz, Charles M., civil service standing....389
Subdivision map not approved by Board of Public Works....70-73
Tax deeds....19, 973
Telegraphic notice revoking power of attorney....369, 370
Vacations for copyists....977

RECREATION CENTERS....546, 547

RECREATION LEAGUE—Aquatic park....851

REDEMPTION—
Bonds....52, 58, 59, 375-77, 1028
Political Code....19
Surplus, bond funds....604
Tax deeds....973
Tax levy....1028

REDUCING—Soap manufacture....847

REDUCTION—
Casserly, Captain John, under duress....767, 768
Election precincts in number....722, 723
Rank....348, 754, 755, 767, 768, 900
Salaries of teachers....704
Street assessment....864, 865

REDWOOD STREET—Whether open public street....660-63

REFERENDUM—Ordinance....414

REFRESHMENT PLACES—
Amusement license....532, 533
License tax....522, 556
Ordinance No. 1677....556

PAGE.

REFRIGERATION—Meat 302

REFUNDS—
Bail, money 536, 538, 588, 589, 674
Barber Asphalt Paving Co. 945
Barlow, Thomas 588, 589
Caggiari, A. 674
Deposits, street openings 271, 562
Duplicate payment of taxes 658, 659
Lambert, Mrs. W. D., taxes 318, 320
Maintenance of minors 401
O'Reilly, Patrick J., void tax sale 657-60, 969, 970
Political Code 970
Private street contract 945, 946
State, illegal tax sales 659, 660
Street opening, deposits 271, 562
Sweeney, James P. 562, 563
Tax delinquency 630-32
Tax sale, erroneous assessment 657-59
Taxes 318, 320, 658, 659, 969, 970
Temporary deposits, contractors 316

REFUSAL—
Appointments, approving 83, 936, 938
Certifications, Civil Service 83, 332, 333
Eligible lists, putting on 149
Employee to serve 165
Extensions of time to contractors 859, 860
Franchise, granting of 363, 368
Permits 789-91
Permitting business of undertaker 33
Recordation of instrument 369, 370
Removal of obstructions 386, 844, 845
Service, furnishing of 292, 293
Temporary appointments, approval 938
Use of streets 409

REFUSE—
Cans, advertising on 505-507
Ordinance forbidding hauling in certain district 1013
Receipts from scavengers 792

REGISTRAR OF VOTERS—
Delegation of authority by Supervisors 101
Election booths contract 253
Election expenses 723
Powers and duties 724
Precincts, reduction in number 722, 723

REGISTRATION—

PAGE.

Alameda County 11-16
Automobiles 488-90, 493, 911
Birth certificates 330
Chimney builders 653, 654
Control of 101, 724
Party affiliation of voters 875
Residence not determined by 11-16

REGRADING—

Assessment district 441
Charter provision 440, 441
Geary Street, incident to Municipal Railway construction 49-51
Harrison Street 440
Hayes Street 831
Power to order 440, 441
Resolution of intention 65
Sterling Street 440
Street railway lowering or raising tracks to conform to new grade 833, 834

REGULATION—

Amusement places 331, 332, 482, 511-15
Anatomical museums 593, 594
Automobile supply stations 788-91
Barber shops 572
Bill boards 139-46
Blasting 704-706
Brickyards 531
Buildings 102, 271, 272, 511-15
Burials 33
Buses 520, 521, 947-49
Business 32-41, 530, 531
Butchers 639
Cars 233, 234, 361, 363, 365, 368
Chimneys 653, 654
Closing time, pawn shops, etc. 570-72
Common carriers 563, 564
Constitutional provisions 72, 248, 278, 362, 426, 710, 711
Cycloramas 482
Dance halls 637-41
Dedication of streets 320
Denial of rights 240, 279
Department of Electricity 586-88
Detective agencies 842, 843
Disease 848-51
Disinfection 849
Dogs, keeping of 435, 436
Electric lighting service 717

REGULATION—(Continued) PAGE.

Electrical installations 598
Embalming establishments 31, 32, 38
Excavations in streets .....
..... 201, 202, 245, 248, 258,270, 271, 272, 294,
402, 409-15, 559-62, 575, 576, 586-88, 597, 598, 619, 642-44
Fares 520, 521
Fire Department 288
Fireplaces 653, 654
Food, quality of 540
Frame buildings 271, 272
Garages 530, 573-75, 634
Gas rates and service 618
Gasoline, storage of 789, 790
Gasoline supply stations 788-91
Harbor Commissioners 280
Health 848-51
Heat rates and service 618, 717
Height of buildings 271, 272
Hotels 708-10
Jitneys 520, 521, 947-49
Junk dealers 570-72
Kinetoscope parlors 482, 1011-13
Laundries 145, 551-56, 570
Libraries, Public 305
Lighting poles, rates and service 618, 717
Liquor, sale of 481-84
Local affairs 638
Lodging houses 708-10
Lubricating oil, storage 789
"McQuillin on Municipal Corporations" 843
Meat inspection 301, 471, 493
Milk 552
Minors, labor of 989
Motor buses 520, 521
Moving picture shows 331, 332, 511-15, 876, 931-33, 1011-13
Museums 482, 593, 594
Obstructions, aisles, etc., amusement places 331, 332
Occupations, lawful 145
Open public streets 320
Opening of streets .....
..... 201, 202, 245, 248, 258, 270, 271, 278, 294, 320,
402, 409-15, 559-62, 575, 576, 586-88, 597, 598, 619, 642-44
Overhead construction 525, 586, 588, 597, 598, 619, 717
Panoramas 482
Passenger fares 361-64
Pawn shops 570-72, 929
Phonograph parlors 482, 1011-13
Pipes, laying of 249, 294, 409-14, 525, 575, 576, 586, 587
Poles 277, 278, 294, 409-12, 415, 525, 586-88, 597, 598, 717
Power of municipality 278

REGULATION—(Continued) PAGE.

Power poles, rates and service....618, 717
Private detectives....842, 843
Prohibition, compared with....32, 37
Property, use of....141
Public libraries....305
Public service corporations....233
Public utilities....135, 618, 758-61
Quarantine....849
Railroad Commission....758-61
Railroads....361-68
Rates....409-11, 617, 618
Roadbed construction....233
Saloons....570
Sanitation....849
Second-hand dealers....570-72
Service....135, 618
Side tracks....335, 336
Slaughter houses....39-42
Soap manufacture....846, 847
Speed, street railway cars....234
Spur tracks....335, 336
Stables....461-63, 552, 553
State—
Board of Equalization....472, 473
Board of Health....848-51
Harbor Commissioners....280, 382-84
Law superseding local law....843
Steam heat rates and service....618, 717
Storage companies....33
Street openings....98, 201, 202, 240, 245, 248, 258, 270, 271, 278, 294, 402, 409-15, 525, 559-62, 575, 576, 586-88, 597, 598, 619, 642-44
Street railways....234, 361-68
Streets, dedication of....320
Supervisors' power....59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710
Supply stations automobile....788-91
Telegraph poles, rates and service....618, 717
Telephone poles, rates and service....618, 717
Theatres....331, 332, 511-15, 1011-13
Tracks....234, 235, 361, 363, 365, 368
Trains....233, 234
Underground conduit construction....586, 588
Undertaking parlors....31, 32, 38
Warehouses....33
Water, delivery of....295
Water rates and service....618, 717
Wholesale liquor dealers....482
Wires....277, 278, 294, 409-12, 415, 619
Wooden buildings....271, 272

REINSTATEMENTS— PAGE.
Board of Public Works....694
Carrell, J. W. 380
Civil Service Commission, power....405
Decisions 380, 766, 767, 809
Delay a bar....766, 767, 809
Department of Electricity....380
Disability ceasing, on....580
Eligible removed from list....405
Firemen 808-10
Forcada, Frank, watchman 693, 694
Henzel, Edward F....380
Hyer, John J....380
Ingham, Richard L....255
Leuterdt, C. F., hoseman 765-67
Macphee, Arthur F., police officer....815-18
Peterson, James E., conductor Municipal Railway....996, 997
Police officers....255, 580, 766, 767, 815-18
Smith, Henry A., fireman....807-810
Statute of Limitations....766, 810
Tax Collector's office, clerk....296-98
Taylor, Charles H., police officer....815-18
Wolff, Charles A....296, 298

REINTERMENTS 397, 475, 476

REJECTION—
Bids....543, 622, 796
Demands 621
Films 932

RELEASE—Bail money 533, 536

RELIEF—
Family of fireman, pension....444
Firemen....103, 104, 286, 287
Sewer Department employees killed....423
Widows' pensions....400, 401

RELIEF HOME—
Boilers, bids 321
Budget appropriations....1, 2
Charter amendment 273
Charter provision 342
Leimert, Walter H., purchase of lands....341-43
Newell-Murdoch Co., water pipe through tract....122, 123
Opening street through....272-74
Pump, installation of 123, 273
Salaries 1, 2
Sale of lands....339-44

RELINQUISHMENT— PAGE.
Badge of office....165, 166
Books, etc., by official at end of term....220, 221
Control over public utilities....759, 761
Office....297
Legislative powers....291
United States, title....547

REMINGTON TYPEWRITER CO.—Contract....281

REMISSION OF PENALTY—Delays on contract....194

REMISSNESS OF MUNICIPAL OFFICES—Liability for....689

REMOVAL—
Bill boards....141
Buildings....102, 103, 649, 734-36
Cattle....30, 39-42
Cemeteries....395-98, 475, 476
Civil service eligible list....147-49, 221-25, 252, 405
Contagious diseases....770, 807, 808, 848
Corrals....30, 39-42
"Dillon on Municipal Corporations"....754, 755
Diphtheria germ carriers....848-51
Employees....222-25, 900
Furniture, keeping record....563
Materials from condemned buildings....168, 169
Murphy, Thomas R., from office....746-55
Nuisances....513
Obstructions....386, 478-80, 668, 844
Office, from....21, 746-55, 809
Overhead construction....524
Probation, during....149
Steam mains, location....618
Tracks....385, 386
Trunks....56, 563
Wires....278

RENDERING—Soap manufacture....846, 847

RENT—
Auditorium....885, 889
Automobiles to City by employees....445-47, 487
Contract, collection on....446
License tax, collectors....528
Market Place and Produce Exchange lots....853, 854, 880-83
Sign on building, Lincoln School lot....262, 263

REORGANIZATION—Fire Department....282, 284, 287, 557, 558, 837

REPAIRS— PAGE.

Automobiles, reporting 928
Board of Public Works, charge of 486, 652
Building Law 272, 511-15, 652
Chimneys 653, 654
Civil Code section 590
Consolidation Act 178
County Jail buildings 999, 1000
Definition 91, 92
Election booths 486, 487
Fire boats 795, 796
Fire houses 486
Fire Wardens, consent 552
Fireplaces 653, 654
Globe Theatre 509-16
Health Department office building 590, 591
Landlord, at expense of 590
Patent chimneys 653, 654
Public buildings 486
Public utility, municipal 605, 606
School houses 486
Stable building 392-94
Tenant, obligation upon 590
Wooden buildings 552

REPAIRS TO STREETS—

Abutting property owners, liability 336
Between tracks 50, 86, 91, 335, 336, 681, 682, 832, 833
Board of Public Works, powers 695-701
Board of Supervisors, powers 695-701
Consolidation Act 245
Contractor, maintenance 125
Crossings 233
Decisions 89-92, 124, 125
Duty a continuous one 93
Embarcadero 382, 533-35
King Street 335, 336
Ninth Street 88, 89, 91, 93-95
Obligation on city 265
Ocean Shore Railway Co. 233, 235
Political Code section 382
Property owners, liability 336, 533-35
Railroads, obligation on 88-95, 358
Sidewalks 264, 265, 533-35
Southern Pacific Co. 335, 336
State Harbor Commissioners 382
Street railways, obligation 88-95, 233, 681, 682
United Railroads 88-95, 681, 682
Urgent repairs 695-97, 701
Water front 534

REPAVING— PAGE.
Obligation—
On City 265
On railroads 93-95, 681, 682
Pennsylvania statute 92, 93
United Railroads....88-95, 682

REPEAL—
Civil Code section not repealed by constitutional amendment 293
Ordinance by State act....709, 711
Statute, by conflicting constitutional provision....242

REPLENISHMENT—Funds 811

REPORTS—
Automobile repairs 928
Electrical installations 601-603, 985
Moving of goods....563, 564

REPRESSION OF THEFT....929

RESCIND—(See Cancellation).

RESERVE—
Buchanan Street, extended northerly....328
Failure to make....328, 329
Great Highway 499
Jefferson Street, extended easterly....328
Laguna Street, extended northerly....328
Market Place and Produce Exchange lots....852
School lot 662
Van Ness ordinance 547

RESERVE FUND 606, 993

RESERVOIRS—Hetch Hetchy 495

RESIDENCE—
Abandonment of 252
Actual, how determined 15
Architect, advisory 46, 47
Bermingham, Samuel 10-16
Charter provisions....14, 20-24, 252, 267
Decisions....15, 22, 24
Districts....145, 250, 461
Education, Board of; charter provision not mandatory on.. 21
Employment on Church Street railway construction....925

RESIDENCE—(Continued) PAGE.

Experts 47
Fact, question of 14, 16
Family separate residence 13
Firemen 267
Howard, John Galen 46, 47
Husband and wife 703
Intention of employee 14, 252
Leader, Municipal Band 8
Less than five years prior to appointment 14, 16
Losing of 15
Maintaining in City 12, 14
Minors 703
Political Code sections 14, 15, 23, 702, 703

Registration—
Alameda County 11-16
For voting not determinative of 15, 16

Repose, seasons of 703
Resolution, Board of Education 20, 22-24
School District; within territorial limits of 23
Sleeping, where 12, 13
Stuart v. Board of Education 22
Teachers 20-24
Tenement houses 538
Voting in outside county 11-16

RESIGNATION—

Acquiescence for three years waives rights 809
Act of relinquishment 297
Assurance against absence without leave 296
Badge of office, relinquishment of 165, 166
Civil Service rules 451
Coercion, through 255, 296-98, 808, 809
Decisions 255, 297, 809, 810
Esola, Frank W 255
Evidences 165, 166
Fire Department 164, 166, 320, 808, 809
Fraudulently altered 297
Hardenedy, W. E 164, 166
Ingham, Richard L. 255, 256
Lane, Franklin K., opinion 715, 716, 809
Officer 320
Police officers 255, 256, 715, 716
Rules, Civil Service 451
Self-operative 320
Teutenberg, Frank J., police corporal 715-717
Undated 297
Withdrawal 164, 166, 255, 256, 809
Wolff, Charles A. 296, 298
Written 297, 320

RESOLUTIONS—

PAGE.

Accounting system, municipal....1004-1006, 1016-18
Adopted....179
Advertising on final passage....73, 744
Alemany Avenue, sewer right of way....600
Amusement enterprise, Van Ness and Hayes....646-49, 665
Amusements, license....648
Appropriations should be made by....64
Aquatic Park, exchange of lots....851
Army Street—
Improvement....731
Tracks of Ocean Shore Railway Co....277
Assessments....65, 1003
Atchison, Topeka and Santa Fe Railway Co., bridge, Islais Creek....799
Ball throwing games, license....648
Barry, David A., assistant clerk, Supervisors....896-901
Beacon Street, City's title to....477
Belt-line Railroad, use for passengers....279
Blasting, Gray Bros., Thirtieth and Castro....477
Board of Education....20, 22-24, 263, 384
Board of Public Works, bringing Great Highway under control of....612
Bond, Crocker National Bank....186, 331
Bonds, interest on....186
Boulevard, Ocean Front....612
Budget, number of votes for passage....608, 609
Building, condemned, demolition....448
Byrne, Stephen A., Gas and Water Inspector....772
California Electric Light Co., rights in streets....244
Castro Street, Gray Bros., blasting....477
Cemeteries, removal of....396, 475
Changes of grade....64-67, 541-43
Charter amendment election....101
Church Street Railway, citizens only to be employed....925
City Electric Co., light and power....762, 763
Civil Service Commission....74, 222, 672
Clement Street, extension....299
Concessions....647, 648
Corporation yard, light and power....762, 763
Demolition of condemned buildings....448
Department of Elections....29, 43
Diamond Street, blasting, Gray Bros....477, 478
Drawbridge, Islais Creek....799
Education, Board of....20, 22-24
Eighteenth Street, closing....565
Election, charter amendments....101
Elections, Department of....29, 43
Electric rates, excess charged....473
Electroliers, connections and lighting....431, 432

RESOLUTIONS—(Continued) PAGE.

Ellison, Edward, Assistant Gas and Water Inspector.....772
Emmet Place 839
Enact, power to.....245
Esplanade, ocean front 612
Excess rates charged 473
Exchange, Market Place and Produce Exchange lots..851, 852
Extensions of time, passage to print.....178, 179
Extensions of water mains.....516
"Fighting the Flames," permit.....646-49, 665
Final passage, advertising 73
Fire Commission 282-84, 746
Fire Department, Civil Service..... 74
Fiscal agent, bond from.....186, 331
Forty-eighth Avenue, extension.....299

Franchises—

Independent Light and Power Co.....244
Mutual Electric Light Co. 244
Presidio and Ferries Railroad Co. 205
San Francisco and San Jose Railroad Co.....213, 214

Garbage disposal bids.....1020, 1021
Gas and water inspectors 772
Gas rates, excess charged 473
Golden Gate Park, Municipal Railway across.....954
Grade changes.....64-67, 541-43
Gray Bros., blasting Thirtieth and Castro.....477
Great Highway, bringing under control of Board of Public Works 612
Hampton, Robert W., Gas and Water Inspector.....772
Harrison Street, grading 826, 950, 969
Hawthorne Street, grades.....950

Hetch Hetchy—

Acquisition of integral part of.....779
Grant, carrying into effect.....494

Holladay Avenue, tracks of Ocean Shore Railway Co.....227
Humphreys Map 357
Independent Light and Power Co., franchise.....244
Installments, street assessments.....1003
Integral part, existing utility, acquisition of.....779
Intention of.....65-67, 181-83, 565, 655-57
Interest on bonds.....186
Jarnac Street, sewer right of way.....600
Kansas Street, improvement.....731
Klink, Bean & Co., uniform accounting system.....1004-1006, 1016-18
Label, union, on printing.....926
Lands, sale of.....340
Library block, Van Ness Avenue, purchase of..... 57

RESOLUTIONS—(Continued) PAGE.

Lighting—
Contract 762, 763
Electroliers 430-32
Streets, additional 162
Lincoln School lot, sign on building 263
Lincoln Way, improvement 197, 198
Main Street, change of grade 541-43, 969
Map, official 357
Market Place lots 851-53, 880-82
Merced, change in location of poles 278
Mission District streets, right of Southern Pacific Co. 207
Mission Viaduct 324
Montgomery Street, acceptance 177
Mothers' Pension Law, putting into operation 400, 401
Municipal accounting system, uniform 1004-1006, 1016-18
Municipal Railway across Golden Gate Park 954
Mutual Electric Light Co., franchise 244
Ocean Front, boulevard and esplanade 612
Ocean Shore Railway Co. 27, 28, 227
Official Map 357
Official newspaper, publication in 744
O'Leary, Frank, Assistant Gas and Water Inspector 772
Outdoor park permit 646-49, 665

Pacific Gas and Electric Co.—
Additional lights 162
Contract, light and power 762, 763
Excess rates charged 473
Lighting electroliers 430-32
Passage to print, extensions of time 178, 179
Potrero Avenue, tracks of Ocean Shore Railways Co. 227, 228
Power contract 762, 763
Presidio and Ferries Railroad, franchise 205
Produce Exchange lots, exchange 851-53, 880-82
Public property, disposal of 340

Publication—
Period of 340
Supervisors ordering 743-46
Publicity campaign literature 591
Rates, gas and electric, excess charged 473
Removal of cemeteries 396, 475
Residence, teachers 20, 22-24
Residents only to be employed on public work 925
Rogers, John W., chief assistant clerk, Supervisors 896-901
Sale of lands 340

San Bruno Avenue—
Litigation 607
Tracks of Ocean Shore Railway Co. 227

RESOLUTIONS—(Continued) PAGE.

San Francisco and San Jose Railroad Co., franchise..... 213, 214
San Francisco Ladies' Protective and Relief Society, deed..685
San Jose Avenue, sewer right of way 600
Santa Rosa Avenue, sewer right of way.....599
Sealer, Weights and Measures 454
Sign on building, Lincoln School lot.....263
Southern Pacific Co.—
Exchange of lots 851, 852
Market Place and Produce Exchange lots..851, 852, 880-82
Right to lay tracks in certain streets.....207
Stanley Place, grades 950
Streets—
Assessments.....65, 1003
Improvement procedure 181-83
Names, pamphlet 264
Superintendent of Schools, traveling expenses.....1026
Teachers, residence 20, 22-24
Team owners insuring drivers.....818
Thirtieth Street, Gray Bros., blasting.....477
Tourists' Association, printing literature.....591
Tupper, O. M., Gas and Water Inspector.....772
Uniform municipal accounting system.....1004-1006, 1016-18
Union label on printing.....926
United Railroads—
Abandonment of franchise 170
Construction of Mission Viaduct.....324
Vassar Place, grading.....826, 950
Vermont Street—
Improvement 731
Tracks, of Ocean Shore Railway Co.....227
Vulcan Street extension 419
Weights and Measures, Sealer 454
Widows' Pension Law.....400, 401

RESPONSIBILITY—(See Liability).

REST—Day of 132, 133

RESTAURANTS—
Amusement license 532
Cafeterias.....556, 557
Class legislation 427, 428
Females, employment in Greek and Chop Suey.....426-28
License tax 522, 556
Ordinance No. 1677.....556
Young Men's Christian Association cafeteria.....556, 557

RESTRAINT— PAGE.
Business 141
Imposing only those reasonably necessary 471
Long term contracts 291
Slaughter houses 471
Succeeding boards, power of 291

RESTRICTIONS—
Building heights 143
Business 34, 35, 531
Class legislation 36
Dogs, keeping of 436
Franchise grant 361, 364
Funds 605
General law, imposed by 362
Hotels, size of 785
Legislature, on lawful business 36
Lodging houses 708, 785
Obstructions, use of street 480
Occupations within certain limits 145
State, imposed by 367
Unlawful, in contracts 125
Uses of property 140

RETAIL LIQUOR DEALERS 481-84

RETAIL MERCHANTS' ASSOCIATION—Selling goods without a license 1015

RETIREMENT—
Firemen 130
Pension, disability 620
Police officers 579

RETROSPECTIVE OPERATION—
Building Law 514, 515
Ordinance 514, 515
Statute 272

RETURN ON INVESTMENT 517, 518

REVERSIONARY INTEREST—State in streets 276

REVIEW—
Officers of special and limited jurisdiction 147
Ordinances by courts 38

REVOCABLE PERMITS—
Spur tracks 550
Steam heat 619
Street openings 195
Track along sewer right of way 228

REVOCATION— PAGE.
License....932, 933
Medical certificate....932
Permits....804

REVOLVING WHEELS—License....648

RICHMOND DISTRICT—Sinking test wells....595

RIGHTS—
Abutting property owners....480
Access to property....506
Acts of Congress....239, 242
Aesthetic objects, giving up for....144
Alleyway, use by lot owners....319, 320
Arbitrary deprivation....34, 36
Business, pursuance of....32, 34, 35
California Electric Light Co....244
City Electric Co....414, 415
Civil Service examination....147
Common, to halls, stairs, etc....537, 538
Constitution—
Massachusetts....32, 33
United States....32, 33
Contract for street lighting....162-64
Damages....542
Denial of....240, 279
Deprivation of....241
Donors, opera house....484, 485
Dore v. Truett....328, 329
Eminent domain....207, 485
Exclusive rights forbidden....247, 358, 410, 414, 525
Fire Department, holders of positions before reorganization....284, 287
Independent Light and Power Co....244
Interference with....33, 37
Jenkins, Judge....247
Life, liberty and happiness....32
Lighting companies....97, 135-37, 200, 201, 241, 249, 292-94, 409, 412, 415, 523-25, 559-62, 575, 576, 586-88, 597, 598, 619, 642
Municipal Light and Power Co....243, 244
Municipality, invasion by....37
Mutual Electric Light Co....244
Occupation, lawful, engaging in....31-37
Ocean Shore Railway Co....24-28, 225-35
Opera House, donors' rights....484, 485
Pacific Gas and Electric Co....201, 244-50, 598, 642-44
Pacific Telephone and Telegraph Co....201

RIGHTS—(Continued) PAGE.

Panama-Pacific International Exposition Co. 458
Patent 333, 334, 453, 454
Pensioner 267
Private property 140
Property, in 142-44
Property owners 140, 319, 449, 480, 506, 737, 738, 784
Protection, private rights 450
Public service corporations in streets 19, 96-98, 135-39, 163, 164, 176, 200-204, 228, 229, 239-50, 258, 277-79, 293-96, 402, 408-15, 523-25, 559-62, 575, 576, 586-88, 597, 598, 618, 619, 642, 727, 913-16
Railroad companies 358-68
Railroad construction preceding laying out of streets 210
Rate litigation 474
San Francisco Gas and Electric Co. 201
Sierra and San Francisco Power Co. 175, 176, 523-25, 912-16
Southern Pacific Co. 207-18, 336
Spring Valley Water Co. 201, 295, 296
State Harbor Commissioners 382-84, 429, 430
State, sovereign authority 249
Streets, in 19, 96-98, 135-39, 163, 164, 176, 200-204, 228, 229, 239-50, 258, 277-79, 293-96, 402, 404, 408-15, 523-25, 559-62, 575, 576, 586-88, 597, 598, 618, 619, 642, 727, 913-16
Tide lands, city in 328, 329
Tracks, city to lay 944
United Railroads 277-79
Use of streets common to all 521
User right 727
Vocation, pursuance of 32, 34, 35
Waiver of 263
Water companies 295, 296, 409, 410, 587
Western Union Telegraph Co. 239-43
Wires, maintenance of 277

RIGHTS OF WAY—

Alleyway, rights of adjoining lot owners 308, 319
Comerford Street 319
Hetch Hetchy 495, 496
Ingress and egress 784
Ocean Shore Railway Co. 226-28
Public utility, municipal, across city property 954
Railroads 227
San Francisco and San Joaquin Valley Railway Co. 317
Southern Pacific Co. 214, 309, 310
State Highways 68
Tunnels 311, 312
Twin Peaks Tunnel 311, 312

RING THROWING GAMES—License 648

PAGE.

RINKS, SKATING—Licenses 648

RIPARIAN RIGHTS 112

RISK 450

ROADBED—
- Ocean Shore Railway Co. 233
- Ordinance No. 547 (New Series) 206
- Ownership by City and County 206
- Presidio and Ferries Railroad Co. 206
- Raising or lowering to conform to grade 833
- Supervisors' power to regulate construction 233
- United Railroads 833

ROANOKE STREET—Grades 737

ROCHESTER—Bill boards 141

ROGERS, JOHN W.—Change in position 896-901

ROLANDI, F.—
- Form of Hetch Hetchy railroad sub-contracts 975
- Forty-eighth Avenue sewer 498

ROLLER SKATING RINKS—License 648

ROMEO FLATS 538, 539

ROOMS—Unfit for occupancy 417, 418

ROSS & McDONALD—Patent royalties 718

ROUTES—
- Jitney buses 949
- Of cars immaterial in exercise of franchise 421
- State Highways 68
- United Railroad cars 170, 421

ROYALTIES—Cars, Municipal Railway 718-21

RULES—
- Acceptance of streets 177
- Civil Service 74, 83, 84, 225, 268, 405, 451
- Diphtheria cases 850
- Discipline 288, 289
- Disinfection 849
- Efficiency 288, 289
- Fire Department 288, 801, 813, 814
- Health 848-51
- Leaves of absence 387
- Libraries, Public 305
- Meat inspection 301
- Probationers 801, 813, 814

RULES—(Continued) PAGE.
Quarantine 849
Resignations 451
Sanitation 849
State Board of Equalization 473
Vacancies 801, 802, 813, 814
Vacations 387
Water, delivery of 295

RUNAWAY HORSES—Accidents 670, 671, 687

RUSSELL, J. E.—Foot injured by steam roller 805

S

SACRAMENTO—
Contracts, charter provision 325
Laundry ordinance 553

SACRAMENTO STREET—
Substitution of electric cars for cable 421
United Railroads franchise 420-22

SAFETY—
Bill boards 141
Blasting regulation 704, 705
Delay in tearing down building endangering 185
Diseases, contagious, isolating 770, 848-51
Food, unwholesome 471
Height of buildings 143
Laundries 145, 161
Lights at excavations 690
Police power 139, 201
Power wires underground 277
Promotion of 32
Restrictions on use of property 140
Stables 462
Theatres 514
Undertaking parlors 32

SALARIES—
Absence from work 44, 45
Actual time employed 29, 30, 43-45, 583
Annual 714
Apprentices 304
Appropriation, failure to make, no justification for non-payment 812

SALARIES—(Continued) PAGE.

Approval of salary roll....381, 939, 968
Assessor, extra employees....822, 823
Assistant Chief Engineers, Fire Department....938
Attachment....304
Auditorium manager....883-90, 923
Back salaries, demands....937
Board of Education fixing....704
Board of Public Works, power to fix....121
Budget limitation on....120, 121
Charter provisions....713, 714
Chief of Police, Confidential Secretary to....1007-1010
City and County Hospital....2, 4
City Engineer....120, 121
Civil Service Commission approving salary roll....381, 939, 968
Collins, Jeremiah L....346-49
Copyists....977
Death compensation based on....424
Deduction for pension....578, 579
Department of Electricity....381
Election officers....721-25
Elections Department....29, 43-45, 486
Examiners, civil service....920, 921
Extra clerks....29, 608, 609, 822, 823
Fire Department....346-49, 713-15, 782, 936
Golden Gate Park employees....755, 756
Grand Jury expert....407
Health Department....1-4, 8
Illness, during....29, 582, 583
Inspectors of Supplies....963
Isolation Hospital....2
Laborers....724
Layden, James F., Assistant Chief, Fire Department....936-39
Levy, Louis, Manager, Auditorium....883-90, 923
Limitation of in budget....120, 121
Maxwell, John R., Assistant Chief, Fire Department....936-39
McEvers, J. W.—Deputy sealer....728-31
Minimum wage....724
Monthly, payable....713-714
Operator to Chief, Fire Department....346-49
O'Shaughnessy, M. M....120, 121
Park employees....755, 756
Pay checks....121, 122
Pension based on....578, 579, 620
Per diem employees....756, 807
Playgrounds....7
Police patrol boat....811, 812
Police pensions, deduction from salary....578, 579
Rank, actual, affecting....347-49
Reductions in....348, 704
Relief Home....1, 2

SALARIES—(Continued) PAGE

Roll, approval of 381
Scott, M. P., deputy sealer 729, 730
Sealer, Weights and Measures 728-31
Seamen 304
Secretary to Chief of Police 1007-1010
Sickness during 29, 582, 583
Special qualifications offsetting reduction in rank 348
Statutes, federal 304
Supervisors' clerks 898
Teachers 703, 704
Teamsters 807
Twice a month 713-15, 755, 756, 807
Two positions 447
Unauthorized appointees, withholding 504
United Railroads paying less than minimum 832-35
Weights and Measures Bureau 728-31

SALE—

Advertising privileges 545
Car barn, Seventeenth Street, old buildings 734-36
Cemetery lands 397
Certificate 166
Charter amendment 58, 273
Charter provisions 339-41, 545
City property 58, 273, 339-44, 372
Code of Civil Procedure 167
Commission 613
Confirmation by Supervisors 339-41
Delinquent assessments 166-68, 256, 845
Employee personally interested in 17, 344
Enjoining 333
Execution 167, 327, 328, 460
Franchises 1020
Installment plan 594
Itinerant vendors 1015
Lands conveyed by state in trust 855
Lane, Franklin K., opinion, city property 372
License tax 484, 1015
Liquor 481-84, 678, 679
Lots with use of alleyway 308, 319
Market Place lots 852, 853
Mayor executing conveyances 340
Meat 300-303
Merchandise 613, 614
Milk 552
Notices 166-68
Officers, prohibited from interest in 17, 344
Ordinance, publication for five days 339-41
Perishable property 167
Personal property 167

SALE—(Continued) PAGE

Playground, Seventh and Bryant, unoccupied....370-72
Procedure....339-41
Produce Exchange lots....852, 853
Publication, period of....340, 341
Relief Home Tract, portion....273, 339-44
Smith, Peter, execution....327, 328
South of Market Playground....370-72
Stockton Street Tunnel assessments....256, 257
Tax sales (See Tax Sales).
Theft, laws checking....929
Tide lands....327, 328
Tunnel assessment, delinquent....166-68

SALOONS—

Amusement license....532
Burke, William J., opinion....399
Charter, re permits....481-84
Church, near....568, 569, 577
Closing hours....570
Decisions....145
Election days, closing on....679
Exclusion, specified districts....145
Greer and Trau....568
Licenses from Police Commission....482-84
Police power....145, 570
Political Code section....679
Regulation....145
School, within 150 feet of....568, 569, 577

SAN BRUNO AVENUE—

Cronin, Ann, protest, street work....732
Federal Construction Co., bid paving....655
Litigation, street work....607, 608
Ocean Shore Railway Co., tracks....227
Resolutions....227, 655-57
Schudel v. City Street Improvement Co....607
Stanke v. City Street Improvement Co....607

SAN FRANCISCO—

Access to ocean front....466, 467
Actions against (See Litigation).
Boundaries....117, 466
Consolidated City and County....455
Dual political character....455
Land titles....117
Littoral proprietor....466
Park lands, title to....466
Patent from United States....115-17, 276, 466, 547, 548
Publicity campaign, literature....591, 592

SAN FRANCISCO—(Continued) PAGE

Quieting titles, act, State Legislature....260
Shifting of population....370
Smith, Peter, judgment....460
Tide lands....274, 275, 327-29, 466
Title, City property....547, 548
(See also City and County.)

SAN FRANCISCO AND SAN JOAQUIN VALLEY RAILWAY CO.—

Bridge, Islais Creek....798, 799
Charter, authority under....360
Franchise....317, 798, 799
Fresno, extension of tracks....359

SAN FRANCISCO AND SAN JOSE RAILROAD CO.—

Consolidation....208
Deed from John Center....210, 214, 216
Existence, term of....208
Franchises....208, 213, 214, 216, 217
Incorporation, date of....208
Location of line....209, 692

SAN FRANCISCO ELECTRIC PROTECTIVE CO.—Bond, street openings....258

SAN FRANCISCO GAS AND ELECTRIC CO.—

Rights in streets....201
Service wires....596

SAN FRANCISCO HOMESTEAD UNION—Distribution....216

SAN FRANCISCO HOSPITAL—

Extensions of time to contractors....858
Polyclinic, visiting privileges....126-28
Salaries....2, 4
Spur track, unused....231, 232
Students, clinical instruction....126

Tuberculosis Hospital—
Competition for plans....338
Locating outside city....625

SAN FRANCISCO LADIES' PROTECTIVE AND RELIEF SOCIETY, deed....685

SAN FRANCISCO MUNICIPAL CIVIL SERVICE ASSOCIATION, suspensions....676

SAN FRANCISCO POLYCLINIC AND POST GRADUATE COLLEGE, visiting privileges....126-28

SAN JOSE— PAGE.
Franchise, street railway 89, 90
Right of city to erect hotel 841

SAN JOSE AVENUE—
Deed, San Francisco Homestead Union 216
Sewer right of way 600
Southern Pacific crossings and rights 210, 214-16

SANITARIUMS—
Building Law 349, 350, 995
Definition 349

SANITARY REDUCTION WORKS—
Litigation 37, 1020
Operation of plant 997, 998

SANITARY STREET FLUSHING MACHINE CO., patent rights 333, 334

SANITATION—
Charter provision, laws 59, 98, 139, 191, 278, 289, 426, 427, 564, 710
Constitutional provision, laws 72, 248, 278, 362, 426, 710, 711
Laundries 161
Sewer construction 501
State laws 303, 849
Supervisors' power to regulate 59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710

SANTA BARBARA—Bond issue litigation 378, 379

SANTA CLARA STREET—Franchise streets, Southern Pacific Co. 211, 212

SANTA MARINA STREET, appeal from assessment 864, 865

SANTA ROSA—
Bond issue, litigation 374-77
Charter 447

SANTA ROSA AVENUE—
Easement from Southern Pacific Co. 99
Paving 599
Portion not open public street 601
Sewer right of way 599, 600

SATURDAY AFTERNOON—
Inspection of meat 470, 471
State law making a holiday 471
Teamsters, pay for 805-807

PAGE.

SCALPERS, TICKET—License 929-31

SCARLET FEVER—Removal of cases 848

SCAVENGERS—Receipts from, use of Islais Creek Incinerator.... 792

SCHMITZ, EUGENE E. 817

SCHOFIELD, N.—Survey 106, 109, 111, 113

SCHOOL DISTRICTS—

Bonded indebtedness 58
Residence of teachers within 23

SCHOOLS—

Acceptance by Board of Education 952
Appropriations 810
Battaini Window Cleaning Co., claim 902, 903
Board of Public Works, charge of construction and repairs 486, 886
Building law 995
Charter provisions 893, 952, 953
Common School Fund 1026-28
Creation and support, reason for 23
Daniel Webster School 891-94
Demands, approval of 1006, 1007, 1026-28
Dental clinic 1026
Directors 21, 22
Garage near 573-75
Health Inspectress 451, 452
John Swett School 662, 663
Kinetoscope parlor near 398-400
Land purchases, payment out of buildings fund 810
Lots—
Reserved under Van Ness ordinance 662
Vacant 399
Maintenance 385, 486
Political Code sections, direct tax for school buildings 384, 385
Printing circulars, demands 1006, 1007
Remington Typewriter Co., contract 281
Repairs to houses 486
Residence of teachers 20-24
Saloon within 150 feet 399, 568, 569, 577
Stable within fifty feet 919
State police regulations, subject to 488, 489
Taxes 384, 385, 798, 952, 1028
Teachers (See Teachers).
Transportation, half fare, for children 90
Traveling expenses, Superintendent 1026-28

SCHOOLS—(Continued) PAGE.
Typewriters, contract 281
Vacant lots 399
Window cleaning, claim 902

SCHUDEL, JOHN—Paving San Bruno Avenue 607

SCHWEITZER, J. & Co.—Meat shipment 299

SCOTT, MAGNER AND MILLER—Barley for Hetch Hetchy 1022-25

SCOTT, M. P.—Deputy sealer, writ for salary 729, 730

SCOTT, R. C., ADVERTISING CO.—Bid 544, 545

SCOTT STREET—Power poles 415

SEAL ROCKS—
Act of Congress ceding 467
Act, State Legislature 260, 261
Sewage system, Seal Rock House 498

SEALED PROPOSALS 180-183

SEALER—Weights and Measures 454-56, 728-31

SEAMEN—Poll tax from 304

SEATING CAPACITY—
Building Law 511, 995
Globe Theatre 512
Kinetoscope parlors 1013
Theatres 331, 332

SEAWALL—Bulkhead 381

SEAWELL, JUDGE J. M.—
Dore v. Truett 274
Partition, Wheeler v. Yarde-Buller 872
Second-hand dealers, license 824, 825
Sewer right of way condemnation 600, 601
Southern Pacific Co., operating on streets 208
Stockton Street Tunnel assessments 256, 257
Weights and Measures Bureau, deputies' salaries 730

SECOND-HAND DEALERS—
License 824
Ordinance regulating 570-72
Permit near Presidio 824, 825
Seawell, Judge, decision 824, 825

SECRETARY—
Of State 208
Of the Interior 494-96
To the Chief of Police 1007-10

SELF-DESTRUCTION—Result of injuries 352, 353

PAGE.

SEMI-ANNUAL INTEREST ON BONDS....375, 376

SENATE BILLS....843

SENIORITY OF SERVICE....715, 716

SERGEANT-AT-ARMS—Appointing....63

SERPENTINE AVENUE—Sewer right of way....228

SERVICE—
- Application for....292
- Building Law, installations....596
- Charter provision....410
- Civil Code section requiring....292
- Constitutional amendment, 1911....241
- Contractors' bonds, installations....596
- Credits for....286
- Damages, refusal to furnish....293
- Employee, pay for actual service....583
- Extensions of service (See Extension of Mains, Service, etc.).
- Growth, keeping pace with....295
- Heat....292, 618, 717
- Light....163, 292, 618, 717
- Motor buses....520, 521
- Officers engaging contrary to charter....503, 504
- Power....618, 717
- Quitting by employee....165
- Railroads....359
- Refusal to furnish....292, 293
- Regulation by Supervisors....135, 618, 717
- Seniority of....715, 716
- Steam heat....292, 618, 717
- Telegraphic....618, 717
- Telephonic....618, 717
- Water....295, 618, 717
- Water company duty bound to serve whole public....295
- Within hundred feet of established mains....292-94

SERVICE CONNECTIONS—
- Charge for disallowed....863
- Civil Code section....292
- County Line Municipal Waterworks....863
- Definition....863
- Electroliers....430-32
- Extensions to....195
- Length of....576, 642
- Lighting companies....292-94
- Ordinances regulating....195, 576
- Pacific Gas and Electric Co....642
- Permits....294, 576

SERVICE CONNECTIONS—(Continued) PAGE.
Railroad Commission order....863
Uniform rule necessary.... 98
Universal Electric and Gas Co....403, 414
Within hundred feet of established mains....292-94

SERVITUDES....737, 738

SETTING APART—
Jefferson Square, fire alarm station....549
Parks, playgrounds and squares....546

SEVENTEENTH STREET—
Buildings, car barn, removed....734-36
Franchise rights, Southern Pacific Co....211

SEVENTH STREET—
Franchise rights, Southern Pacific Co....211, 212, 214
Playground land, exchange or sale....370-72
Spur track privileges....212

SEWARD STREET—Land for opening....326

SEWERS, SEWER RIGHTS OF WAY—
Abutting owners, construction at expense of....501-503
Alemany Avenue....600
Asphyxiation, deaths from....422-26
Assessments....502, 503
Baker's Beach outfall sewer....856-61
Bernal, J. C., et al., City and County v....600, 601
Charter provisions....499, 501
Chenery Street.... 54
City's liability....424
Clay Street sewer....423, 424
Conlon, James, asphyxiated....422, 423
Croke Street....600
Decisions....501, 502
Defective condition....424
Definition....499
"Dillon on Municipal Corporations"....501
Embarcadero....382-84
Forty-eighth Avenue....498
Fresno....290
Great Highway....500-503
Howard Street....381-84, 534
Jarnac Street....600
Lynch, Patrick, killed by asphyxiation....422, 423
Mile Rock Tunnel....856-61
Ocean Shore Railway Co., laying track on....228

SEWERS, SEWER RIGHTS OF WAY—(Continued) PAGE.
Ordinance ordering construction....501
Parks....500-503
Potrero Avenue....228
San Jose Avenue....600
Santa Rosa Avenue....599-601
Seal Rock House....498
Squares....502
Storrie, R. C. & Co....856-61
Street improvement includes sewer construction....499
United Railroads....54
Water front streets, extension across....382-84
Wilder Street....54

SEX DISQUALIFICATION....427

SHACKS—
Board of Public Works, power to demolish....184-86
Charter provisions....448
Demolition....184-86, 448-50
Eddy Street, at Hyde....184
Fire Limits, within....184
Flooring; condemnation....433, 434
Laundry, reconstruction of....160-62
Market and Steuart Streets....433
Materials, razed premises....168
Ordinance No. 1139 (New Series)....184, 185
Power of Municipality to tear down....146, 184
Reconstruction of....160-62

SHASTA STREET—Franchise rights, Southern Pacific Co....211

SHEEP—Grazing on hills....30, 42

SHERIFF—
Brackett, Dr. G. F., druggist, County Jail....965
Deputy entitled to office of....716
Employees brought under civil service....389, 390, 771, 803, 830
Execution on judgment....536
Greene, Edward M., civil service standing....879, 880
Smith, Peter, execution sale....327, 460

SHERMAN CLAY & CO.—Installment contracts....594

SHERMAN, WILLIAM—Mortgage....107

SHOEING—Horse....16, 17, 934, 935

SHORE....114, 115

SHOTWELL STREET— PAGE.
Franchise rights, Southern Pacific Co.....216
Power poles 134

SHOWS—Obstructing aisles, etc.....331, 332
(See also Kinetoscope Parlors; Moving Pictures; Nickelodeons; Theatres.)

SICKNESS—
Cement dust, employee incapacitated 664
Leahy, Dennis, laborer, compensation.....663, 664
Nurse, contracting, compensation.....903-906
Salary during 29, 582, 583

SIDE TRACKS—
Charter provisions 28, 550
King Street 335, 336
Ordinances regulating 335, 336
Revocable permits 550
Southern Pacific Co.....318, 335, 336
Supervisors only board with power to permit laying of.... 28

SIDEWALKS—
Arguello Boulevard 180
Bonnett v. San Francisco.....264
Charter provisions.....278, 440, 441
City, where liable for.....264, 265
Decisions 264
Embarcadero.....382, 533-35
Farming out 507
Grant Avenue 269, 270
Health Department office building, fronting.....591
Merchandise on 85
Mission Street 591
Montgomery Street 176-78, 264
Narrowing 176-78, 264, 265
Obligation to renew on City where street accepted.....264
Obstructions authorized 84, 85
Occupation, specific, authorized 85
Ordinance No. 916.....84, 85
Property owners, liability 533-35
"Public Streets of San Francisco".....269
Randall Street 866
Repair of 264, 265
Use of space below 264, 265
Water front 533-35
Whitney Street 866

SIERRA AND SAN FRANCISCO POWER CO.—
Franchise rights.....134-39, 175, 176, 524, 912-16
Overhead wires, changing to underground.....523-25
Panama-Pacific Exposition grounds 523-25
Temporary permit 525

PAGE.

SIERRA STREET—Franchise rights, Southern Pacific Co.....211

SIGNATURE—Typewritten, on bid 668-70

SIGNS—
Height 139-43
Indecent 140
Lincoln School lot building.....262, 263
Noises on streets, warning 307
Ordinances regulating 142
Plumbers 909, 910
Public safety, dangerous to 141
Rental of.....262, 263

SILVER AVENUE—Open public street.....403-405

SINKING FUND—
Charter provision 892
Public utility, municipal.....605, 606
Surplus, bond funds 604
Water mains, laying of 518

SITTING IN AISLES, ETC.—Amusement places 331

SIXTEENTH STREET—Franchise rights, Southern Pacific Co.....212

SIXTH STREET—Franchise rights, Southern Pacific Co.....213, 214

SKATING RINKS—License 648

SLAUGHTER HOUSES 39-42, 471

SLIDES—
Landslide, Bemis Street 736
Toboggan 648

SLOSS, JUSTICE—Arcata railroad case 365

SMALLPOX CASES—Removal of 848

SMITH, FRED P.—Operation, Sanitary Reduction Works.....997, 998

SMITH, HENRY A.—Reinstatement 807-810

SMITH, J. J.—Employee, bidding on public work.....344

SMITH, PETER—
Execution judgment, tide lands.....275, 327
Judgment, South Beach Water Blocks.....460

SOAP MANUFACTURE—Regulation 846, 847

SOLANO STREET—
Change in name.....565
Franchise rights, Southern Pacific Co.....211

SOLVENT CREDITS 594

PAGE.

SONOMA STREET—Franchise rights, Southern Pacific Co.....211

SOUTH BEACH WATER BLOCKS.....460

SOUTH OF MARKET PLAYGROUND—Exchange or sale.....370-72

SOUTH PARK—Franchise rights, Southern Pacific Co.....211

SOUTH PASADENA—Street railway litigation.....360-64

SOUTHERN PACIFIC CO.—

Action to enjoin operation of cars.....208
Berry Street, rights in.....211, 218
Bluxome Street.....459, 460
Bridge over Islais Creek at Kentucky.....316-18, 798-800
Center, John, deed from.....210, 214, 216
Closing, Fourth Street.....309, 310
Conditions in franchise, writing certain in.....358, 367, 368
Consolidation of railroads.....208
Construction preceding laying out of streets.....210
Division Street, rights in.....212, 217
Exchange of lots.....851-56
Fifth Street, rights in.....213, 214

Fourth Street—
- Closing of portion.....309, 310
- Dedication of strip.....309
- Rights in.....213

Franchises.....208, 210-14, 217, 317, 318, 335
- Change in.....316-18
- Including certain conditions in.....358, 367, 368
- Track lay-out, application.....309, 310

Harrison Street, rights in.....210, 212, 217, 218
Havelock Street, fence.....69
Herrin, W. F., maps and franchises.....209, 211
Hood, William, maps and franchises.....209
Incorporations.....208, 209

Islais Creek—
- Bridge over.....316-18
- Streets, title to.....106, 120

Kentucky Street, bridge.....798-800
King Street, paving.....335, 336
Market Place lots.....853, 854, 880-83
Mission District streets, right to lay tracks over.....207, 210, 214-18
Municipal Asphalt Plant, spur tracks.....550
Orders granting franchises.....211-14
Ordinances granting franchises.....211-14, 317, 318, 335
Paving obligation.....336
Predecessors in interest.....210, 692

SOUTHERN PACIFIC CO.—(Continued) PAGE.

Produce Exchange lots....853, 854, 880-83
Santa Rosa Avenue, extension....99
Seawell, Judge, injunction....208
Seventh Street, rights in....211, 212, 214
Sixth Street, rights in....214
Spur track privileges....211, 335, 336, 550

Streets—
Occupied by tracks for which no franchise was granted....217, 218
Repairs to....336
South of Market, rights in....211-14

Track lay-out, franchise for....309, 310
Title acquired....210
Valencia Street line....210

SOUTHERN PACIFIC RAILROAD CO.—
Existence, term of....209
Franchises....208, 210-14, 217, 335
Incorporation, date of....208
King Street, paving....335
Ordinances granting franchises....335
Predecessor in interest....692
Repair of street, obligation on....335
Right of way....692

SPARRING EXHIBITIONS....757

SPECIAL—
Elections....100, 373, 678, 679
Ordinances....457
Police officers, free transportation....218, 219
Privileges....34, 36, 247, 410, 414, 525

SPECIFICATIONS—
Arguello Boulevard, paving, etc....180
Beale Street Bridge....235-38
Buildings, alterations, etc....652
Car barn, Seventeenth Street....734
Cars, Municipal Railway....158, 718
Department of Electricity, approval....586, 588
Fire Hose....82
Garbage Disposal System....192-94
Hotel construction....709
Interpretation....82
Invalid clause....777, 778
Islais Creek Incinerator....192-94
Locally manufactured goods, preference....580, 581
Lodging house construction....709
Overhead construction....586, 588
Public buildings, light, heat, and power....432, 622-24
Underground conduits....588

PAGE.

SPEED—Street railway cars....233, 234

SPELLMAN, MARTIN—Hoseman appointed lieutenant....282-85

SPENCER STREET PLANING MILL—Contract, election booths....253, 254

SPITE FENCES....60, 142

SPREAD OF DISEASE—Preventing....770, 848-51

SPRING, JOHN R.—Bernal Rancho....109

SPRING VALLEY WATER CO.—
- Extension of mains, no obligation....295, 296
- Fires, water for, free....295
- Impounded moneys, assessment....614, 615
- Lukrawka v. Spring Valley Water Co....295
- Openings in streets....200
- San Francisco v. Spring Valley Water Works....363
- Streets, rights in....295, 296

SPRINKLERS—Exempted, Motor Vehicle Act....489, 493

SPUR TRACKS—
- Asphalt Plant, spur tracks....550
- Berry Street....211
- Bluxome Street....213
- Channel Street....211
- Charter provisions....28, 550
- City and County Hospital....232
- Fifth Street....213
- Fourth Street....213
- Hooper Street....211
- King Street....211, 335, 336
- Ocean Shore Railway Co....24-28, 231, 232
- Ordinances—
  - Granting....211-214
  - Regulating....335, 336
- Otis Street....25
- Permits....550
- Potrero Avenue....231, 232
- Revocable permits....550
- Seventh Street....212
- Sixteenth Street....212
- Sixth Street....213, 214
- Southern Pacific Co....211-14, 318, 335, 336
- Stone, E. B. & A. L. Co....24-28
- Supervisors only board with power to permit laying of....28
- Townsend Street....213
- Twelfth Street....24-28
- Twenty-second Street....231, 232
- Water front....280

SQUARES— PAGE.
Act, March 11, 1858....547
Control under Charter....467, 468
Hamilton Square....546, 547
Jefferson Square....548, 549
Playgrounds, set apart in....546
Transfer from one department to another....546, 547
Van Ness Ordinance....547, 548

ST. FRANCIS HOTEL—Guest selling goods without license....1015

ST. JOSEPH, MO.—Tearing down buildings....185

ST. LOUIS—
Charter....506
Patents litigation....334
Stable ordinance....552
Street rights....506, 507
Waste cans....505-507

ST. LOUIS STREET FLUSHING MACHINE CO.—Patent rights..333

ST. PAUL—Railway litigation....650

STABLES—
Alterations to building....392-94
Appellate Court decision, permits not necessary....461,462
Building Law, sections invalid....392-94, 461, 462
California law....250
Danger to public health and safety....462
Decisions....250, 393, 394, 461-63, 552, 553
Districts where permits unnecessary....461
Eddy Street, at Hyde....184
Ex parte Quong Wo....250
Florida Street, reconstruction....392
Folsom Street....919, 920
In re Dondero....393, 461, 462, 530, 552
Michellari and Longo, reconstruction permit....392-94
Ordinances, constitutionality of....251, 461, 462, 919, 920
Permit not necessary....394, 463
Permits....552, 553, 920
Regulation of....461-63
Shacks, tearing down....184
St. Louis ordinance....552

STACK, EDMOND—Compensation, death of son....819-22

STAIRWAYS—
Common right to....537, 538
Emmet Place....839
Romeo Flats....538
Tenement houses....538
Theatres, obstructing....331, 332

PAGE.

STALLS ON STREETS 506

STANDING IN AISLES, ETC.—Amusement places 331

STANFORD UNIVERSITY—
Medical clinic 437, 439
Visiting privileges, City and County Hospital 127

STANISLAUS NATIONAL FOREST—Conduit through 496

STANKE, HUGO—Paving, San Bruno Avenue 607

STANLEY PLACE—Grading 440, 950

STARK STREET—Encroachments 844, 845, 873, 874

STATE BOARD OF CONTROL—
Accounting system, uniform 1005, 1017, 1018
County offices, jurisdiction over 1005
Maintenance of minors 401

STATE HARBOR COMMISSIONERS—
Act of March 15, 1878 383
Belt-line Railroad, transportation of passengers 279-81
Building encroaching on Embarcadero 429
Bulkhead, concrete 382
Elevated railroad 280
Embarcadero, jurisdiction 382-84, 533, 534
Howard Street sewer, extension 381-84
Jurisdiction 382-84, 429, 430, 533, 534
Power to extend width of streets 382
Talcott v. Harbor Commissioners 383
Tide lands 565
Tracks 280
Water front, jurisdiction 382-84

STATE IMPROVEMENT CO.—Contract Bemis Street 868

STATE OF CALIFORNIA—
Admission to statehood 274, 327, 466
Aliens, employment by prohibited 902
Assembly, 1839 107
Attorney General 132, 133, 488, 489
Automobile license fees 488-90, 493
Belt line railroad, transportation of passengers 279-81
Board of Control 400, 401, 1005, 1017, 1018
Board of Equalization, exemption affidavits 472, 473
Board of Health 330, 848-50
Bond, State Highway 67-69
Bureau of Vital Statistics 330
Controller, tax sales 973
Delegation of powers 314, 367
Department of Engineering 68, 69

STATE OF CALIFORNIA—(Continued) PAGE.

Embarcadero, rights in....429
Entering, debarring from....303
Exposition building, Golden Gate Park....841
Franchise powers granted to City....359, 360, 367, 368
Grant from United States....855
Grant to City....852, 854
Highway tax on automobiles....940-42
Highways....67-69
Health laws....848-51
Hotel and Lodging House Act....708-10, 784, 785
Industrial Accident Commission (See Industrial Accident Commission).
Labor Commissioner....132
Law superseding ordinance....843
Laws....967, 989, 990
Legislature (See Legislature, State).
Market Place lots....852-54
"McQuillin on Municipal Corporations"....843
Minors, maintenance....400, 401
Motor Vehicle Act....488-90, 493, 910
Police power (See Police Power),
Powers, delegation of....314, 367
Protection from disease....303
Produce Exchange lots....852-54
Railroads—
Encouragement of....359
Franchises to....360, 367, 368
Registry Bureau....330
Reversionary interest in streets....276
Sovereign power of....249, 314
Tax—
Deeds....188
Exemption affidavits....472, 473
Highway, automobiles....940-42
Sales....659, 660, 973-75
Tenement House Act....537-39, 712
Tide lands, proprietorship of....274, 327, 466, 852
Title affected by delay in recording tax deed....18, 19
Transportation, free, for officials....90
Treasurer, license fees....488

STATION—Fire alarm....548, 549

STATIONERY—Non-contract orders in cases of great necessity..994

STATUTES—
(See Laws; Citations at front of volume.)

STAY—Appeal not operating as a....480

STEAM CARS....40

PAGE.

STEAM HEAT—
City Electric Co., bid 622-24
Civil Code section re service 292
Pacific Gas and Electric Co., bids 622-24
Public buildings, bids 622-24
Regulating rates and service 617-19, 717, 758-62
Removal of mains 618
Revocable permits 619

STEAM RAILROADS—(See Railroads).

STEAM ROLLER—
Automobile colliding with 689
Claim for foot injured 805
Runaway horse frightened by. driver injured 671

STENOGRAPHER—Board of Public Works 221-25

STERLING STREET—Regrading 440, 441

STEUART STREET—
Open fruit stand, condemnation 433
United Railroads, proposed routing over 169, 170

STEVENS, HARRY H.—Team driver, injured 787

STOCKTON—Ordinance 555

STOCKTON STREET—
Municipal Railway 606
Stairway to Emmet Place 839

STOCKTON STREET TUNNEL—
City's share of assessment, payment of 603-607
Cooper v. City and County of San Francisco 256
Obstructions, Emmet Place 480
Seawell, Judge, decision 256, 257
Step to completion of Stockton Street line 606
Transfer from Municipal Railway fund 603-607, 992, 993
Validity of assessments 256, 257

STOCKYARDS—Proximity to slaughter houses 30, 41, 42

STOLEN AUTOMOBILES 928, 929

STOLTZ, CHARLES M.—Civil service standing 389

STONE, E. B. & A. L. CO.—Spur track, Twelfth Street 24-28

STOPPING PAYMENTS—Holman, W. L. Co. 442

STORAGE—
Automobiles in hotels 529
Companies 33
Gasoline 789, 790
Lubricating oil 789

PAGE.

STORMS DELAYING CONSTRUCTION 153

STORRIE, R. C. & CO.—Extensions of time on contracts 856-61

STOVES—Laundries 161

STREAMS—
- Banks, defining 113
- Boundary of property 112
- "Dillon on Municipal Corporations" 738
- Drawbridges across 800
- Railroads, power to construct across 226, 358, 359
- Title to beds of 112

STREET CLEANING—
- Charter provision 618
- Refuse cans 505

STREET FLUSHERS—Patent infringement 333, 334

STREET NAMES—
- Changes in 565, 692
- Duplication 72
- Publication 264

STREET RAILWAYS—
- Abandonment of franchise 421
- Acceptance of franchise involves performance of obligations 651
- Advertising in cars 639
- Alameda 639
- Assessment for street work lien upon 89, 90
- Belt line railroad, passenger service 279
- Between tracks, repairs to street 50, 86-92, 681, 682, 832, 833
- Binghampton 92
- Boulevards, not allowed on 190, 191
- Cable lines 421
- Cars, routing of 170
- Charter provisions 190, 191, 234
- Chicago 92
- Church Street railway 840-42
- Civil Code 88, 89, 95, 907
- Columbus 91
- Consolidation of companies 420
- Construction and operation 190
- Crossings, paving 233
- Decisions 87-92, 360-67, 386, 650, 651
- Detroit ordinance 90
- Doubling of tracks 90

STREET RAILWAYS—(Continued) PAGE.

Duties, performance compelled by mandamus....650, 651
Electrification of cable lines....421
Eminent domain proceedings....207
Expiration of franchises....205, 206
Extension of lines, compelling....650
Fillmore Street....277
Franchises....360-65, 420-22, 681
Abandonment of....421
Expiration of....205, 206
Limit on power of Supervisors....190
Must be for public, not private purposes....506, 507
Obligations, mandamus enforcing....650, 651
Sale of....1020
Two, validity depends upon separate use....421, 422
Freight, hauling of....105
Golden Gate Park....842, 954-62
Grading, obligations....90, 92, 650
Half fare, school children....90
Jacksonville....92
Lien for street work....89, 90
Lights, maintaining during darkness....650
Limiting speed of cars....233, 234
Locomotives, running of....232
Los Angeles....90, 360, 362
Mandamus compelling paving....650
Market Street Railway Co....681, 832
Mission Park....842
Municipal Corporations Act, 1883....361, 363, 365
Municipality, intention to operate....205, 206
New York City....92
Obligations under franchises....90-95, 233, 650, 681, 832, 833
Ordinance No. 1604....233
Overlapping franchises....420-22
Parks....842, 954-62
Paving—
Between tracks....86-95, 681, 832
Obligation....91, 93-95, 233, 650, 681, 832, 833
People v. Park and Ocean Railroad Co....842, 954
Percentage of receipts....419-22
Philadelphia....91, 92
Police officers, free transportation....218, 219
Power of Supervisors to construct and operate....190
Presidio and Ferries Railroad Co....205-207
Rails property of company....385
Raising or lowering tracks to conform to grade....833
Repair of streets....89-92, 233, 650, 681, 682, 832, 833
Roadway, entire or portion, in repair....86-96
Routing of cars....170, 421
San Jose....89, 90
South Pasadena....360-64

STREET RAILWAYS—(Continued) PAGE.
Special Police officers, free transportation....218, 219
Speed of cars, limiting....233, 234
Steam cars 40
Street work, obligation on....91, 93-95, 233, 650, 681, 832, 833
Sutter Street Railroad Co. (See Sutter Street Railroad Co.).
Tracks—
Ownership 206
Removal of....385, 386
Trenton 92
Trolley cars substituted for cable cars....421
Uncompleted portion, forfeiture of....907
United Railroads (See United Railroads).
Validity of franchise depends upon use....421
Van Ness Avenue....190-92
Viaduct, compelling construction....650
Williamsport 92
Wires, placing under ground....277
(See also Franchises; Municipal Railway; Tracks.)
STREET SWEEPERS INJURED....615-17, 687, 688, 1021, 1022
STREETS, STREET WORK—
"Abbott on Municipal Corporations"....241, 242
Abdicating control over....507
Acceptance (See Acceptance).
Accidents, defective condition....424
Act—
March 11, 1858 547
Of Congress 239, 242
Street improvement 65
Advertising for proposals....181-83, 264, 269
American District Telegraph Co., bond, opening streets..258
Animals, roaming in....39, 42
Appeals from assessments....864-70, 1002, 1003
Area-walls 264, 265
Asphalt, paving with....629
Assessments—
Appeals from 864-70, 1002, 1003
Charter 628
Decisions 869, 870
District, defining of....441
Fifty per cent of value....503, 868, 869
Installment payments....441, 869, 1003
Lien on street railway....89, 90
Reduction in....864, 865
Separate for each kind....628, 629
Uniform rate per front foot....629
Automobile—
Equipment exempted under Motor Vehicle Act..489, 493
Horn blowing near a hospital....307
Parking station 633, 634

STREETS, STREET WORK—(Continued) PAGE.

Automobiles congesting 634, 947
Basalt blocks, paving with 629
Bates v. Twist 65
Between tracks 50, 86, 91, 335, 336, 681, 682, 832, 833
Bids 180-84, 198, 656
Binghampton 92
Bitulithic pavement 453, 454
Board of Public Works 135, 262, 656, 695, 699, 700
Board of Supervisors 135-37, 656, 699, 700
Bonds—
  Maintenance of streets 124-126
  Opening streets 258, 259
  State Highway 67-69
Bonnett v. San Francisco 264
Building heights 144
California Electric Light Co., rights 244
Cans, refuse 505-507
Cattle driven in 39
Central Pacific Railroad Co., rights in 208, 211, 213, 214, 217
Changes—
  Grades 440, 441
  In work after contracts let 181-83
  Names 72, 264, 565, 692
Charge, use of streets 240
Charter—
  Amendment, use of streets 98
  Definition of word "street"; what it includes 499
  Framers, intent, use of streets 411, 412
  Procedure 51, 418, 440, 441, 656, 695, 700
  Provisions 440, 441
Chicago 92
City Electric Co. 195, 415, 622-24
City Land Association tract 845
City property, street through 273, 274
City Street Improvement Co., bid irregular 180-84
Civic Center 695
Civil Code 241
Closing of (See Closing of Streets).
Columbus 91
Completion to satisfaction of Board of Public Works 918
Congested by automobiles 634, 947
Consolidation Act 177, 178, 245, 404
Continuation, new job, on basis of unit prices old contract 198, 199
Contractor, bond, maintenance of street 124-126
Contracts 181-83, 656, 696-99
Control over 135-37, 203, 262, 367, 409-14
Corporations' rights in (See Opening of Streets; Public Service Corporations).

STREETS, STREET WORK—(Continued) PAGE.

Crossings 233
Decisions 65, 66, 89-92, 124, 125, 181-83, 228, 264, 404, 405, 506, 507, 656, 869, 870
Dedication (See Dedication).
Defective condition 424, 690, 691
Definition 499
Department of Electricity, wires 292-294
Detroit 90
Dore v. Truett 275, 276
Dust, hauling substances giving off 1013, 1014
Electricity, bids 622
Entire roadway, railroad 86-95
Excavations (See Opening of Streets).
Exclusive privileges to use 247
Exposition grounds 523-25
Extensions of service (See Extension of Mains, Service, Etc.).
Failure to fill openings in 258
Fairmount Extension Homestead 53, 174
Farming out 507
Fee in 246, 601
Flushers, patent rights 334, 335
Franchise, rights in 88-95, 96-98, 134-39, 163, 164, 176, 195, 200-204, 228, 229, 239-50, 258, 277, 293-96, 359-68, 402, 408-15, 523-25, 575, 576, 586-88, 597, 598, 618, 619, 642, 912-16
Fresno 359
"Freund on Police Power" 247
Gafney v. San Francisco 183, 656
Garbage cans, advertising on 505-507
Gas, bids 622
Gasoline pumps on curbs 84, 85
Geary Street Municipal Railway construction, repaving incident to 49-51
Grades (See Grades).
Harbor Commissioners 382-84, 429, 430, 533, 534
Hauling substances giving off dust 1013, 1014
Highway Bonds, State 67-69
Hillcrest 19
Hole in street, automobile damaged 791
Hospital, noises in vicinity prohibited 307
Huckster stands 506
Improvement—
Act 65
Charter 51, 418, 440, 441, 499, 656, 750
Defined 518
Ordinance, street improvement 440, 441, 655, 864-71, 917
Independent Light and Power Co., rights 244
Ingleside Terraces 845

STREETS, STREET WORK—(Continued) PAGE.

Injuries, defective condition 424
Injuries to pavements, street openings 560, 618
Inspectors, openings 560, 561
Installment payment of assessments 441, 869, 1003
Intention, resolution of 65-67, 181-83, 655-57
Invalid proceedings 181-83
Islais Creek 106, 120
Jacksonville 92
Jitneys 520, 521
Journal resolution on lighting not granting any rights 163
Lane, Franklin K., bond for maintenance 124, 126
Laying of pipes (See Pipes, Laying of).
Leasing out portions of 506
Legislative, acts sufficient acceptance 405
Liability of City 270
Lighting 162, 246, 247, 431, 432, 622-24
Lighting companies (See Lighting).
Los Angeles 90, 99, 362, 699, 750
Lukrawka v. Spring Valley Water Co. 295
Maintenance of streets, bonds 124-26
Map showing new streets, filing of 71, 72
Merritt v. Barta 404
Mission District streets, rights to lay tracks 207, 210, 214-18
Mission Political Improvement Association, assessment 916
Monopoly to occupy 247
Motor—
Buses 520, 521
Equipment exempted under Motor Vehicle Act 489, 493
Municipal Light and Power Co., rights 243
Municipal Railway construction, Geary Street, regrading incident to 49-51
Municipality—
Control over 97
Owning fee in 246
Powers of 278
Regulation for use of 240
Mutual Electric Light Co., rights 244
Names 72, 264, 565, 692
New streets, map showing 71, 72
New York City 92
Newell-Murdock Co., opening through Relief Home Tract 272-74
Ninety-nine-year interest of City 275
Noises on, ordinance prohibiting 307
North Peter Smith Tract 276
Notices calling for proposals 180-83
Obligation on street railways 88, 91, 93-95, 233, 650, 681, 832, 833
Obstructions 84, 85

STREETS, STREET WORK—(Continued) PAGE.
Ocean Shore Railway Co., rights....24-28, 225-35
Officials, power and duty....125
Opening of (See Opening of Streets).
Open public street (See Open Public Streets).
Ordered by Supervisors....656
Ordinance, Street Improvement..440, 441, 655, 656, 864-71, 917
Overhead construction (See Overhead Construction).
Ownership of fee in....246
Pacific Gas and Electric Co., rights....162-64, 200, 244-50, 559-62, 596-99, 622-24, 641-44
Pacific Telephone and Telegraph Co., rights....196, 201, 402
Panama-Pacific Exposition, changing overhead wires..523-25
Parking stations for automobiles....633, 634
Patented pavement....453, 454
Paving (See Paving).
Peddlers....506
Philadelphia....91, 92
Pipes, laying of (See Pipes, Laying of).
Poles, erection of (See Poles, Erection of).
Police power over....201, 240, 246-48
Political Code section....565
Power companies using....135, 136, 175, 176, 523-25
Powers of municipality....278
Prescriptive use of streets....404
Private contracts....866, 867
Private ownership....662, 663
Procedure—
Charter....51
Decisions....181-83
Improvements....656
Open public street....707
Subsequent to resolution of intention by separate resolutions....66
Property owners, liability to pave....336
Proposals, sealed....180-183
Public—
Convenience and necessity requiring to be done....50, 66
Entitled to free passage along....506
Public Service Corporations, rights in....19, 96-98, 134-39, 163, 164, 176, 195, 200-204, 228, 229, 239-50, 258, 277-79, 293-96, 359-68, 402, 408-15, 523-25, 559-62, 575, 576, 586-88, 597, 598, 618, 619, 642
Publication....181-83, 264, 269
Publishing notice inviting proposals....181-83
Quigley, Thomas D., appeal from assessment....1002, 1003
Railroads—
Construction between tracks....50, 86, 91, 335, 336, 681, 682, 832, 833
Construction preceding laying out of streets....210
Enjoining from operating cars on....208

STREETS, STREET WORK—(Continued) PAGE.

Railroads—
Lien upon street work....89
Occupation by....228, 229
Repairs by....86-96, 335, 336, 358, 832, 833
Use by....24-28, 227, 358-68
Refuse cans, advertising on....505-507
Regrading....440, 441
Relief Home Tract, opening through....272-74
Repairs—
Charter....358, 695-97, 829
Definition....91, 92
Duty, continuous....93
Political Code....382, 384
State Harbor Commissioners....382
Urgent....695-97, 701, 829
Reserve, failure to, no rights in city....328, 329
Resolution of intention....65-67, 181-83, 655-59
Reversionary interest of State....276
Rights of corporations in—(See Opening of Streets; Public Service Corporations.)
Russell, In re....96, 97, 136, 201, 243, 293, 410, 413, 586, 587, 597, 642, 913
Safer for life and property....634
San Francisco Electric Protective Co., bond, openings in, 258
San Francisco Gas and Electric Co., rights....201
San Jose....89, 90
Sealed proposals....180-183
Sewer cost cannot be included in assessment for....502
Sidewalks—(See Sidewalks.)
Sierra and San Francisco Power Co., rights....134-39, 175, 176, 523-25, 912-16
Signs warning against noises on streets adjoining hospitals....307
South of Market streets, rights of Southern Pacific Co. in....211-14
Southern Pacific Co.—
Occupation without franchise....217, 218
Rights....200, 201, 207-18, 309, 310, 335, 336
Southern Pacific Railroad Co., rights....208, 210-14, 217
Spring Valley Water Co., rights....200, 201, 296
Sprinklers exempted, Motor Vehicle Act....489, 493
Stalls on....506
State—
Authority of....249
Harbor Commissioners, jurisdiction....382-84, 429, 430, 533, 534
Highway bonds....67-69
Reversionary interest in....276
Steam cars....40

STREETS, STREET WORK—(Continued) PAGE.

Steam heat mains 619
Street improvement ordinance.... 440, 441, 655, 656, 864-71, 917
Street railways, obligations .....
..... 88, 91, 93-95, 233, 650, 681, 682, 832, 833
Sub-area walls 264, 265
Subdivisions, laying out of 71, 72
Superintendent of Streets 181, 656, 689, 690
Supervisors' control over 135-37, 656, 699, 700
Supreme Court, sidewalk construction 264
Telegraph companies using 239-42
Tracks—(See Tracks.)
Traffic regulation 947-49
Trenton 92
Tunnel construction; restoration of surface travel 312
Unit prices, contract 198, 199
United Railroads, obligations 88, 91, 93-95, 681, 682
Universal Electric and Gas Co. 408, 414
Urgent repairs 695-97, 701, 829
Use of—(See Use of Streets.)
User right 404, 661, 727
Van Ness ordinance 547
Vrooman Act 90, 689, 690, 750
Walls, sub-area 264, 265
Waste cans, advertising on 505-507
Water companies—(See Water Companies.)
Water Front 382-84, 533-35, 565
Water mains—
Cost cannot be included in assessment for 502
Laying of 516-19
Western Union Telegraph Co., rights 239-42
Whistle blowing near hospital 307
Width necessary, dedication 309, 320
Williamsport 92
Wires, installation of—(See Wires.)

STRIKES—Delaying contract work 153, 154

STRUCTURES—(See Buildings.)

STUDENTS—Instruction, City and County Hospital 126, 127

SUB-AREA WALLS 264, 265

SUB-CONTRACTS—Hetch Hetchy railroad 975

SUBDIVISIONS—

Alleyway through center of block 308, 319
Approval by Board of Public Works 70-73
Biedeman Tract 372, 661
Charter requirements 71
City Engineer, investigation of 72
Comerford Street 308, 319
Hayes Tract 662
License tax 527, 528

SUBDIVISIONS—(Continued) PAGE.
Maps, filing 70-73
Monuments, placing 72
North Peter Smith Tract 274
O'Neil and Haley Tract, map 403
Political subdivisions of State 488
San Francisco Homestead Union 216
Statute 1907 70
SUBJECT—Ordinance embraced in title 535
SUBSISTENCE OF PRISONERS—Supplies 539-41
SUBSTITUTE TEACHER—Pension fund 566
SUBSTITUTION—
Bids 545
Underground conduits, changing overhead to 523-25
SUICIDE—
Arata, John 352, 356
Fireman, result of injuries 352, 353, 356
Insanity, result of 352, 353
Insurer not exempted from liability 353
SULLIVAN, JUDGE—Forfeited bail money 674
SUMMARIZING APPROPRIATIONS 2, 4, 5
SUNDAY CLOSING—Pawnshops, etc 570-72
SUNSET DISTRICT—Sinking test wells 595
SUPERINTENDENT, MUNICIPAL RAILWAY—
Assignment of employees 464
Bond 189
Discretion 464
Preferred runs 464
Premiums on bonds 497
SUPERINTENDENT OF SCHOOLS—
Approval of demands by Board of Education 1006
Charter limitations on taxes 798
Horse and buggy hire 935
Printing circulars, demands 1006, 1007
Traveling expenses 1026-28
SUPERINTENDENT OF STREETS 181, 201, 656
SUPERINTENDENT OF SUPPLIES 922
SUPERVISION—
Blasting 704, 705
Building 649, 666, 710, 711
Contracts 705
Great Highway 612
Playgrounds 636
Public buildings 885, 886
Public utilities 886
Results, not methods 705
Street improvements 695
Tunnel construction 706

PAGE.

SUPERVISOR OF WORKING MINORS....989

SUPERVISORS—

Abandoned—

Children, maintenance of....400, 401
Franchises....169, 170, 421, 906-909
Tracks....386

Abandonment of cemeteries....395-98, 475, 476
Abatement of nuisances....40, 386, 448, 513
Absence, legislative authority....711

Acceptance—

Franchises....234
Streets....94, 177, 918

Access to property....506, 784
Accidents....615-17
Accounting system, uniform municipal....1004-1006

Acquisition—

Lands for tunnels....311, 312
Public utility....49
Vested rights....273, 274

Action to forfeit franchise....230, 231

Additional—

Appointments, authorizing....62, 63, 608, 609, 823
County officers, creation by Legislature....455
Employees....62, 63, 608, 609, 1008-10
Street lights....162

Adopted resolutions....179

Advertising—

Bills....179, 339, 340
Cars, Alameda....639
Departments....492
Election days....313, 314
Finally passed matters....73, 74
Indecent....140
Misleading....932
Municipal Railway cars....290, 543-46
Official....743, 777, 778
On municipal waste cans....505-07
Ordinances....339-41, 743-46
Resolutions....179, 340, 743-46

Advisory Board on Moving Pictures....932
Aitken, Frank W., refund, illegal tax sale....658
Alferitz, Suzanne, refund, delinquency on taxes....630-32
Alleyway, use by lot owners....318, 319
Allied Printing Trades' Council, label....926

SUPERVISORS—(Continued) PAGE.

Alterations to buildings 666
Amateur boxing exhibitions 757
Ambiguity in franchise 26, 87, 229
Ambulance, Emergency Hospital, damaged in collision....314
Ambulances exempted, Motor Vehicle Act....493
Amusement places 482, 665
Anatomical museums, regulating 593, 594
Anglo-American Land Co., land for opening streets....326
Animals 39, 42, 435, 436

Apartment House —

Dogs kept in 434-37
Garage in 529

Appeals, street assessments 864, 865, 868-70, 1002, 1003

Appointments—

Additional....62, 63, 608, 609, 823
Charter 901
Power to make 63
Procedure 1008
Supplies Bureau 963, 964
Unauthorized 503, 504

Appropriations....1-4, 179, 388, 591, 592, 723
Approval of demands....3, 740, 741, 953
Aquatic park 851-55
Area walls, reconstruction of 264, 265
Army Street 227, 228, 732
Ashes, haulage 1013
Asphalt plant 762-65
Asphyxiation, deaths from 422-26

Assessments—

Appeals from 311-13, 864, 865, 868-70, 1002, 1003
Districts 311-13, 441, 541-43
Erroneous 657-59
Exemptions 472
Fifty per cent of value....868, 869, 1002,1003
Grade changes 542
Stockton Street Tunnel 603-607
Streets..89, 90, 542, 543, 864, 865, 868-70, 916-18, 1002, 1003
Twin Peaks Tunnel 311-13
Water mains 518

Assessor, extra employees....823
Assignments of franchises 88, 95
Assistant clerks 898
Atchison, Topeka and Santa Fe Railway Co....
....212, 316, 317, 799
Auditorium, manager 883-90, 923, 924

SUPERVISORS—(Continued) PAGE.

Auditorium, municipal department maintaining office in 986, 987

Authorization of public work....999-1001

Automobiles—

Exemptions, license 493
Horn blowing near hospitals....307
Parking station, permit 633-35
Storing in apartment houses 529
Supply stations 788-91

Bacon, Edward R. Co., bid....668-70
Bail money 562, 563, 588, 589
Baker's Beach outfall sewer....858
Band, Municipal, leader 8
Banks of streams 113
Barber Asphalt Paving Co., private street contract....945
Barbers open Sundays 572
Barley for Hetch Hetchy....1022-25
Barlow, Thomas, return of bail....588, 589
Barnett, Benjamin, teamster 787, 788
Barry, David A., change in position....896-901
Baseball people, ordinance re noises....306, 307
Bay, tide lands 327
Bay View District, grazing of cattle....30, 42
Beacon Street 478, 803, 804
Beale Street Bridge 235-38
Belt Line Railroad, transportation of passengers....279-81
Bemis Street 868-70
Benjamin, L. M., infringement, patent rights....333, 334
Bernal Rancho 106-109, 118-120
Berry Street, rights of Southern Pacific Co....211, 218
Between tracks, railway paving....50, 86, 91
Bicycle racks 85
Bids....543-45, 622, 668, 669, 777-79, 927, 991, 992
Billboards, regulation of 139-46

Bills—

Passage to print 179
Publication of 339, 340

Bitulithic pavement, use of....453, 454
Blackwood Street, portion erroneously assessed....657-59
Blanketing employees under civil service....
....389, 390, 771, 803, 830, 897
Blasting 477, 478, 704-706, 803, 804
Board of Public Works, bringing Great Highway under control of 612, 613
Bodies, disinterment of 395-97
Bodies, removal of 475, 476

SUPERVISORS—(Continued) PAGE.

Bonds—
Crocker National Bank 186, 187
Extensions of water mains 77, 78, 595, 596
Geary Street and lower Market Street Municipal Railway 48, 49
Hetch Hetchy 494, 495, 595, 596
Municipal Railway 48, 49, 603, 604
Municipal Railway employees 497
Proceedings 377, 379
Proceeds, applying of 51, 603
Redemption 52
State Highway 67-69
Water 595, 596
Water mains 518

Booths, election 723

Boulevards—
Declaring certain streets to be 191
Ocean front 612

Boundaries 112, 115, 117
Boxes, street litter 505-507
Boxing exhibitions 757
Brannan Street acceptance 94
Brickyards, prohibited, certain districts 531
Bridge over Islais Creek at Kentucky 316-18
Bryant Street, acceptance 94
Bubonic plague 848
Buchanan Street, extension northerly 328

Budget—
Adoption of 4, 5, 609
Appropriations 1-4
Cannot create new positions 608
Estimates 723
Number of votes for passage 608, 609
Preparation of 1, 4, 5, 388
Schools 951, 952

Buggies, contracting for 16-18, 934, 935
Building Law 251, 265, 272, 349, 350, 448, 449, 461-63, 552, 556, 666, 667, 711
Building permits 350, 666

Buildings—
Alterations 666
Condemned, demolition of 448-50
Construction 511, 666, 710, 711
Contracts 540
Dogs kept in 434-37
Height 143
Razed, disposition of material 168, 169
Repairs 666
Reconstruction 160-62

SUPERVISORS—(Continued) PAGE.

Bunkers, Ocean Shore Railway Company....25, 28
Burden on title imposed by former owner....319
Burdens, street railway franchise....88, 90
Bureau of Efficiency....63, 64
Bureau of Supplies....922
Bureau of Weights and Measures....454-56
Burials....33
Buses....520, 521

Business—
Carrying on at certain hours prohibited....570
Classification....638
License....638-40
Regulation of....31, 32, 36, 38, 145, 146, 481-84, 530, 531

Butchers....41, 639
Byrne, Stephen A., gas and water inspector....772
Cable franchise, abandonment of....421
Cable line, electrification of....421
California Electric Light, Co., franchise....244
Campaign, publicity, literature....591-93
Caroline Street, illegal taxes....632
Carrie Street....55

Cars—
Advertising in....290-92, 543-46, 639
Operation....28, 361, 363, 365, 368
Regulation....233, 234
Speed....233, 234

Castro Street, Gray Brothers, blasting....478, 803, 804
Cattle, moving and grazing....30, 39-42
Cement, haulage....1013, 1014

Cemeteries—
Lots....397, 398
Parking....475, 476
Removal....395-98, 475, 476

Censorship, moving pictures....932
Central Pacific Railroad Co., franchises....208, 211, 213, 214, 217

Certified—
Check accompanying bid....622, 623, 668, 669, 777
Copy of ordinance, recording....340, 341

Changes—
Employees, positions....896-901
Grades....64, 67, 440, 441, 541-43
Location of poles....278
Names of streets....565
Overhead construction to underground....523-25

Charges—
Regulation....525
Use of streets....240

SUPERVISORS—(Continued) PAGE.

Charter—
Amendments 98, 100-102, 273, 389, 390, 463, 830
Framers, intent 312, 411, 412
Measures powers of municipality 360, 361, 364
Powers under 59, 98, 139, 191, 278, 289, 426, 427, 448, 520, 564, 710
Procedure, Municipal Railway 49, 51
Procedure, street work 51
Provisions paramount 926

Chauffeur's license, city motor vehicles 493
Check accompanying bid 622, 623, 668, 669, 777
Checks in payment of taxes 631
Chenery Street, private ownership 54, 55
Cherry River, water supply 494-96
Chestnut Street lot, title, Mary Farley 786, 787
Chief assistant clerk 898
Chinese, exclusion from keeping laundries 552, 554
Cholera, preventing spread 848
Church, garage near 573-75
Church, stable near 919
Church Street railway 925-27, 943-45
Citizens, employment on public work 925-27

City Electric Co.—
Bid 622-24, 762-65
Opening streets 195

City Engineer, salary 120, 121

City property—
Exchange 309, 371, 372
Ownership of pipes through 123
Sale 371, 372
Street through 273, 274
Transfer from one department to another 371, 372
Use for library purposes 58

City's liability —
Damages 542
Injuries 424

City's power to prescribe conditions 413

Civic Center—
Exchange of lots 609
Paving streets 695

Civil service, employees brought under 389, 390, 771, 803, 830, 897

Claims—
Discretionary power 3
For damages 805

Class legislation 36, 436, 462, 572, 638-40
Classifications 637-41, 899, 900

SUPERVISORS—(Continued) PAGE.

Clay Street sewer, employees asphyxiated 423, 424
Cleaning of streets 618
Clement Street, open public street 299
Clerk conducting election 100-102
Clerks, additional 62, 63, 608, 609
Clinic, medical, permit for 437-39

Closing—

Chenery Street 55
Fourth Street 309, 310
Streets 565, 566
Time, pawn shops, etc. 570-72

Coal, haulage 1013, 1014
Collision, ambulance with automobile 314
Comerford Street, tax sale 318-20
Commercial use of lighting poles 162, 163, 912-15
Common carriers 33, 34, 563, 564
Competition, encouraging or discouraging 624
Competitive bidding 927, 991, 992
Compromise of litigation 425
Concrete mixers, bids 668-70

Condemnation—

Buildings 168, 448-50
Hetch Hetchy rights of way 496
Lands for tunnel 311, 312
Portion of existing utility 779, 780
Rights of donors of opera house 484, 485

Conditions—

City's power to prescribe 413
Contracts 927
In franchise, writing certain in 358, 367, 368

Conductors, Municipal Railway, bonds 497
Conduits, laying of 97, 98, 137, 203, 241, 249, 277, 295, 296, 409-14, 523-25, 619, 717, 913-15
Confiscatory rates 474
Congress, grant, pueblo lands 117
Conlon, James, Sewer Department employee, killed 422-26
Connections to electroliers 430-32
Consolidated city and county 455

Consolidation—

License ordinances 527
Railroads 208

Consolidation Act 177, 178, 245, 246
Constitution, powers under 32, 33, 65, 72, 248, 278, 362, 363, 710, 711, 758-62
Constitutional amendment, 1911, use of streets, 96, 134-37, 195, 196, 240-43, 250, 295, 409, 411, 412, 523-25, 619, 913-16

SUPERVISORS—(Continued) PAGE.

Construction—
Buildings 511, 666, 710, 711
Public buildings 885, 886
Public utility 49, 51
Supervision 511

Contagious diseases, isolating 770, 848-51
Contractors, extensions of time 178, 179

Contracts—
Awarding of 668, 669
Extending beyond fiscal year 290-92
Lighting 431, 432
May be condemned 485
Officers interested in 17, 344-46
Official advertising 777-79
Parties charged with notice of laws 507
Power to make 363
Prison supplies 539-41
Public work 999-1002
Supervision 705
Supplies 539, 935
Teams and buggies 16-18
Written contracts 696-99

Control—
Expenditures 6
Fares, rates 520, 521
Funds 951-54
Great Highway 612
Motor buses 520, 521
Ocean Front 612
Public utilities 545, 717
Streets 278, 367, 409-14, 695-701
Use of streets 202

Copyists, Recorder's office, vacations 977
Corporation Yard, light and power contract 762-65
Corrals, moving 30, 39-42
County Jail buildings, alterations 999, 1000
County officers, creation by Legislature 455
Courts upholding municipality in its local regulations 638
Cow stables, permit 552

Creation—
Industrial zones 461
Monopoly 291, 507
Positions 63, 823, 1008-10

Crocker National Bank, depository bond 186, 187
Crossings, Ocean Shore Railway 25
Curbs, resetting 176-78
Cyclorama, permit for 482
Dairy stable, permit 552

SUPERVISORS—(Continued) PAGE.

Damages—
City's liability 542
Claims for 805
Collision, ambulance with automobile 314
Main Street, change of grade 541-43
Pavements 409, 618

Dance hall licenses 637-41
Dance license ordinance, interpretation 508
Dances, classification of 637
Daniel Webster School, purchase of land 891
Davidson Avenue, title 106, 120
Day labor 696, 699-701, 999-1002

Death—
Benefits 820-22
Compensation to family 424
Sewer employees 422-26
Through injuries 616

Debris from razed buildings 168, 169
Dedication of streets 320, 328, 329
Defective condition, public work 424
Deficit, departmental funds 6
Delegation of powers 251, 314, 395
Delinquent taxes 630-32, 744
Demands, approval of 3, 740, 741, 953
Demolished buildings, material from 168, 169
Demolition of condemned buildings 448-50

Denial—
Rights 240, 279
Tax refund 320
Validity of contract 367

Department maintaining office in auditorium 986, 987

Department of Electricity—
Approving overhead construction 245
Permits, opening of streets 164, 912

Departmental expenditures 3, 4, 6, 8
Depository bond, Crocker National bank 186
Deposits, street openings 561
Deprivation of rights 34, 36
Deputies, additional 62, 63, 608, 609, 1008-10
Destruction, animals 42
Destructor Company, litigation 998
Diamond Street 54, 478, 803, 804
Diphtheria germ carriers, isolation 848-51
Director, Bureau of Efficiency 63, 64
Discharge of fireworks 705

SUPERVISORS—(Continued) PAGE.

Discretion—

Issuance of permits 789, 790
Police Commission 482, 483
Street improvements 699, 700

Discriminatory legislation 462
Diseases, contagious, isolating 770, 848-51
Disinfection 849
Disinterments 395-97, 475, 476
Dismissal of litigation 425, 426
Disposition, material, razed buildings 168, 169
Districts, industrial and residence 143, 250, 251, 461-63, 554
Diversion of funds 51, 603, 607
Division Street, rights of Southern Pacific Company 212, 217, 218
Doctrine of estoppel 366, 367
Dog hospital 30
Dogs in flats 434-37
Dolge, William, percentage of receipts, United Railroads 419-22
Dollar limit, taxing above 592
Donation, families of sewer employees killed 423, 425
Donors, opera house, condemning rights of 484, 485
Dore v. Truett 327-29
Doubling of tracks 90
Doubts in franchise 26, 87, 229
Drawbridge, Islais Creek Channel 317, 799
Drivers of teams, owners insuring 818
Duke, Robert D., advertising on waste cans 505-507
Duplicate payment of taxes 658, 659
Dust, haulage of materials giving off 1013, 1014
Duties of officers 504

Easements—

Subject to eminent domain 485
Tunnels 311, 312

East Mission Improvement Club, complaints 231

Education, Board of—

Approving demands 953
Budget estimate 951
New schools 952

Edwards, Sager, and Wooster, patent rights 333
Efficiency, Bureau of 63, 64
Egress, right of 784
Eighteenth Avenue, lot for playground 685-87
Eighteenth Street, closing 565, 566
Eleanor, Lake, water supply 77, 494-96

SUPERVISORS—(Continued) PAGE.

Elections—
- Appropriations 723
- Booths 723
- Charter amendments 100-102
- Commission, delegation of authority 101
- Control 101, 724
- Geary Street Railway bonds 48, 49
- Hetch Hetchy project 494, 495
- Holidays 314
- Officers, compensation 721-25
- Precincts 722, 723
- Railroad Commission, transferring powers to 759
- Water bonds 77

Electric—
- Cable lines, change to 421
- Lighting contract and bids 162, 622-24
- Power franchises 525, 912-15
- Rate suits 474
- Rates 431, 432, 473, 474, 758-62

Electroliers on Polk and Mason Streets 430-32
Electrolysis 50
Eleventh Avenue South, title 106, 120
Ellison, Edward, water inspector 771-75
Embalming establishments 30, 33, 38, 42
Embarcadero, street railway franchise 170
Emergency Hospital ambulance damaged in collision 314
Emergency leaves of absence 977
Emergency tax 592
Eminent domain proceedings 207, 484, 485
Emmet Place 783, 784, 839

Employees—
- Additional 62, 63, 608, 609, 1008-10
- Asphyxiated, claims of families 422-26
- Brought under civil service 389, 390, 771, 803, 830, 897
- Change in positions 896-901
- Classifications 899, 900
- Injuries 787, 788
- Municipal Railway preference 463, 464
- Negligence of 315

Employer's Liability 616
Enacting ordinances and resolutions 245
Entire roadway, railway keeping in repair 86-95
Erection of poles 164, 239-41, 244, 245, 248, 277, 278, 294, 409-12, 415, 523-25, 717, 912-16
Erroneous taxes 631, 632, 657-59
Esplanade, ocean front 612
Estimates 49, 51
Estoppel, doctrine of 366, 367

SUPERVISORS—(Continued) PAGE.

Excavations in streets 96-98, 135, 164, 195, 203, 204, 239-50, 277, 294, 409-14, 523-25, 559-62, 619, 912-15

Excess charges, gas and electricity 473, 474
Excess to general fund 606
Execution sale 327, 328

Exchange—
City property for private property....609, 851-56
Lands 371, 372
Market Place and Produce Exchange lots....851-56

Exclusive privileges 247, 358, 410, 414, 525
Exemptions, Motor Vehicle Act....493
Exhumation of bodies, power to order....395-97

Expenditures—
Advertising 179
Control over 6
Departmental 3, 4, 6, 8

Experts—
Employment of 1019
Grand Jury 407

Expiration of franchises....88, 91, 95, 205, 206
Explosives, injunction against use of....478

Exposition—
Inside Inn 456-59
Placing power wires underground....523-25

Expressmen reporting removals of trunks, etc....563

Extensions—
Mains, Spring Valley Water Company....295, 296
Service, public service corporations....96-98, 135, 195, 203, 241, 294-96, 409-15, 516-19, 915, 916
Time to contractors 178, 179, 857
Water mains 77, 78, 516-19, 595, 596

Failure—
Construction street railway within statute time....908
To dedicate streets 328, 329
To make reserve for street purposes....328

Fairmount Extension Homestead, streets....53-55

Families of Sewer Department employees killed, pensions to 423-26

Fares, regulating 361-64, 520, 521
Farley, Mary, title, Chestnut Street lot....786, 787
Farming out streets and sidewalks....507
Father, deceased employee, compensation 819-22
Federal franchise 239-43
Fee in streets 246
Fees, automobile registration 493

SUPERVISORS—(Continued) PAGE.

Fences 59-61, 142
Fever, preventing spread of 848
Fifteenth Avenue South, bed of Islais Creek 113, 114
Fifth Avenue, tearing up tracks 386
Fifth Street, rights of Southern Pacific Co. 213, 214
"Fighting the Flames," amusement enterprise 647, 665-67
Filings on water, Hetch Hetchy 494-96
Fill-in 235-38
Fillmore Street, franchise rights, United Railroads 277-79
Final passage, ordinance 339-41, 609
Finally passed matters, advertising 73, 74
Finance Committee, duties and powers 884
Finances, control over 6
Fire alarm station 548
Fire Department automobiles, exempted, Motor Vehicle Act 493
Fire limits 161
Fire truck damaging window 972
Fire Wardens, consent, alterations 552
Firemen, free transportation 90
Fires, free water for 295
Fireworks, discharge of 705
Fiscal agent, bond 186
Fiscal year, contract extending beyond 290-92
Fish peddlers 638
Fixing—
  Rates 409-11, 617, 618, 758-62
  Tax rate 472
Flats, keeping dogs in 434-37
Flushers, street, patent infringement 333, 334
Folsom Street—
  Acceptance 94
  Street railway franchise 170
Food, quality of 540
Forest Hill, water main to 123
Forfeiture—
  Bail 562, 563, 588, 589
  Franchise 230, 231, 907
  Uncompleted portion of railroad 229, 230
Former employees of railway; preference 463
Fort Mason, tide lands 327-29
Forty-eighth Avenue, open public street 299
Fourth Avenue South, title 106, 120
Fourth Street—
  Closing of portion 309, 310
  Rights of Southern Pacific Co. in 213

SUPERVISORS—(Continued) PAGE.

Franchises—
Abandonment 169, 170, 229-31, 906-909
Acceptance 234
Advertising 179
Ambiguity in 26, 87, 229
Assignments, obligations under 88, 95
Atchison, Topeka and Santa Fe Railway Co....212, 316-18
Bids, let without calling for....365
California Electric Light Co....244
Central Pacific Railroad Co. 208, 211, 213, 214, 217
Conditions, inserting in 414
Denial 246-48, 310
Different, validity, depends upon separate use....421, 422
Discretion to grant or refuse....363, 368
Eminent domain, subject to 485
Exclusive 525
Expiration of....88, 91, 95, 205, 206, 420, 421
Federal 239-43
Fillmore Street car line 277-79
Forfeiture of....230, 231, 907
Granting of 190, 246-48, 310, 525
Independent Light and Power Company....244
Lighting 525, 912-16
Limit on power to grant 190
Market Street Railway Co....906
Municipal Light and Power Co....243
Mutual Electric Light Co....244
Non-user 229-31
Ocean Shore Railway Company 24-28, 225-35
Pacific Gas and Electric Company 244-50
Poles 163, 912
Power 525, 912-16
Presidio and Ferries Railroad Company....205, 206
Public utility, when ordinance going into effect....317
Railroads 360-68
San Francisco and San Joaquin Valley Railway Company 317
San Francisco and San Jose Railroad Company....208, 213, 214, 216, 217
Sierra and San Francisco Power Co....134-39, 912-16
Southern Pacific Company 208, 210-14, 217, 218, 309, 310, 316-18
Southern Pacific Railroad Company....208, 210-14, 217
Spring Valley Water Company....296
Street railways 86, 205, 206, 277-79, 420-22, 906-909, 912-15
Streets, right in 96-98, 134-39, 164, 195, 203, 204, 228, 229, 239-50, 277-79, 294-96, 359-68, 408-14, 523-25, 618, 619, 912-16

SUPERVISORS—(Continued) PAGE.

Franchises—
- Sutter Street Railroad Company....86
- United Railroads....86, 277-79, 420-22, 906-909, 912-15
- Western Pacific Railroad Company....208, 217
- Western Union Telegraph Company....239-43
- Writing certain conditions in....358, 367, 368

Free transportation....90
Free water for fires....295
Freight, hauling of....105
Fruit peddlers....638
Functions....545
Funded debt, Commissioners of....119
Funds, bond....51, 52
Funds, charter restrictions....605
Funds, control by various departments....951-54
Funds, diversion of....51, 603-607
Furnishing of service....295, 618
Game peddlers....638

Garage—
- Construction....634
- In hotels....529-31
- Near church or school....573-75

Garbage—
- Cans, advertising on....505-507
- Disposal, bids....997, 998, 1020, 1021

Gas—
- Bids....622
- Mains....247, 914
- Rate litigation....474
- Rates and service....473, 474, 618, 758-62

Gas and water inspectors....771-75

Gasoline—
- Pumps on sidewalks....84, 85
- Storage of....634, 789, 790
- Supply stations, permit....633-35, 788-91

Geary Street—
- Repaving incident to railway construction....49, 51
- Widening....835, 836

Geary Street, Park and Ocean Railway Co.—
- Employees, preference for employment....463
- Tracks....206, 386

Geary Street Railway bonds....48, 49
General Fund....893
Golden Gate Park, Municipal Railway across....954-62
Grade changes....64-67, 440, 441, 541-43

SUPERVISORS—(Continued) PAGE.

Grading—
Incident to municipal railway construction....49-51
Obligations, street railway 90, 92

Graduated licenses 639
Grand Jury, expert 407

Grant—
Bernal Rancho 106, 107, 118
Pueblo lands 117
Tide lands 327

Grant, Harry E., injured in collision 877-79
Gray Bros., blasting, Thirtieth and Castro....
....477, 478, 803, 804
Grazing of cattle 30, 39, 42
Great Highway 260, 261, 612, 613
Grocery stores, license 482
Growth, water service keeping pace with....295
Hackney carriages 520
Half fare, school children 90
Half Orphans, maintenance of 400, 401
Hampton, Robert W., gas inspector....771-75
Hanbridge, F. B., private ownership, streets 53
Harbor Commissioners, Belt Line Railroad....279-81
Harris Automatic Stop Signal, traffic....991
Harrison Corporation, damages, overflow of water....976
Harrison Street, grades....950
Harrison Street, Southern Pacific rights....210, 212, 217, 218
Hauling certain materials forbidden....1013, 1014
Hawthorne Street, grades....950
Hayes Map 662
Hayes Street regrade 831
Health, general laws 848-51
Health Department expenditures....1-4

Heat—
Public buildings, bids....622-24
Regulating rates and service....617-19, 717, 758-62

Height—
Bill boards 139-43
Buildings 143

Hetch Hetchy project....
....77, 78, 494-96, 595, 596, 779, 780, 975, 1022-24
Highway Bonds, State 67-69
Hiring of horses and buggies....934, 935

Holidays—
Declaring 314
Election days 314
Pawnshops, etc., closing on....570-72

Holladay Avenue, tracks....227

SUPERVISORS—(Continued) PAGE.

Horse shoeing 16, 17, 934-36
Horses, hiring 934, 935

Hospital—
And clinic, distinction 438, 439
Dog 30
Locating outside city 625
Noises on streets adjoining 307
Permit for 349-51

Hotel, garage in 529-31
Hours of labor 724
Howard Street, acceptance 94
Huckster stands on streets 506
Human remains, disinterment of 395-97, 475, 476
Humphreys map 660-62
Illinois Street, railroad franchise 317
Improvement of streets, procedure 51, 66, 67
Inadequacy of water supply 595, 596
Incinerator, Islais Creek 998
Incorporations of railroads 208, 209
Indecent signs 140
Independent Light and Power Co., franchise 244
Industrial zones 143, 250, 251, 461-63, 554
Infectious diseases, preventing spread of 848-51
Infringement, patents, street flushers 333, 334
Ingress, right of 784

Injuries—
Employees 787, 788
Pavements 618
Street sweeper 615-17

Inside Inn, Exposition 456-59
Inspection, slaughter houses 41
Inspectors, gas and water 771-75
Inspectors of supplies 962-64
Installation, negligent 618
Installments, street assessments 1003
Institutions, supplies 539-41
Integral part, Hetch Hetchy system 77, 78, 595, 596, 779, 780
Intention, Resolution of 65-67

Interest—
Officers in contracts 17
On bonds 52
Taxes illegally levied 659

Interference—
Business 35, 36, 37
Property 144

Interior Department, Hetch Hetchy grant 494-96

SUPERVISORS—(Continued) PAGE.

Interments a nuisance....475, 476
Intoxicants, sale of....481-84
Investigate, power to....170
Irregularities, bond issue proceedings....377, 378

Islais Creek—
Bridge over....316-18, 799
Title....106-120

Islais Creek Incinerator, litigation....998
Isolating, contagious cases....770, 848-51

Jackson Building and Realty Co., appeal from assessment....868-70

Jails—
Alterations to buildings....999, 1000
Maintaining....625

Jarnac Street, extension....99
Jefferson Square, fire alarm station....548, 549

Jefferson Street, from Larkin to Van Ness, not open public street....327-29

Jitney buses, permit....520, 521
John Swett School....662, 663
Junk dealers, ordinance regulating....570-72
Juno Street, widening....322
Kains, Archibald, deed, widening of Juno Street....322
Kansas Street, improvement....732

Kentucky Street—
Bridge....316-18, 799
Railroad franchise....317

Kinetoscope, permit....482
Kirkwood Avenue, title....106, 120

Klink, Bean & Co., uniform municipal accounting system....1004-1006

Kohler and Chase, glass window damaged by fire truck....972
Label, union, on printing....926
Labor of minors....989, 990
Laguna Street, extension northerly....328
Lake Eleanor water supply....77, 494-96
Lambert, Mrs. W. D., refund of taxes....318-20

Lands—
City property....123, 273, 274, 371, 372
Relief Home, sale....339-44
Sale of....339, 340
Tunnels....311, 312
Values....143

Lane Hospital clinic....437
Lapier, L. B., permit for garage....529
Laundries....145, 160-62, 461-63, 551-56

SUPERVISORS—(Continued) PAGE.

Laurel Hill Cemetery 475
Lawful business 31, 37
Laws, making and enforcing 59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711
Laying of pipes 97, 98, 137, 203, 204, 241, 249, 294-96, 409-14, 516-18, 523-25, 914, 915
Leader, Municipal Band 8
Lease, advertising privileges in cars 290-92
Leasehold interest in tide lands 328
Leasing out portions of streets 506
Legislative power 59, 65, 72, 98, 139, 191, 203, 251, 278, 289, 362, 363, 426, 427, 639, 711
Legislature creating additional county officers 455
Leimert, Walter H., sale of Relief Home lands 341, 343
Leprosy, preventing spread of 848
Levy, Louis, Manager of Auditorium 883-90, 923, 924
Levying taxes 5
Lewis Street, City's rights 329
Liability—
  City for injuries 424
  Personal, officers making appointments 503, 504
  Street railways 88-95
Libraries, Public—
  Power to authorize use of any City real estate for 58
  Tax levy 305
License ordinances, consolidation 527
Licenses 37, 146, 436, 482-84, 493, 520-22, 639, 797
Lighting—
  Asphalt plant 762-65
  Companies using streets 98, 135-37, 164, 203, 241, 249, 294, 409-12, 415, 913-15
  Contract 162, 431, 432
  Electroliers 430-32
  Franchises 164, 246, 247, 525, 913-16
  Public buildings and streets 622-24
  Rates 431, 432, 610, 758-62
  Service 163, 618, 717
Lime, forbidding hauling 1013, 1014
Limiting—
  Departmental expenditures 3, 4, 6, 8
  Use of property 60
Lincoln School lot, sign on building 262, 263
Lincoln Way, paving 198
Liquor, sale of 145, 481-84
Litigation, compromise and dismissal 425, 426
Litter, street, cans 505-507

SUPERVISORS—(Continued) PAGE.

Lobos Square, underground wires....524
Local laws, making....59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711
Location of poles, changing....278
Locomotives, running of....232
Locust Avenue, status of....660-63
Lodging house, garage in....529
Long term contracts....291
Los Angeles ordinances....482, 527
Lower Market Street, Municipal Railway bonds....48, 49
Lowest bid, acceptance....622, 777, 991
Lubricating oil, storage....789
Lump sum settlement, injury or death....821
Lynch, Patrick, Sewer Department employee, killed..422-26
Main Street, change of grade....541-43
Mains, extensions of....96-98, 135, 195, 203, 241, 294-96, 409-15, 516-19, 915, 916
Maintenance of minors....400, 401
Manure, hauling....232, 1013
Market Place lots....851-56, 880-83
Market Street, City's right to lay tracks....944
Market Street extension....311-313
Market Street Railway Co., franchise....832, 906
Mason Street, electroliers....430-32
Materials of razed buildings, disposition....168, 169
McGinn, G. W. & Co., assessment, Santa Marina Street....864
Meat peddlers....638
Medical clinic, permit for....437-39
Merchants, license....640
Mexican Grants....106, 107, 118
Mile Rock Tunnel....857
Milk, sale and delivery of....552
Minimum wage....724
Minors, labor of....989, 990
Minors, maintenance of....400, 401
Misleading advertising....932
Mission Creek lands, sale....854
Mission District streets, rights to lay tracks....207, 210, 214-18
Mission Political Improvement Association, street assessment....916-18
Mission Street, acceptance....94
Mission Street, tracks and station, Ocean Shore Railroad Co....943
Modification of ordinances....250
Monopoly—
  Creation of....34, 291, 507
  Forbidden....358, 410, 414
  Occupancy of streets....247

SUPERVISORS—(Continued) PAGE.

Montgomery Street, sidewalks....176-78, 264
Monuments....112, 115
Moraga Street, appeal, street assessment....1002, 1003
Mothers' Pension Law, putting into operation....400, 401
Motor bus permit....520, 521
Motor Vehicle Act....493
Motorcycle racks....85
Motormen, Municipal Railway, bonds....497

Moving—
Cattle....30, 39-42
Pictures, permits....482, 876, 931-33
Trunks, etc., keeping record of....563, 564

Municipal—
Accounting system, uniform....1004-1006
Band, leader....8
Department maintaining office in Auditorium....986, 987
Ownership....51, 205, 206
Public utility, funds....605, 606
Waste cans, advertising on....505-507
Water works....516-19

Municipal Light and Power Co., rights in streets....243

Municipal Railway—
Across Golden Gate Park....954-62
Cars, advertising in....290-92, 543-46
Cars, number in operation....544
Employees, bonds....497
Geary and Lower Market Streets, bonds....48, 49
Preferred runs....463, 464
Problems....51
Public convenience and necessity demanding construction....958
Repaving incident to construction....49-51
Stockton Street Tunnel, transfer of funds....603-606, 993
Van Ness Avenue....190-92

"Municipal Record"—
Official advertising....778
Publicity pamphlets....590, 591

Municipality—
Not answerable for negligence of officers....314, 315
Powers measured by grant from State....368

Museums—
Anatomical, regulating....593, 594
Permits for....482

Mutual Electric Light Co., franchise....244
Muzzling of dogs....436

SUPERVISORS—(Continued) PAGE.

Names of streets, changes in....565
Narrowing sidewalks....264, 265
Negligence of officers....315
Net return, rate of....474
New positions....608, 609

Newell-Murdoch Co.—
Street through Relief Home Tract....272-74
Water service....122, 123

Newhall, George A., land for widening Geary Street....835, 836

Newspaper, official....340, 491, 743, 744
Newspapers, license....639
Nickelodeons, permits....482, 876
Night, prohibiting business during....570-72
Nineteenth Avenue, lot for playground....685-87
Nineteenth Street, opening of....326

Ninth Street—
Acceptance of....94
Obligation on United Railroads to repair....88, 91, 93-95

Noble Jones Co., pump....123
Noises on streets, prohibiting....307
Non-resident leader, Municipal Band....8
Non-user of franchise....229-31

Notice—
Sale of lands....343
To voters....49, 50

Nuisance, abatement of....40, 386, 475, 476, 513
Number of votes, passage of ordinance....339-41, 700
Obligations, franchise assignments....88, 95
Obligations, unauthorized, imposing....504
Obstructions....84, 85, 386, 478
Occupancy, unsafe structures....513

Occupation—
Classification....638
Lawful....31-37
Streets by railroads....228, 229
Tide lands....327

Ocean Avenue, abandonment of franchise....906-909
Ocean Front, boulevard and esplanade....612

Ocean Shore Railway Co.—
Cars of other railroads....105
Franchises....24, 28
Hauling freight....105
Rearrangement of tracks....943
Rights....225-35
Spur track....24, 28

O'Donnell, Patrick, injury....615-17

SUPERVISORS—(Continued) PAGE.

Officers—
- Free transportation ... 90
- Interested in City contracts ... 17
- Negligence ... 315
- Personal liability ... 503, 504
- Powers, duties and liabilities ... 504

Official—
- Advertising ... 743, 777-79
- Newspaper ... 491, 744

Old San Jose Road, railway crossings ... 210
O'Leary, Frank, assistant gas and water inspector ... 772
Open public streets, regulations ... 320, 499
Opening of streets ... 96-98, 134-39, 164, 195, 203, 204, 239-50, 277, 294, 408-14, 523-25, 559-62, 619
Opening, street through Relief Home Tract ... 272, 74
Opera House, condemning rights of donors ... 484, 485
Operation of cars ... 233, 234
Orders, passage of ... 245

Ordinances—
- Consolidation ... 527
- Effective sixty days after passage ... 414
- Enacting of ... 245
- Final passage ... 339-41

Invalid—
- If taking away powers of Commission ... 481
- Only where fundamental rights or personal privileges invaded ... 553

- Modification of ... 250
- Number of votes for passage ... 64, 339-41, 700
- Operating prospectively ... 272
- Ordering publication ... 743-46

Passage—
- By majority of board ... 609
- Powers ... 457
- To print ... 339-41

- Public utility franchise, going into effect ... 317
- Publication ... 339-41
- Recording certified copy ... 340, 341
- Referendum provisions ... 414
- Repealed by State law ... 711
- Street improvements ... 700
- Subject to review by the courts ... 38

O'Reilly, Patrick J., refund, void tax sale ... 657-59, 969, 970
Organic law ... 413
Orphans, maintenance of ... 400, 401
O'Shaughnessy, M. M., salary ... 120, 121

SUPERVISORS—(Continued) PAGE.

Otis Street, bunkers and spur track 25
Ottofy, L. F., patent rights 333, 334
Outdoor Art League, removal of cemeteries 475, 476
Outdoor park permit 665-67

Overhead construction 98, 135-39, 164, 239-41, 244, 245, 277, 278, 294, 409-12, 415, 523-25, 717, 912-15

Overhead wires, changing to underground 523-25
Overlapping franchises, United Railroads 420-22

Ownership—
- Pipes on City property 123
- Tracks and roadbed 206, 207

Pacific Gas and Electric Co.—
- Asphalt Plant, light and power 762-65
- Electroliers on Polk and Mason Streets 430-32
- Excess rates charged 473, 474
- Light contract 162-64, 431, 432, 622-24
- Rights in streets 244-50

Pacific Taximeter Cab Co., garage 529

Panama-Pacific Exposition—
- Changing overhead wires 523-25
- Inside Inn 456-59

Panorama, permit 482
Parking of cemeteries 475, 476

Parks—
- Sewers across 502
- Tax levy 775, 776

Passage to print—
- Extensions of time 178, 179
- Ordinances 64, 339-41

Passenger fares, fixing 361-64
Passenger vehicles 520,521
Passengers over Belt Line Railroad, transportation 279-81

Patents—
- Bernal Rancho 106, 107, 118
- Eminent domain, subject to 485
- Pueblo lands 115
- Street flushers 333, 334

Patrol boat, police 811, 812

Paving—
- Between tracks 50, 86, 91
- Damaged by public service corporations 409, 618
- Obligation of street railways 91, 93-95
- Ocean Shore Railway Co. 232, 233, 235
- Railroads to do 358
- Use of Bitulithic 453, 454

SUPERVISORS—(Continued) PAGE.

Pawn Shops, regulating 570-72
Pay rolls oftener than once a month 807
Payment, voluntary 632
Peddlers 506, 638
Pension, families of sewer employees killed 423, 425
Percentage of receipts 98, 411, 419-22, 505, 520, 521
Per diem employees 807
Permits—
Absence of legislative authority 711
Blasting 704-706, 803, 804
Building 350
Department of Electricity 164
Discretion in granting 530, 789, 790
Extensions of service 294, 409, 415
Garages 529-31
Hospitals 349-51
Laundries 160-62, 461-63
Nickelodeons 482
Police Commission 481-84
Revocation of 804
Spur and side tracks 28
Stables 392-94, 461-63, 920
Steam heat mains 619
Temporary 248, 525
Use of streets .....
164, 195, 203, 204, 248, 294, 359-64, 409, 415, 912
Personal liability of officers, appointments 503, 504
Personal property, condemnation 485
Phonograph parlors 482
Pipes—
Laying of 97, 98,
137, 203, 204, 241, 249, 294-96, 409-14, 523-25, 914, 915
Through city property, ownership 123
To be laid before acceptance of street 918
Plague, preventing spread 848
Playgrounds—
Approval of demands 740, 741
Transfer of lot 685-87
Poles—
Changing location of 278
Erection of 164, 239-41, 244,
245, 248, 277, 278, 294, 409-12, 415, 523-25, 717, 912-915
Ocean Shore Railway Co. 234, 235
Pacific Gas and Electric Co. 163
Police—
Alarm station 548, 549
Commission, liquor permits 481-84
Patrol boat 811, 812
Wagons 493

SUPERVISORS—(Continued) PAGE.

Police laws, making....59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711
Police power....33-37, 145, 278, 395, 435, 436, 462, 469, 475, 501, 564, 570
Policy, advising on matters of....944
Polk Street....329, 430-32
Pool rooms, permits....482
Positions—
Creating of....63, 608, 609, 823, 1008-10
Poles, changing....278
Potrero Avenue, rights of Ocean Shore Railway Co.,....225-29, 231, 232
Poultry peddlers....638
Pound, public....42
Power—
Asphalt Plant....762-65
Contract....162
Franchises....525
Public buildings....622-24
Rates and service....618, 717, 758-62
Wires, placing underground....277, 523-25
Powers—
Abatement of nuisances....448
Appeals from assessments....864, 865
Appointments....63, 455
Business regulation....483
Change of grades....440, 441
Charter, under....59, 98, 139, 191, 278, 289, 426, 448, 457, 504, 520, 522, 625, 630
Closing of streets....310, 565
Condemnation....168, 311, 448
Consolidation Act, under....245, 246
Constitution, under....32, 33, 65, 72, 248, 278, 362, 363, 710, 711, 758-62
Contracts, making....363
Doing of public work by contract....1001, 1002
Enacting ordinances and resolutions....245, 481-83
Franchises, granting....89, 95, 190, 310
Franchises, writing conditions in....358, 367, 368, 414
Licenses, imposing....37, 146, 522
Making and enforcing laws....59, 65, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711
Municipality measured by charter....360, 361, 364
Officers....504
Official investigation....170
Park, Municipal Railway across....959-62
Passage, special ordinances....457, 458
Positions, creating....63

SUPERVISORS—(Continued) PAGE.

Powers—
- Rate fixing 617, 618, 758-61
- Service, regulation of 618
- Sewer construction 501, 502
- Streets 278, 695-701
- Unsafe buildings 513-16

Precincts, election 722, 723
Preferred runs, Municipal Railway 463, 464
Presidio and Ferries Railroad Co., franchises 205, 206
Primary election day a holiday 314

Printing—
- Contracts 540
- Election days 313, 314

Prisons, supplies 539-41, 625

Private ownership—
- Alleyway 319
- Islais Creek 120
- Redwood Street 662, 663
- Streets 54, 55

Private street contract 945, 946
Privileges, special 34, 36
Problems, municipal ownership of railway 51

Proceedings—
- Bond issues 377, 378
- Geary Street Railway bonds 48

Proceeds, sale of bonds 51

Procedure—
- Abatement of nuisance 386
- Acquisition of public utility 49
- Appointments 1008
- Cemetery removals 395-98
- Charter amendments 100
- Closing of streets 565
- Hetch Hetchy project 494-96
- Municipal Railway 49-51
- Sale of lands 339-41
- Street improvements 51, 66, 67, 695, 700

Produce Exchange lots 851-56, 880-83
Progressive payments on contracts 999
Prohibition and regulation 37

Property—
- Owners, rights 784
- Restricting use of 36, 60
- Use of 141
- Value of, diminishing 60

Proposals, sealed 180-183

SUPERVISORS—(Continued) PAGE.

Prospectively, ordinance operating....272

Public—

Health....32, 851
Institutions, supplies....539-41
Pound....42
Lands, withdrawal....496
Libraries....58, 305
Property, disposal of....339, 340
Safety and welfare, wires underground....277
Welfare, providing for....33-35
Work....424, 925, 999-1002

Public buildings—

Cleaning....885
Construction....885, 886
Light, heat and power....622-24

Public service corporations using streets....
....96-98, 134-39, 164, 195, 203, 204, 228, 229, 239-50, 277-79, 294-96, 359-68, 408-14, 523-25, 559-62, 619, 912-16

Public utilities—

Acquisition of....49
Act....759
Condemnation....779, 780
Construction....49-51, 518
Control of....545, 717, 758-61
Franchise ordinance going into effect after sixty days,....317
Municipally owned....605, 606

Publication—

Bills....179, 339, 340
By departments....492
Ordering....743-46
Ordinances....339-41
Resolutions....179, 340

Publicity campaign, appropriation for literature....591-93
Pueblo lands, patent and grant....115-118
Pump, Relief Home....123, 273
Pumps on sidewalks....84, 85
Purchase of lands for tunnels....311, 312
Purchase of supplies....988
Pushing of trains....233
Quarantine....770, 849
Quieting titles....260
Quigley, Thomas D., appeal, street assessment....1002, 1003
Quint Street, railroad franchise....317
Race prejudice, moving pictures....872, 932
Racks on sidewalks....85
Railroad Commission fixing rates....758-61

SUPERVISORS—(Continued) PAGE.

Railroads—

Construction between tracks 50, 86, 91
Construction preceding laying out of streets 210
Construction, street work incident to 49
Enjoining from operating cars on streets 208
Entering city 226, 317, 358
Franchise grants 360-68
Occupying streets 228, 229
Powers of 227
Street work 50, 86, 91, 93, 95, 232, 233, 235, 358

Rails—

Ownership by city 206, 207
Tearing up 385, 386

Raker Act 494, 495
Randall Street 725-27, 866, 945
Rate of return 474

Rates—

Excess charged 473, 474
Fixing 409-11, 474, 525, 617, 618, 758-61
Gas 473, 474, 617, 618
Lighting 431, 432, 617, 618
Power 617, 618
Steam heat 617, 618
Taxes 472
Telegraph and telephone 617, 618
Water 617, 618

Ratican, William, patent rights 333, 334
Razed buildings, disposition of materials 168, 169
Reasonableness of rates 474
Receptacles, street litter 505-507
Recommendations, appointments 62, 63
Reconstruction of premises 160-62, 666, 696-700
Recorder's copyists, vacations 977
Recording certified copy of ordinance 340, 341
Recreation League, aquatic park 851
Redemption of bonds 52
Redwood Street 660-63
Referendum provisions, ordinance 414
Refund of taxes 318-20, 630-32
Refuse cans, advertising on 505-507
Refuse, haulage 1013
Registrar of voters, delegation of authority 101

Registration—

Automobiles 493
Voters 101, 724

Regrading, Geary Street Railway 49-51

SUPERVISORS—(Continued) PAGE.

Regulation—
Business 31, 32, 38, 145, 481-84, 530, 531
Fares 361-64, 520, 521
Laundries 461-63
Stables 461-63

Regulations, making 59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427, 564, 710, 711

Reinterments 475, 476
Rejection of bids 543
Relief, families of employees killed 425
Relief Home, pump 273

Relief Home Tract—
Opening street through 272-74
Running water pipe through 122, 123
Sale of lands 339-44

Removal—
Cemeteries 395-98, 475, 476
Contagious cases 770, 848-51
Obstructions 386, 478
Tracks 386
Wires 278

Rental, sign on building, Lincoln School lot 262, 263

Repairs—
Buildings 666
Streets 265, 697-701
Streets by railroads 50, 86, 91, 232, 233, 235, 358

Repaving, street railways 93-95
Reserve for streets, failure to make 328, 329
Reserve fund 605, 606, 993
Reservoir construction 501
Resetting curbs 176-78
Residence districts 143, 250, 461, 554
Residents only to be employed on public work 925

Resolutions—
Enacting of 245
Extensions of time 178, 179
Of intention 65-67
Ordering improvements on more than one street 64-67
Publication of 340, 743-46

Restraint, long term contracts 291

Restrictions—
Business 36, 145
Use of property 36

Retail liquor licenses 482-84
Retrospectively, ordinance not operating 272
Return on investment 517, 518

SUPERVISORS—(Continued) PAGE.

Revocable permits 195, 228, 619
Revocation of license 933
Revocation of permits 804
Richmond District, extension of mains 595

Rights—
City to tide lands 328, 329
Corporations charging rates they please 474
Corporations in streets 96-98, 134-39, 164, 195, 203, 204, 228, 229, 239-50, 277-79, 294-96, 408-14, 523-25, 618, 619, 913-15
Deprivation of 34, 36, 279

Rights of way—
Hetch Hetchy 495, 496
Tunnels 311, 312

Riparian rights 112

Roadbed—
Construction 233
Ownership by city 206

Rogers, John W., change in position 896-901
Rolandi, F., form of sub-contracts, Hetch Hetchy railroad 975
Rolled barley, contract 1022, 1023
Routing of cars 170, 421

Safety—
Promotion of 32
Wires underground 277

Salaries—
Board of Public Works, power to fix 121
City Engineer 120, 121
Limitation of, in budget 120, 121

Sale—
Cemetery lands 397
Charter amendment, lands 273
Lands 273, 339, 340, 372
Liquor 481-84
Relief Home Lands 339-44
To municipality, officers prohibited from interest in 17
Under execution 327, 328

Saloons 145, 482-84

San Bruno Avenue—
Paving 607, 608
Tracks 227

San Francisco and San Joaquin Valley Railway Co., franchise 317
San Francisco and San Jose Railroad Co., franchises— 208, 213, 214, 216, 217

SUPERVISORS—(Continued) PAGE.

San Francisco Ladies' Protective and Relief Society, deed 685
San Jose Avenue, railway crossings 210
Sanitarium, permit for 349, 350
Sanitary laws, making 59, 72, 98, 139, 191, 248, 278, 289, 362, 363, 426, 427
Sanitary Reduction Works 997, 998, 1020
Sanitary Street Flushing Machine Co., patent rights 333, 334
Santa Marina Street, appeal from assessment 864, 865
Santa Rosa Avenue, extension 99
Saturday full pay for teamsters 805-807
School—
  Garage near 573-75
  Land purchases 810
  Stable near 919
  Tax levy 952
School children, half fare 90
Schudel, John, paving, San Bruno Avenue 607
Scott, Magner and Miller, barley for Hetch Hetchy 1022-25
Scott, R. C., Advertising Co., bid 544, 545
Sealer Weights and Measures 454-56, 729, 731
Second-hand dealers, ordinance regulating 570-72
Secretary of the Interior, Hetch Hetchy 494-96
Service—
  Connections 98, 195
  Extensions, permits 294, 409, 415
  Lighting and power 618
  Regulation 618, 717
  Telegraph and telephone 618
  Water, etc., furnishing of 295, 618
Sergeant-at-arms, appointing 63
Seventh Street, rights of Southern Pacific Co. 211, 212, 214
Seward Street, opening 326
Sewer—
  Construction 501, 502
  Defective, city's liability 424
  Employees, asphyxiated 422-26
  Flushing 618
  Right of way, United Railroads 54
  To be laid before acceptance of street 918
Shacks 146, 160-62, 168, 448-50
Sheep, grazing of 30, 39, 42
Shoeing, horse 16, 17
Side tracks, sole power to grant permits for 28
Sidewalks—
  Montgomery Street 176-78
  Obstructions on 84, 85
  Reducing width 176-78, 264
  Repair 264, 265

SUPERVISORS—(Continued) PAGE.

Sierra and San Francisco Power Co., right to maintain poles....134-39, 523-25, 912-16
Sign on building, Lincoln School lot....262, 263
Signature, typewritten, on bid....668-70
Signs, regulating....142
Sixth Street, rights of Southern Pacific Co....214
Sixty days after passage, ordinance, public utility franchise....317
Slaughterhouses, moving of cattle to....30, 39-42
Smith, Fred P., operation, Sanitary Reduction Works, ...997, 998
Smith, Peter, judgment....327
South of Market streets, rights of Southern Pacific Co., in....211-14
Southern Pacific Co.—
Application to close street....309, 310
Change in franchise....316-317
Conditions in franchise, inserting....358, 368
Exchange of lots....851-56
Franchises....218, 309, 310, 317, 318, 358, 368
Islais Creek title....106, 120
Market Place and Produce Exchange lots....880-83
Right to lay tracks in certain streets....207-218
Santa Rosa Avenue extension....99
Spur tracks....211-14
Southern Pacific Railroad Co., franchises....208, 210-14, 217
Sparring exhibitions....757
Special—
Election....100
Ordinances, power to pass....457
Privileges....34, 36
Speed, street railway cars....234
Spite fences....59-61
Spread of disease, preventing....848-51
Spring Valley Water Co.—
Extension of mains....295, 296
Franchise....296
Sprinklers, street, exempted, Motor Vehicle Act....493
Spur tracks—
Ocean Shore Railway Co....24-28, 231, 232
Sole power to grant permits for....28
Southern Pacific Co....211-14
Squares, sewers across....502
St. Louis Street Flushing Machine Co., patent rights....333
Stables....250, 251, 392-94, 461-63, 530, 552-56, 919, 920
Stack, Edmond, compensation, death of son....819-22

SUPERVISORS—(Continued) PAGE.

Stalls on streets....506
Stanford Medical Clinic....437, 439
Stanke, Hugo, paving, San Bruno Avenue....607
Stanley Place, grades....950

State—
Board of Control, maintenance of minors....401
Board of Health, spread of disease....848-50
Delegation of powers....367
Grant of tide lands....327
Harbor Commissioners, Belt Line Railroad....279-81
Highway Bonds....67-69
Law repealing ordinances....711
Legislature creating additional county officers....455
Payment of auto registration fees to....493
Tenement House Act....553

State Improvement Co., contract....868
Stationery....926, 994
Statutes operating prospectively....272
Steam cars....40

Steam heat—
Franchises....618, 619
Public buildings....622-24
Regulating rates and service....617-19, 758-62

Steam railroads—
Entering city....317, 358
Franchise grants....360-68
Operation of cars on streets....208
Street work....50, 232, 233, 235, 358

Stock pens....41, 42
Stockton Street Tunnel assessment, city's share....603-607
Stockton Street Tunnel, transfer of funds....992, 993
Stone, E. B. and A. L. Co., spur track....24-28

Storage—
Automobiles....529
Gasoline....789, 790

Streams, beds of....112
Street cans....505-507
Street cleaning....618
Street flushers, patent infringement....333, 334
Street lights....162
Street names, changes....565

Street railways—
Construction and operation....190
Forfeiture, uncompleted portion....907
Franchises....86, 190, 205, 206, 1020
Repairs to streets....88-95

SUPERVISORS—(Continued) PAGE.

Street sprinklers exempted, Motor Vehicle Act....493
Street sweeper, injured....615-17

Streets—

Acceptance....177

Assessments—

Appeals from....864, 865, 868-70, 917, 1002, 1003
Fifty per cent of value....868, 869
Installment payments....869
Lien on railway....89, 90

Board of Public Works....699, 700
Closing....309, 310, 565
Completion to satisfaction of Board of Public Works..918
Congestion by automobiles....634
Control....367, 409-14
Dedication....320
Failure to reserve....328, 329
Fee in....246

Improvement—

Combining in one resolution....64-67
Defined....418, 518
Procedure....51, 66, 67, 695, 700

Legislative authority....203
Light bids....622
Obstructions on....84, 85
Occupied by railroads....228, 229
Ocean Shore Railway Co....232, 233, 235
Openings, revocable permits....195
Ordinance, street improvement....440, 441, 917
Power of municipality over....278
Repair by railroads....50, 86, 91, 93, 95, 232, 233, 235, 358
Repair by street railways....88-95

Repaving incident to construction, Municipal Railway....49-51

Through Relief Home Tract, opening....272-74
Under five hundred dollars....695-98, 701
United Railroads....88, 91, 93-95
Urgent repairs....695-97, 701

Use of....96-98, 134-39, 164, 195, 203, 204, 228, 229, 239-50, 277-79, 294-96, 359-68, 408-14, 520, 521, 523-25, 559-62, 619, 913-15

Sub-area walls, reconstruction of....264, 265
Subsistence of prisoners, supplies....539-41
Succeeding boards, restraint on power of....291
Sundays, pawn shops, etc., closing on....570-72
Sunset District, extensions of mains....595
Supervisor of Working Minors....989

SUPERVISORS—(Continued) PAGE.

Supplies—
Bureau, expenses 922
Contracts for 539, 926, 935, 988
For prisoners 539-41
Inspectors of 962-64
Superintendent of 922
What term covers 17

Supply stations, permit 788-91

Surplus—
Bond proceeds 603
Operation, municipal public utilities 605, 606

Surplus Fund 425, 731
Surrender, legislative powers 291
Sutter Street Railroad Co., franchises 86, 88, 95, 231
Sweeney, James P., return of bail 562, 563
Taaffe, J. L., obstructions 84, 85
Tamura, F. C., laundry permit 160

Tax—
Delinquency 630-32
Interest and redemption of bonds 52
Levies 5, 305, 775, 776, 1028
Rate 472
Refund, Mrs. W. D. Lambert 318, 320

Taxability certain United Railroads receipts 419-22

Teams—
Contracting for 16-18
Driver injured 787, 788
Owners insuring drivers 818
Separate Saturday pay rolls 805-807

Tearing up tracks 386
Telegraph rates and service, regulating 135, 618, 717
Telephone service, regulating 135, 618, 717, 758-62

Temporary—
Appointments 771
Permits 248, 415, 525

Tenement houses, dogs kept in 434-37
Test, wells, sinking 595
Thirtieth Street, blasting 478, 803, 804
Thirty-first Street, blasting 803, 804

Tide lands—
Fort Mason 327-29
Islais Creek 111, 114, 115
Rights of city 328, 329

Title, alleyway 319
Tonquin Street, city's rights 329
Torts in discharge of duty, municipality not liable for 314

SUPERVISORS—(Continued) PAGE.

Tourists' Association, publicity literature....591-93

Tracks—

Abandoned....386
City's right to use company's tracks....944
Doubling of....90
Geary Street, Park and Ocean Railway Co....386
Laying....361, 363, 365, 368
Lay-out, franchise for....309, 310
Ocean Shore Railway Co....24-28, 234, 235
Ownership by city....206, 207
Paving between....50, 86, 91
Southern Pacific Co....207-18
Tearing up....386
Water front....280

Trade regulation....31, 32, 38
Trading stamps, merchants giving, higher license....640
Traffic, control over....947
Trains and cars, regulation....233, 234

Transfer—

City vacant lots, from one department to another....371, 372
Franchises....88, 95
Funds....51, 603-607, 992, 993

Transfers....90
Transportation, free....90
Trolley cars substituted for cable cars....421
Troughs, watering....85
Truck, Fire Department, damaging window....972
Tuberculosis Hospital, change in location....625, 629, 630

Tunnels—

Construction....706
Funds....604
Lands for....311, 312
Restoration of surface travel....312

Tuolumne River water supply....77, 494-96
Tupper, O. M., gas and water inspector....772
Twelfth Street, rearrangement of Ocean Shore Railway Co.'s tracks....943
Twelfth Street, spur track....24-28
Twenty-fifth Street, rights of Ocean Shore Railway Co....225, 229-31
Twice a month salaries....807
Twin Peaks Tunnel....311-13
Typewritten signature on bid....668-70
Unauthorized appointments....503, 504
Uncompleted portion, street railway....907

SUPERVISORS—(Continued) PAGE.

Underground—
Changing overhead construction to....523-25
Conduits....411-14
Placing power wires....277

Undertaking establishments....30-33, 38, 42

Uniform—
Municipal accounting system....1004-1006
Operation of ordinances....555

Union label on printing....926
Union Street line, surplus....605, 606

United Railroads—
Abandonment of franchise....169, 170, 906-909
Chenery Street, title....54, 55
Church Street railway....943-45
Franchises....88, 169, 420-22
Ninth Street, repair....88, 91, 93-95
Percentage of receipts....419-22
Rights assigned....88, 95
Tracks, city's right to use....944
Wires Fillmore and Webster Streets....277-79

Universal Electric and Gas Co., extension of system..408, 414
Unsafe structures....513
Unused tracks....231, 232
Unwholesome trades....40
Urgent Necessities Fund....388, 425
Urgent repairs to streets....695-701

Use—
Alleyway....319, 320
Property....60, 141
Streets....96-98, 134-39, 164, 195, 203, 204, 228, 229, 239-50, 277-79, 294-96, 359-68, 408-14, 520, 521, 523-25, 559-62, 619, 912-16
Tide lands....327

Vacations, power to allow....289, 977
Valencia Street railway line....210

Validity—
Contract....366, 367
Franchise depends upon use....421

Value of property, diminishing....60
Van drivers reporting moving of goods....564

Van Ness Avenue—
From Jefferson to Lewis, not open public street....327-29
Municipal Railway....190-92

Van Ness ordinance....661, 662
Vassar Place, grades....950
Vaults under sidewalks....265
Vegetable peddlers....638

SUPERVISORS—(Continued) PAGE.

Vehicles, passenger 520

Vermont Street—
Franchise rights 227, 231
Improvement 732

Vested rights, acquisition of 273, 274
Vocation, pursuance of 32, 34, 35
Voluntary payment 632

Voters—
Notice to 49, 50
Registration of 101, 724

Votes necessary, passage of ordinance 64, 339-41, 700
Vrooman Act 90
Vulcan Street, extension 419
Walls, sub-area 264, 265
Waste cans, advertising on 505-507

Water—
Bonds 494, 495, 595, 596
Bonds, use for extensions of mains 77, 78
Companies using streets 97, 98, 137, 241, 295, 296, 409, 410, 913
Company duty bound to serve whole public 295
Front, tracks on 280
Inspectors 771-75
Rates 517, 518, 618, 758-62
Rights 112
Service, furnishing of 295, 717

Water mains—
Extensions 516-19
Extensions, bond moneys for 77, 78
Legislative authority 247

Water supply—
Hetch Hetchy 494-96
Inadequacy of 595, 596

Water troughs 85
Webster Street, conduits, United Railroads 277-79
Weights and Measures Bureau 454-56, 729, 731
Wells, test, sinking 595
Western Pacific Railroad Co., franchises 208, 217
Western Union Telegraph Co., franchise rights 239-43
Whistle blowing near hospital 307
Whitney Street, appeal from assessment 866, 945
Wholesale liquor dealers 482
Widows' Pension Law 400, 401
Window damaged by fire truck 972
Wing-walls 235-38

SUPERVISORS—(Continued) PAGE.

Wires—
Erecting of....98, 135-37, 164, 239-41, 244, 245, 277, 278, 294, 409-12, 415, 523-25, 913-15
Fillmore Street, changing to Webster Street....277-79
Placing under ground....277
Removal of....278
Right to maintain....277

Wise Realty Co., lease....262
Withdrawal of lands, Hetch Hetchy....496
Wooden buildings....146, 552
Working minors, regulating....989
Workmen's Compensation Act....424, 616, 787, 820-22
Written contracts....696-99, 1001
Wyatt & Co., automobile injuring street sweeper....615-17
Yellow fever, preventing spread of....848
Zones, industrial and residence....143, 250, 251, 461-63, 554

SUPPLIES—
Act, Pennsylvania State Legislature....17
Advertising for bids....539
Bacon, Edward R. Co., concrete mixers....668-70
Barley....1022-25
Bids....1023
Board of Supervisors, jurisdiction, contracts....936
Bureau of Supplies....922
Charter framers, intent....540
Concrete mixers....668-69
Consolidation Act....540
Expenses, Supplies Committee....922, 962-64
Fire Department....80
General conditions....1024, 1025
Horse and buggy hire....935
Horse shoeing....934, 935
Inspectors....962-64
Items of expense to be included under....17
Lane, Franklin K., opinion....16, 17, 935
Neal v. Rolph....925, 926
Officers prohibited from being interested in furnishing of....17, 344-46
Prisons....539-41
Sacramento Charter....325
Scott, Magner and Miller....1022-25
Stationery orders, non-contract, cases of great necessity....994
Superintendent of Supplies....922
Union label on printing....926

SUPPLY STATIONS—Automobile, permit....788-91

SUPPRESSION—Business....35, 36, 37

SURETY BONDS— PAGE
Approval by Mayor....497, 704, 705
Benjamin, L. M. 334
Blasting 704, 705, 804
Board of Public Works, employees....189
Books, etc., to be surrendered by official....220, 221
Building Law 596
Car contractors 719-21
Charter provisions....189, 220
Commonwealth Bonding and Casualty Co....856, 857
Conditions in official bonds....219-21
Conductors, Municipal Railway....189, 497, 498
Contractors, electric installations....596
Crocker National Bank....186, 331
Elective officers 497
Electrical contractors 596
Filing in Auditor's office....189, 190
Fiscal agent 186, 331
Jewett Car Co....719-21
Keystone Construction Co., failure on contract....323
Lloyd and Spengler, premiums....497
Massachusetts Bonding and Insurance Co....323, 324, 597
Mayor, conditions, official bonds....219-21
Mission Viaduct 323
Motormen, Municipal Railway....189, 497, 498
Municipal Railway employees....189, 497, 498
Officials....219-21, 497, 498
Pacific Gas and Electric Co....596, 597
Premiums, payment of....189
Street flusher contract....334
Superintendent, Municipal Railway....189
Treasurer 331
Wiring buildings 596
Work done under contractor's bond....323, 856, 857

SURFACE OF GROUND—Change in 738

SURFACE WATER 737, 738

SURPLUS—
After satisfaction of judgment....536
Bond proceeds 603
Fund....425, 606, 730, 811, 892
Municipal Railway funds 605, 606
Public utility, municipal 605, 606
Transfer to general fund 606
Union Street line operation....605, 606

SURRENDER—
Badge of office....165, 166
Books, etc., by official at end of term....220, 221
Control over public utilities....759, 761

SURRENDER—(Continued) PAGE.
Legislative powers 291
Office 297
United States, title 547

SURVEYS—
Bernal Rancho 106, 109, 110, 111
Chenery Street 55
Field assistants, vacation 403
Great Highway 261
Hetch Hetchy project 495
Hoadley survey 110
Holcomb, Charles H. 171-73
Potter survey 110
Schofield, N. 106, 109, 111, 113
Von Leicht, F. 115

SUSPENSIONS—
Appeals from 676
Appointing officers, powers 693
Casserly, Thomas, plumbing inspector 861
Causes for 677
Charter framers, intent 683
Charter provisions 676, 683, 861
Chief of Police, temporarily 683
Code, James A. 676-78
Firemen 684
Forcada, Frank, watchman 693, 694
Illegal 677
Investigation by Civil Service Commission 676-78
Legislative powers 291
Limiting to thirty days 861
Police officers 580, 683
Tax Collector 676-78
Tripp, Edwin B. 676-78
Whim of suspending officer 677

SUSSKIND, S. H.—Automobile damaged colliding with steam roller 689-91

SUTRO BATHS 259, 261

SUTTER STREET—Power poles 415

SUTTER STREET RAILROAD CO.—
Assignment of rights to United Railroads 88, 95
Franchises 86-95
Litigation with city 231
Ninth Street, keeping in repair 86-89, 93-96
Order No. 1525 86
Order No. 1907 ..... 86-88, 94, 95

SWEENEY, JAMES P.—Return of bail 562, 563

SYSTEM OF ACCOUNTING—Uniform municipal 1004-1006, 1016-19

T

PAGE.

TAAFE, JOSEPH L.—Obstructions 84, 85

TALLOW—Rendering 847

TAMURA, F. C.—Laundry 160

TAX COLLECTOR—
- Alferitz, Suzanne, refund, delinquency 630-32
- Amusement license 532
- Apartment houses, license 522, 537
- Assessments, Stockton Street Tunnel 256, 257
- Authority to issue new deed for lost one 188
- Ball rooms 508
- Boarding house, license 522
- Brokers, commission, license 613, 614
- Cabarets, license 532, 533
- Cafeterias, license 556, 557
- Caterers, license 522
- Cemetery lands, sale of 397
- Certificate of sale of property 166
- Checks, accepting 631
- Code, James A., suspension 676-78
- Comerford Street 318
- Commission merchants, license 613
- Concert license 532
- Cooper, J. A., Stockton Street Tunnel assessments 256, 257
- Cycloramas, license 648
- Dance license ordinance, interpretation 508
- Delay in recording tax deeds 18, 19
- Delinquent taxes 630-32
- Delinquent tunnel assessments 166, 167
- Delivery companies, license 535
- Draying firms, license 535
- Duties 930
- Employee absent without leave 296
- Employees—
  - Brought under civil service 389, 390
  - Suspensions 676-78
- Execution sale 167
- Fitz, G. L., tax deed 188
- Halls, common right to 537, 538
- Hotel license 522, 532, 556
- Hotel room, sale of goods in, without license 1014-16
- Itinerant vendors 1014-16
- Kinetoscope parlors 1011-13
- Lambert, Mrs. W. D., tax sale 318
- Laurelle v. Bush 483
- Licenses, collection of 930
- Liquor license 483, 532
- Lodging house license 522

TAX COLLECTOR—(Continued) PAGE.

Merchandise brokers, license....613, 614
Ministerial officer....930
Money, taxes paid in lawful....631
Moving pictures....1011-13
New deed to replace lost tax deed....188
Notice of sale of property....166-68
Nuckles, A. W., tax deed....188
Panoramas, license....648
Political Code sections....19, 174, 631, 658, 973-75
Qualifications for eligibility....71
Real estate dealer, license....527, 528
Refreshment places, license....522, 556
Reinstatement....296-98
Rent collectors, license tax....528
Resignation through coercion....296-98
Restaurants, license....522, 532, 533, 556
Romeo Flats....538, 539

Sales—
Goods without license....1015
On execution....167
Property, delinquent tunnel assessment....166, 167
Property irregularly assessed....174

Scalpers, ticket, license....929-31
Sheehan v. Scott....71
Stairways, common right to....537, 538
Stockton Street Tunnel assessments....256, 257
Subdivision owners, license....527, 528
Suspensions of employees....676-78
Tax deeds....18, 19, 973-75
Tenement House Act....537-39
Tenement houses, license....522, 537
Ticket peddlers, license....929-31
Transfer companies, license....535
Tripp, Edwin B., suspension....676-78
Tunnel assessment, delinquent, sale of property....166, 167

Validity—
Assessments....257
Ordinance, license, apartment houses....522

Wolff, Charles A., reinstatement....296-98
Yards, common right to....537, 538
Young Men's Christian Association cafeteria, license....556, 557

TAX DEEDS—
Cancellation....172
Charter provisions....845, 846
Delay in recording....18, 19
Fitz, G. L....188
Legislature, amendments adopted....973-75

TAX DEEDS—(Continued) PAGE.

New deed to replace lost tax deed....188
Noe Street, lot on....171-75
Nuckles, A. W. 188
Political Code....19, 973-75
Recording, delay in....18, 19
Stockton Street Tunnel assessments....257
Streets opened, delinquent assessments....845

TAX LEVIES—

1916-17....1028
Annual....5
Bonds, redemption of....373, 374, 377, 380
Charter provisions....305
Consolidation Act....893, 894
Decisions....374, 377
General Fund....1028
Libraries, Public....305, 1028
Parks....775, 776, 941, 1028
San Francisco v. Broderick....893, 894
School buildings....384, 385, 952
School districts....385

TAX SALES—

Aitken, Frank W., refund....658
Blackwood Street, portion sold delinquent taxes....658
Certificates....166-68
Charter provisions....845, 846
Code of Civil Procedure....167
Comerford Street....318-20
Decisions....256, 257, 658
Description at length not necessary....167
Erroneous assessments....174
Errors in certificate....174
Execution sale....167
Lambert, Mrs. W. D. 318-20
Legislature, amendments adopted....973-75
McWilliams, Jane....171, 173
New deed to replace lost tax deed....188
Noe Street, lot on....171-75
Notice, form of....166-68
Officers personally interested in....344
O'Reilly, Patrick J., refund....657-59
Personal property....167
Political Code....174, 658, 659, 973-75
Refunds....657-60
Seawell, Judge, decision....256, 257
State, refunds....659, 660
Stockton Street Tunnel assessments....256, 257
Streets opened, delinquent lots....845
Tunnel assessment....166-68

TAXES— PAGE.
Aesthetic objects purely 144
Alferitz, Suzanne, refund, penalty, delinquent taxes 630-32
Assessment roll 472
Banks, impounded moneys 614, 615
Bill boards 146
Bonds, interest and redemption 52
Cemetery property exempted 827-29
Charter provisions 5
Checks in payment of 631
Constitution of California 472
Decisions 614, 615, 631, 658, 798, 828, 829
Delinquent, refund 630-32
Delinquent tax sales 166-68, 171, 173
Dollar limit, above 592
Doubling assessed value when taxes escape 610, 611, 615
Duplicate payment 658, 659
Emergency tax 592
Erroneous assessment roll 472
Escaping 611, 614, 615
Estates 610
Exemption from 174, 472, 473, 597, 827
Franchise privileges 240
Impounded moneys, rate litigation 614, 615
Interest on bonds 58
Lambert, Mrs. W. D., refund 318-20
Litigated money and property 971
Mail, delay in 631
Minnesota statute, exemptions 828
O'Reilly, Patrick J., refund, erroneous taxes 657-59, 969, 970
Political Code sections 472, 473, 631, 658, 659
Poll tax 304
Public service corporations, exemption 597
Rate fixed by Supervisors 5, 472
Receiver, property in hands of 971
Refunds 318-20, 630-32, 657-59, 969, 970
Sales, delinquent assessments 166-68
Schools 385, 798
Spring Valley Water Co., impounded moneys 614, 615
State Board of Equalization 472, 473
State highway tax on automobiles 940-42
Veterans, exemption from 472
Voluntary payment 632
Warren v. San Francisco 632

TAXPAYER—Burden, additional, on 377, 378

TAYLOR, CHARLES H.—Reopening case 815-18

TEACHERS— PAGE.
Appointing 703
Charter provisions 703, 704
New York decisions 900
Officers 23
Pension fund 566, 567
Political Code 23
Residence in San Francisco 20-24
Salaries 704, 713, 714
Stuart v. Board of Education 22
Substitute teachers, pension fund 566, 567

TEAMS—
Barnett, Benjamin, driver, injured 787, 788
Coming under "supplies" 18
Controversy between Supervisors 805
Industrial Accident Commission 787
Officers, prohibiting from using their own 17
Owners of teams insuring drivers 797, 818, 819
Per diem employees 807
Separate Saturday pay rolls 805-807
Statute 1860 17
Stevens, Harry H., driver, injured 787
Tittle, H. S., driver, injured 787

TEARING DOWN SHACKS 184-86

TEARING UP TRACKS 385, 386

TECHNICALITIES—Contracts 81

TELEGRAPHIC NOTICE—Recording 369, 370

TELEGRAPHS—
Act of Congress 239, 240
American District Telegraph Co. 258
Erection of poles 204, 717
Rates and service 618, 717
Use of streets 239-42
Western Union Telegraph Co. 239-43

TELEPHONES—
Civil Code 240
Constitutional privilege 587
Election of poles 204, 717
License tax 597
Merger 196, 402
Pacific Co., connection with Home Co. 402
Permits 588
Railroad Commission order 863
Rates and service 410, 618, 717, 758-62
Service connections free 863
Western Electric Co., installing motors 601-603

TEMPORARY— PAGE.
Deposits 316
Discharge of firemen 837, 838
Permits 248, 415, 525

TEMPORARY APPOINTMENTS—
Assistant Chiefs, Fire Department 936, 938
Auditor 29
Charter framers, intent 938
Charter provisions 83, 938
Civil Service Commission control over 83, 84
Civil Service Commission refusing to approve 83
Department of Elections 29
Discretion in making selection for 84
Experts 1019
Fire Department 83, 84
Gas and water inspectors 771-75
Salary discrimination 44

TEMPORARY BUILDINGS—(See "Shacks").

TENANT—Obligation to repair 590

TENEMENT HOUSES—
Alterations 272
Apartment houses (See Apartment Houses)
Baker and Fulton Streets 271
Building law 272
Common right to conveniences 537, 538
Conversion of frame building into apartment house 271
Cooking on premises 538
Definition 538
Demolition of portion 417, 418
Dogs kept in 434-37
Entrances and halls 537-39
Insanitary 417, 418
License tax 522
Light 418
Ordinance No. 1677 537
Romeo flats 538, 539
Stairways, common right to 537, 538
State Hotel and Lodging House Act 784, 785
State Tenement House Act 537-39, 553, 712
Validity of Act 553
Ventilation 418
Yard space 784, 785
Yards, common right to 537, 538

TENT—A structure 434

TENURE OF OFFICE 748-50

TERM OF OFFICE 747-50, 753

PAGE.

TEST WELLS—Sinking 595

TEUTENBERG, FRANK J.—Credits for service 715-17

THEATRES—
- Alterations 514, 515
- Audience, limiting to seating capacity 331, 332
- Building law 331, 332, 511-15
- Fire Wardens, supervision of alterations 511, 515
- Globe Theatre 509-16
- Liberty Theatre 873, 874
- Obstructing aisles, etc. 331, 332
- Ordinances regulating 331, 332, 511-15, 1011-13
- Permits, Police Commission 1011-13
- Seating capacity 331, 332, 511, 512
- Ticket peddlers, license 930
- Unlawful construction 512

THEFT—Checking 928, 929

THIRTEENTH STREET—Haulage certain substances prohibited 1013

THIRTIETH STREET—
- Blasting by Gray Brothers 477, 478, 803, 804
- Quiet title suit 172

THIRTY-FIRST STREET—Blasting, Gray Bros. 478, 803, 804

THORNE, ISAAC N.—Tide lands 275, 328

TICKET PEDDLERS—License 929-31

TIDE LANDS—
- Acts, State Legislature 274, 852
- Decisions 114, 115, 274-76, 327-29
- Dore v. Truett 274-76, 327-29
- Federal control 466
- Fort Mason 327-29
- Freeman v. Belgarde 114, 115
- Grant by State 274, 275, 327, 852
- Islais Creek 111, 114, 115
- Leasehold interest of city 327
- Line of high or low water mark 114
- Ninety-nine-year grant 327
- Political Code section 565
- Sale under execution 327, 328
- Smith, Peter, judgment 327
- State Harbor Commissioners 565
- State Tide Land Commissioners, Board of 565
- State title 274, 327, 466
- Thorne, Isaac N., sale to 328

TILTON MAP 54, 667, 873, 874

PAGE.

TIME BOOK—Employees 43

TIME LIMIT—

Bail forfeiture 589
Cars, Municipal Railway 159
Claims for damages 805
Death after injury 354, 355, 443, 444
Exemption from taxation, affidavits 472, 473
Lodging house erection 708
Public utility franchise, into effect 317
Railroad construction 229, 230
Reinstatements 809
Statute of Limitations 472
Street railway construction 907, 908
Suspensions 861

TIMENO, MANUEL—Grant by 106, 109

TITLE—

Act, State Legislature 260
Alleyway used by owners of lots on either side 308, 319
Appeal not operating as a stay 480
Beach Street 276
Beds of streams 112
Burden imposed by former owner 308, 309, 319
Cemetery lots 396-98, 475
Chenery Street 54, 55
City deeds to clear up titles 371
City property 547, 548
Comerford Street 308, 319
Cronin, Ann 732, 733
Decisions 109-115
Dore v. Truett 328
Emmet Place 479
Farley, Mary 786, 787
Freeman v. Belgarde 112
Hamilton Square 546, 547
Heirs, vesting in 610
Hetch Hetchy grant 495
Islais Creek bed 106-120
Jefferson Square 548, 549
Market Place and Produce Exchange lots 854, 855
Order No. 800 260
Ordinance covering subject 535
Park lands 466
Pueblo grant 466, 547, 548
Quiet title (See Quiet Title).
Quieting, Act, State Legislature 260
Railroad construction preceding laying out of streets 210
Rancho Rincon de las Salinas y Potrero Viejo 106-109, 118-20

TITLE—(Continued) PAGE
Randall Street 726, 727
Recording of deeds....18, 19, 369
Southern Pacific Co....210
State, to tide lands....274
Streets, North Peter Smith Tract....276
Tide lands....274, 327, 466
United States, relinquishment....547
Van Ness ordinance....547, 548

TITTLE, H. S.—Team driver injured....787

TOBIN, AGNES—Nurse, contracting typhoid fever....903-906

TOBOGGAN SLIDES—License 648

TONQUIN STREET....276, 329

TORTS—
Fence, injuries through....60
Liability for 905
Municipality not liable for torts in discharge of duties..314

TOURISTS' ASSOCIATION—Appropriation for literature....591-93

TOWNSEND STREET—Rights of Southern Pacific Co....211, 213, 214

TRACKS—
Abandoned....229, 230, 386
Army Street....227, 228
Atchison, Topeka and Santa Fe Railway Co....212
Berry Street....211, 218
Board of Public Works, supervision....234, 235
Central Pacific Railroad Co....211, 213, 214
Charter regulation 234
City's right to use United Railroads tracks....944
Civil Code....88, 89
Crossings, right to construct....229
Decisions 386
Detroit ordinance 90
Division Street....212, 217
Doubling of 90
Eminent domain proceedings....207
Extension of 229
Fifth Avenue 385, 386
Fifth Street 213-214
Fourth Street 213
Franchise must be for public, not private, purposes....506, 507
Franchise, track lay-out....309
Fresno 359
"Freund on Police Power"....247
Geary Street, Park and Ocean Railroad Co....206, 385, 386
Grade change; reconstruction to conform with....310, 833
Harbor Commissioners 280

TRACKS—(Continued) PAGE

Harrison Street....210, 212, 217, 218
Holladay Avenue....227
Howard Street....216
Intersections, street....229
King Street....211, 214, 335, 336
Laying, franchise condition....368
Light weight and construction....235
Masonic Avenue....871
Mission District streets....207, 210, 214-18
Municipal Corporation Act, 1883....361, 363, 365
Ocean Shore Railway Co....24-28, 226-232, 235
O'Farrell Street....681, 682
Ordinance No. 547 (New Series)....206
Ownership of....206, 207
Political Code....280
Potrero Avenue....226-229
Power to prescribe heavier tracks....235
Presidio and Ferries Railroad Co....206
San Bruno Avenue....227
San Francisco and San Joaquin Railway Co....359
Seventh Street....212, 214
Sixteenth Street....212
Sixth Street....213, 214
Southern Pacific Co....207-18, 309, 310, 318, 335, 336
Southern Pacific Railroad Co....211-14
State Harbor Commissioners....280
Statute 1883....361, 363, 365
Tearing up....385, 386
Townsend Street....211, 213, 214
Twenty-fifth Street....229
Two franchises over one set of tracks....420-22
United Railroads....421, 681, 682, 871, 943
Unused....231, 232
Vermont Street....227
Water front....280

TRACTS—(See Subdivisions).

TRADE—(See Business).

TRADING STAMPS—Higher license merchants giving....640

TRAFFIC—
Diversion....948
Harris Automatic Stop Signal....991
Ordinance....947
Regulation....947, 948

TRAINOR STREET—Power poles....134

TRAINS—
Pushing of....233
Rapid running....232

PAGE.

TRANSFER COMPANIES—License....535

TRANSFERS—

City real estate....58, 371, 372, 546, 547, 685-87
Common School Fund to General Fund....1027
Eighteenth Avenue lot to Playground Commission....685-87
Franchise provision 90
Funds....51, 603-606, 891, 992, 993, 1027
Hamilton Square....546, 547
Home telephone to Pacific....402
Human bodies....397
Los Angeles, street railway franchise.... 90
Municipal Railway funds....603-606, 992, 993
Obligations of original holder rest upon assignee.... 88
Officers....747, 754, 755
Park Commission, transferring city property....546, 547
Patent rights....453, 454
Playground Commission, city property transferred to.... ....546, 547, 685-87
Reserve fund....606
Stockton Street Tunnel fund....603-607, 992, 993
Surplus, bond funds....603, 604
Sutter Street Railroad Co., rights....88, 95
United Railroads....88, 95

TRANSPORTATION—

Allowances to employees using their own automobiles....487
Belt Line Railroad, passengers over....279-81
City providing free....364
Delays through strikes....154
Employees, allowance 445
Firemen, free 90
Franchise, Los Angeles street railway.... 90
Free....90, 218, 219, 364
Golden Gate Park, Municipal Railway across....957, 958
Hackney carriages....520
Health Department employees....487
Interstate shipments 300
Meats, imported....300, 302
Motor buses 520
Officials, State 90
Policemen, free 90
School children, half fare.... 90
Special police officers, free transportation....218, 219

TRAVELING EXPENSES—Superintendent of Schools.....1026-28

TREASURER— PAGE.

Approval of demands.....122, 673, 939
Barry, John F., demand.....406, 407
Battaini Window Cleaning Co., claim.....902, 903

Bond—
Fiscal agent.....186, 187
Official, liability under.....331

Contractors, temporary deposits held out.....316
Crocker National Bank, depository bond.....186, 187, 331
Demands, payment of.....121, 122, 729
Deposits held out on judgments.....316
Employees brought under civil service....389, 390, 771, 803, 830
Grand Jury expert, demand.....406, 407
McEvers, J. W., deputy sealer, salary demands.....728-31
Pay checks.....121, 122
Pay rolls, approval.....673
Per diem employees.....756
Police pensions, deductions from salary.....579
Salaries twice a month.....756
School windows, cleaning.....902
Scott, M. P., deputy sealer, salary demands.....729, 730
Street opening deposits.....561, 562
Surplus Fund 730
Weights and Measures Bureau, demands of sealer and deputies 728-31

TREAT AVENUE—Rights of Southern Pacific Co.....216

TREAT, JOHN AND GEORGE—Deed.....215

TREATMENT—Injured employees.....
.....626, 627, 646, 687, 877-79, 1021, 1022

TREES—Outer line of sidewalk..... 85

TRIALS—
Board of Public Works.....693
Civil Service Commission.....223, 224, 676
Firemen.....683, 684, 747, 752, 766
Police officers 683, 684

TRIPP, EDWIN B.—Suspension.....676-78

TROUGHS ON SIDEWALKS..... 85

TROUTT, JUDGE—Decree, Chestnut Street lot.....786

TRUCK, FIRE DEPARTMENT—Damaging window.....972

TRUNKS—Moving of, reporting.....563, 564

TRUST CONVEYANCE FROM STATE.....855

TUBERCULOSIS HOSPITAL—Location.....625, 629, 630

TUNNELS— PAGE.
Charter sections....311, 312
Delinquent assessments....256, 257
Easements....311, 312
Funds, discretion of Supervisors....605
Lands for....311-13
Necessary or convenient, additional expenditure....311-13
New York City....706
Ordinance No. 1651 (New Series)....166, 167
Sale of property, delinquent assessment....166-68
Stockton Street Tunnel....256, 603-607
Twin Peaks Tunnel....311-13

TUOLUMNE RIVER—Water supply....77, 494-96

TUPPER, O. M.—Gas and Water Inspector....772

TURK STREET—Franchise, United Railroads....420, 421

TWELFTH STREET—
Franchise rights and tracks, Ocean Shore Railway Co. 24-28, 226
Rearrangement of tracks and station buildings....943

TWENTIETH STREET—Franchise rights, Southern Pacific Co....211

TWENTY-FIFTH STREET—
Abandonment, tracks, Ocean Shore Railway Co....229
Franchise rights, Southern Pacific Co....211, 216
Ocean Shore Railway Co., rights in....229-31
Opening, telephone ducts....196
Ordinances....229, 230
Unused rails and poles....232

TWENTY-FIRST STREET—Franchise rights, Southern Pacific Co. 211

TWENTY-FOURTH STREET—Rights, Southern Pacific Co....211, 216

TWENTY-NINTH AND CASTRO STREETS DISTRICT IMPROVEMENT CLUB—Blasting 803

TWENTY-SECOND STREET—
Rights, Southern Pacific Co....211, 216
Unused spur track....231

TWENTY-SIXTH STREET—Deed 216

TWENTY-THIRD STREET—Rights, Southern Pacific Co....211, 216

TWICE A MONTH SALARIES—
Park employees....755, 756
Per diem men....756, 807
Teamsters 807

TWIN PEAKS TUNNEL....311-13

PAGE.

TYPEWRITERS—Contract for....281
TYPEWRITTEN SIGNATURE ON BID....668-70
TYPHOID FEVER—Nurse contracting....903-906
TYPHUS FEVER—Removal of cases....848

U

UNAPPORTIONED FEE FUND....567, 811, 892
UNAUTHORIZED APPOINTMENTS....503, 504
UNCONSTITUTIONAL—(See Invalid).

UNDERGROUND CONDUITS—
- Bay Street....524
- Buchanan Street....524
- Charter framers, intent....411, 412
- Chestnut Street....524, 525
- Department of Electricity....586-88
- Franchises....241, 249, 294, 411-14, 523-25, 575, 576, 586-88, 597, 598, 618, 619, 642
- Francisco Street....524
- Inspection Fees....598
- Keppelmann, In re....597, 598
- Lobos Square....524
- Los Angeles....586, 587
- Orders regulating....244, 277
- Ordinances regulating....619
- Overhead, changing to....523-25
- Panama-Pacific Exposition grounds....523-25
- Power wires, United Railroads....277-79
- Public safety and welfare, wires underground....277
- Reporting installation....601-603
- Sierra and San Francisco Power Co....523-25
- Webster Street....524

UNDERTAKING BUSINESS—Regulation....30-33, 38, 42

UNDERWRITERS' FIRE PATROL—Exemption, charges for alarm bells....336, 337

UNGUARDED HOLE IN STREET—Automobile damaged....791

UNIFORM—
- Assessments....629
- Defined....556
- Elevator operators, City Hall....988
- Laws, operation of....555
- Municipal accounting system....1004-1006, 1016-19
- Operation of law....427
- Ordinances, operation of....555

PAGE.

UNION LABEL ON PRINTING....926

UNION LABOR—Delays on contracts....153, 154

UNION PARK LAND CO.—Title to Chenery Street....54, 55

UNION STREET—Street railway franchise....207

UNION STREET RAILWAY—(See Presidio and Ferries Railway; Municipal Railway).

UNIT PRICES—Lincoln Way paving....198, 199

UNITED ENGINEERING WORKS—Bid, fire boats....795, 796

UNITED RAILROADS—

Abandoned franchises....169, 170, 421, 906-909
Assignment of rights by Sutter Street Railroad Co....88, 95
Cable franchise, abandonment of....421
California Street line, right to demand percentage of receipts....422
Cars, Municipal Railway, haulage....159, 160
Chenery Street, ownership in....54, 55
Church Street railway....943-45
Commercial sale of power....912-913
Consolidation....420
Dolge, William, percentage of receipts....419-22
Electrification of cable lines....421
Embarcadero, abandonment of franchise....169, 170
Entire roadway, keeping in repair....86, 91, 94
Expiration of franchise....88, 91, 95
Fairmount Extension Homestead, ownership....54
Fillmore Street, rights on....277-79
Folsom Street, abandonment of franchise....169, 170
Franchises....88, 91, 95, 169, 170, 277-79, 420-22, 681, 832, 906-909
Fulton Street line, right to demand percentage of receipts....422
Golden Gate Park, railway across....956
Grade change; tracks to conform to....833
Haulage, cars, Municipal Railway....159, 160
Hayes Street, regrade....831-35
Howard Street, proposed routing over....169, 170
Market Street Railway Co., franchise....681, 832
Masonic Avenue, at Haight Street, track connection....871
Mission Viaduct, contribution and work done....322-26
Municipal Railway cars, haulage....159, 160
Ninth Street, franchise and street work....86-89, 91, 93-96
Obligations through assignments of franchise rights....88, 95
Ocean Avenue, abandonment of franchise....906-909
O'Farrell Street, paving....681, 682
One set of tracks, but two franchises....420, 421
Orders granting franchises....170, 681, 832, 906
Overlapping franchises....420-22

UNITED RAILROADS—(Continued) PAGE.
Pacific Avenue franchise....86, 88, 91, 95
Paving obligations....88, 95, 681
Percentage of receipts....419-22
Power wires, placing underground....277
Predecessors in interest....906, 956
Repaving....93-95
Routing of cars immaterial in exercise of franchise....421
Sacramento Street line, percentage of receipts....422
Sewer right of way, Fairmount Extension Homestead.... 54
Steuart Street, proposed routing over....169, 170
Street work, obligation upon....88, 91, 94, 95, 681
Sutter Street Railroad Co., assignment of rights....88, 95
Use of tracks by city....943
Validity of franchise depends upon use....421
Webster Street, changing wires to....277-79
Wilder Street, ownership in.... 54
Wires, right to maintain....277-79

UNITED STATES—
Board of Land Commissioners....116
Bureau of Animal Industry....300, 302
Bureau of Pure Foods and Drugs....299-303
City of San Francisco v. United States....116
Clement Street, extension, agreement....299
Commissioners of the General Land Office....115, 116
Department of Agriculture....299-303
Fort Miley, land for, condemnation....298
Franchises....239-43
Grant, Bernal Rancho....106, 107, 118
Hetch Hetchy grant....494
Meat inspection....299-303
Pueblo Lands, patent....115-17, 276, 466, 547, 548, 855
Tide lands....466
Title relinquished....547

UNIVERSAL ELECTRIC AND GAS CO.—Extension of system....408, 414

UNIVERSITY OF CALIFORNIA—Students, City and County Hospital....127

UNLAWFUL—
Construction....512
Occupancy....513
Use....512

UNOCCUPIED CITY PROPERTY—Exchange of....370-72

UNSAFE STRUCTURE....513

UNUSED—
Franchise....229-31, 421
Poles....232
Tracks....229-32, 386

PAGE.

UNWHOLESOME FOOD—Prevention of sale 471
URGENT NECESSITIES FUND 388, 425
URGENT REPAIRS TO STREETS 695-701
USE—
Alleyway 308, 319, 320
Contrary to law 512
Employees, their own automobiles 487
Funds, charter restrictions 605
Motor buses, streets 520, 521
Non-user 230
Obstructions restricting 480
Parks 549, 841, 956, 962
Patented pavement 453, 454
Property 60, 141
Public street, as 479
Sewer right of way by railroad 228
Street flushers 334
Sub-sidewalk areas 265
Tide lands 274, 275, 327
Union label 926
United Railroads tracks 943
Unsafe structures 513
USE OF STREETS—
Act of Congress 239, 240
Arcata, City of 365
Arrests, corporation employees 986
Board of Public Works 19, 20, 135, 163, 164, 176, 200-204, 239-44, 258, 270, 271, 402, 559-62, 575, 576, 619, 642-44
Board of Supervisors 96-98, 134-39, 164, 195, 203, 204, 228, 229, 239-50, 277-79, 294-96, 359-68, 407-14, 520, 521, 523-25, 559-62, 619, 913-15
Bonds 258
Brooklyn, parkway 959, 960
Central Pacific Railroad Co. 208, 211, 213, 214, 217
Charge for 240
Charter amendment 98
Charter framers, intent 411, 412
Charter provisions 98, 135-38, 195, 278, 410, 411
Chief of Police 414, 415
City Electric Co. 195, 415
Civil Code sections 359, 361, 363
Constitutional amendment 96, 134-37, 176, 195, 196, 200-203, 240-43, 250, 293, 295, 402, 408, 411, 415, 523, 587, 597, 619, 642-44
Control permitted by State 367
Decisions 96, 135-37, 201, 239, 240, 243, 278, 293, 360-67, 402, 409-11, 506, 507, 586, 587, 597, 598, 642
Department of Electricity 164, 292-94, 586-88, 597, 598, 913-16, 985

USE OF STREETS—(Continued) PAGE.

Exclusive privileges 247
Gasoline pumps 84, 85
Huckster stands 506
Jitneys 520, 521
Leasing out portions 506
Legislative authority 247
Lighting companies 96-98, 135-37, 163, 164, 201, 202, 241, 249, 409-12, 415, 523-25, 559-62, 575, 586-88
Los Angeles 362
Monopoly 247
Motor buses 520, 521
Municipal Corporation Act, 1883 ....361, 363, 365
Municipal regulation 240
Ocean Shore Railway Co. 24-28, 225-35
Ordinances 258, 523-25, 559-62, 575, 576, 586, 588, 597, 598, 619, 642-44
Pacific Gas and Electric Co. 162-64, 200, 244-50, 559-62, 596-99, 641-44
Pacific Telephone and Telegraph Co. 196, 201, 402
Pasadena 137
Peddlers 506
Pipes—(See Pipes, Laying of.)
Poles—(See Poles, Erection of.)
Power companies 985, 986
Prescriptive use 404
Public service corporations 96-98, 134-39, 163, 176, 195, 200-204, 239-50, 258, 277-79, 293-96, 402, 408-15, 523-25, 559-62, 575, 586-88, 597, 618, 619, 642-44, 912
Railroads 24-28, 227, 358-68
Right common to all 521
Russell, In re 136, 201, 243, 293, 410, 413, 586, 597, 642, 913
Sierra and San Francisco Power Co. 134-39, 175, 176, 523-25
Southern Pacific Co. 200, 201, 207-18, 309, 310, 335, 336
Southern Pacific Railroad Co. 208, 210-14, 217
St. Louis 506
Stalls 506
Steam cars 40
Supreme Court 201, 293, 561, 586, 597, 598, 642
Telegraph companies 239-42
Telephone systems, connection between 402
Traffic 947-49
United Railroads 88, 91, 93-95, 169, 170, 277-79, 420-22, 681, 832
Universal Electric and Gas Co. 408, 414
Water companies 97, 137, 201, 241, 295, 409, 516-19, 587, 913
Western Union Telegraph Co. 239-42

USER RIGHT TO STREETS 404, 727

V

VACANCIES— PAGE.
Charter provisions 816, 817
Civil Service Commission to be notified 130
Conditions creating 817
Eligibles appointed to 130
Filling 75
Filling before creating new positions 823
Fire Department 801, 802, 813, 814
Notices of 813, 814
Office declared vacant 746
Police Department 816
Political Code section 817
Rules 813

VACANT—
Lot, use for library purposes 58
Playground lots 370-72
School or church property, kinetoscope parlor near 399

VACATIONS—
Actual time in service 288, 290, 977, 980
Board of Public Works 980-83
Civil service rule 387
Committee of Efficiency superintending 288
Continuous employment for one year 980
Decisions 289
Discretion, head of department 387
Dismissed employees 403
Efficiency, interest of 288, 289, 862, 977, 980
Fire Department 387
Golden Gate Park employees 984
Municipal Railway employees 984
Ordinances 288-90, 387, 977, 980-84
Pay during 977
Per diem men 980-83
Power of Supervisors 289
Recorder's copyists 977
Surveyors' field assistants 403

VALENCIA STREET—Crossing Southern Pacific Co. 210

VALIDITY—(See Constitutionality.)

VALLEJO STREET—Street railway franchise 207

VALUE—
Height of buildings, relation to 143
Market Place and Produce Exchange lots 881
Of property, diminishing 60
Street improvements increasing or diminishing 273

VAN DRIVERS—Reporting moving of goods 564

VAN KEUREN, MARY—Pension 266

VAN NESS AVENUE— PAGE.
Boulevard 190
Dore v. Truett....327-29, 707
"Fighting the Flames," amusement enterprise....647, 665
Municipal Railway Bonds, street railways on....604
Municipal Railway over....190-192
Northerly from Beach Street, procedure to declare open public street 707
Northerly from Jefferson Street, not open public street..329
Private ownership 707

VAN NESS IMPROVEMENT ASSOCIATION....707

VAN NESS MAP 276, 660

VAN NESS ORDINANCE....547, 661, 662

VASSAR PLACE—Grading 825-27, 950

VAULTS UNDER SIDEWALKS....265

VEGETABLE PEDDLERS 638

VENTILATION—Lodging houses 418, 785

VERMONT STREET—
Franchise rights, Ocean Shore Railway Co....25, 26, 231
Improvement 731
Ocean Shore Railway Co., tracks....227
Opening 845

VESTED RIGHTS—
Acquisition of....273, 274
Corporations in streets....
....97, 200-203, 241, 277, 293, 409, 597, 598, 914, 915
Fire Department, holders of positions before reorganization....284, 287
Heirs of estates....610
Pacific Gas and Electric Co....598
Police officers 580
Tide lands, State 466

VETERAN VOLUNTEER FIREMEN'S ASSOCIATION—Exempted, fire alarm charges....337

VETO—Ordinance 804

VIADUCTS—
Mandamus to compel construction....650
Mission Viaduct 324
Ocean Shore Railway Co., over Ocean Avenue....650, 651
(See also Bridges.)

VICTORIA STREET—Opening 845

VIOLATION— PAGE.
Building Law 512
California Constitution 427
Charter 80, 84, 325, 901
Statutes 375, 378, 379
United States Constitution 427

VIRGINIA—Legislature 1009

VISITING PRIVILEGES—San Francisco Hospital 126-128

VISITOR ON PLAYGROUND—Accident to 611, 612

VITAL STATISTICS 330

VOCATION—Right to pursue 32-36

VOID—(See Invalid.)

VOLUNTARY—
Act 366, 368
Payment 632

VON LEICHT SURVEY 115

VOTING, VOTERS—
Appointments, additional 608, 609, 1008
Budget 608, 609
Charter provisions 101
Elections, votes cast 722, 723
Extensions of time to Contractors 859
Municipal Railway 51
Notice to voters 49, 50
Ordinance, passage of 339-41, 501, 700
Public utility construction 49
Railroad using streets 359, 363
Registration—
Party affiliation 875
Voters 724
Residence, affecting 11-16
Supervisors 63, 339-41, 501, 608, 609, 700, 859, 1008

VROOMAN ACT 90, 750

VULCAN STREET—Extension 419

W

WAIVER—
Contract provision 193, 194
Repairs at expense of landlord 590
Rights under lease 263

WALLS— PAGE.
Subsidewalk area 264, 265
Wing-walls 235-38
WALNUT AVENUE—Open public street....372
WARD WOMAN—Isolation Hospital....332
WAREHOUSES 33
WARRANT—Assessment 917
WASHHOUSES—(See Laundries.)
WASTE CANS—Advertising on....505-07
WASTE, JUDGE—Telephone merger....196
WASTE PAPER—Streets....505
WATER—
Inspectors, appointments 771-75
Rights 112
Surface, protection from....737
Works, municipal 241
WATER BONDS—
Election 77, 495
Extensions of mains, use for....77, 78, 595, 596
Integral part of existing utility, purchase with....779, 780
Purposes of issue.... 77
WATER COMPANIES—
Charter provision 410
Civil Code section, re service....295
Constitutional amendment limiting rights in streets....
....19, 293, 409, 410, 415, 913
Constitutional privilege to use streets....
....19, 200, 201, 241, 243, 295, 296, 409, 410, 587, 913
Duty bound to serve whole public....295
Extension of service....
....19, 20, 987, 200, 201, 241, 295, 296, 409, 410, 587
Extent of means....295
Free water for fires....295
Lukrawka v. Spring Valley Water Co....295
Meters 863
Railroad Commission order....863
Service, furnishing of....295, 717
Service connections 863
Vested rights in streets....915
WATER FRONT—
Act of March 15, 1878....383
Addition to building....429
Commerce, needs of....280
Elevated railroad 280
Extension of streets....382-84

WATER FRONT—(Continued) PAGE.
Political Code sections....280, 382, 383, 534
Railroads running cars to....317, 358
Sidewalks....534
State Harbor Commissioners, jurisdiction....382-384
Streets....382-84, 565
Tracks on....280

WATER FRONT REALTY CO.—Permit to erect building....429, 430

WATER MAINS—
Assessment....502
Charter amendment....518
Extensions....
....19, 20, 97, 200, 201, 241, 295, 296, 409, 410, 516-19, 587
Forest Hill....123
Laying, procedure some municipalities....516
Legislative authority....247
Los Angeles....516, 517
Relief Home Tract....123

WATER RATES—
Assessments for mains lowering....517, 518
Charter provisions....410, 618
Impounded moneys....614, 615
Litigation....614, 615
Supervisors fixing....758-62

WATER SUPPLY—
Bloom, J. W....19
Bond issues....494, 495
Civil Code section....295
Delivery, rules for....295
Forest Hill....122, 123
Growth, keeping pace with....295
Hetch Hetchy....77, 494-96, 779, 780
Hillcrest....19
Inadequacy of....77, 78, 295, 409, 410, 595, 596
Lake Eleanor....77
Lukrawka v. Spring Valley Water Co....295
Relief Home Tract....122, 123
Test wells, Richmond and Sunset, sinking....595

WATERING TROUGHS ON SIDEWALKS....85

WEBB PLACE—Public street....667, 668

WEBB, U. S.—Day of rest....132, 133

WEBSTER STREET—
Rights, Sierra and San Francisco Power Co....524
United Railroads conduits....277-79

WEIGHTS AND MEASURES— PAGE.
Act, State Legislature....455
Bureau not under jurisdiction of Supervisors....455
McEvers, J. W., writ for salary....728, 730
Ordinance....454, 729
Scott, M. P., writ for salary....729, 730
Sealer....456, 728-31

WELFARE—(See Public Welfare.)

WELLS—Test, sinking....595

WEST CHICAGO—Parks....501, 502

WEST MISSION STREET—Ocean Shore Railway Co. tracks.... 28

WESTERN ELECTRIC CO.—Installation of telephone motors..601-603

WESTERN PACIFIC RAILROAD CO.—
Assessment of money in hands of receiver....970, 971
Franchises....208, 209, 217

WESTERN UNION TELEGRAPH CO.—Franchise rights....239-43

WESTINGHOUSE ELECTRIC MANUFACTURING CO.—Apparatus, Municipal Railway cars....442

WETMORE, MANUEL & WETMORE—Grading, Harrison Street..440

WHARFING-OUT—Privileges....468, 470

WHEELS—Revolving, license....648

WHELAN, JOHN J.—Copyist, County Clerk....802, 803, 830-31

WHISTLE BLOWING NEAR HOSPITAL....307

WHITNEY STREET—Assessment....865-67, 945, 946

WHOLESALE BUTCHERS—Inspection of meat....492, 493

WHOLESALE LIQUOR DEALERS....482

WIDOWS—
Fireman....620, 621
Naturalized alien....702
Pensions....400, 401

WILDER STREET—Private ownership.... 54

WILLIAMS, THOMAS F.—Contract, Mile Rock Tunnel....856, 857

WINDOW CLEANING—Schools, claim....902, 903

WINDOW DAMAGED—Fire truck....972

WING-WALLS—Beale Street Bridge....235-38

WIRES—
Act of Congress....239
Arrests, corporation employees....415
Bonds, installations....596
Building Law....596

WIRES—(Continued) PAGE.

California Electric Light Co., franchise....244
Charter framers, intent....411, 412
Charter provisions....98, 136, 137, 410, 411, 525
Chestnut Street....524, 525
Chinatown....596
City Electric Co....195, 414, 415
Civil Code....240
Constitutional Amendment, 1911....240, 241, 293, 409, 411, 412, 415, 523-25, 587, 597
Defects in installations....596, 598
Department of Electricity, permits....245, 586-88
Electricians, bonds....596
Fillmore Street....277, 524
Franchises....239-41, 244, 245, 277, 293, 294, 409-12, 415, 523-25, 586-88, 597, 598
Francisco Street....524
High tension pole leads parallel to low voltage....586
Inspection fees....598
Lobos Square....524
Orders regulating....244, 277
Ordinance No. 1564....248, 249
Overhead wires, changing to underground....523-25
Pacific Gas and Electric Co....244, 245, 596-99
Panama-Pacific Exposition grounds....523-25
Permits....245, 415, 586-88
Police power of municipality....277, 278
Public safety and welfare, wires underground....277
Removal of....278
Reporting installation....601-603
Rights of corporations....98, 137, 176, 239-41, 244, 245, 258, 277, 293, 294, 409-12, 415, 523-25, 586-88, 597, 598
Russell decision not affecting power or telephone service....587
Sierra and San Francisco Power Co....175, 176, 523-25, 912
Temporary permits, Board of Public Works....415
Underground, placing....277, 523-25
United Railroads....277-79, 912
Universal Electric and Gas Co....408, 414
Webster Street....277, 524

WISE REALTY CO.—Lease....262

WITHDRAWAL—

Bid....545
Public lands, Hetch Hetchy....496
Resignations....255, 809

WITHHOLDING MONEY—

Alien, from....903
Holman, W. L., contract....442
Jewett Car Co....719-21
Salary, unauthorized appointee....504

PAGE.

WITTMAN, LYMAN & CO.—Bid 321

WOLFF, CHARLES A.—Reinstatement 296-98

WOMEN—Employment 426-28

WOODEN BUILDINGS—
- Baker and Fulton Streets 271
- Board of Public Works, power to demolish 185, 186
- Building Law 271, 272
- Conversion into apartment house 271
- Demolition of 448-50
- Fire Limits, within 184
- Fire Wardens, consent, alterations 552
- Globe Theatre 510, 514
- Laundry 160
- Open fruit stand 433
- Power of municipality 146
- Reconstruction of 160-162
- Steuart and Market Streets 433

WORDS AND PHRASES—
- "Acceptance" 159
- "Additional" 1009
- "Aggregate sum" 5
- "Along" Ocean Shore 466
- "Altered" 103
- "Assessment" 828
- "Avoidable delays" 153
- "Bank" 114
- "Broker" 613, 614
- "Building" 433, 434
- "Cause" 753
- "Church" 399, 577, 578
- "Clinic" 438
- "College" 127
- "Commission merchant" 613
- "Commissions" 528
- "Concession" 458
- "Convenient" 312
- "Delays" 153
- "Delivery Company" 535
- "Domestic" 581
- "Duration" 749
- "Employee" 584
- "Employer" 424, 583, 584
- "Entrance" 574, 575
- "Factor" 613
- "Fees" 528
- "Fill-in" 235-38
- "Final" 881
- "Flooring" 433, 434
- "Garages" 634

WORDS AND PHRASES—(Continued) PAGE

"Good order and repair" 91, 92
"Hospital" 349, 350, 438
"Improvement" 499, 518
"Integral" 78
"Investigate" 223
"Itinerant vendor" 1015
"Killed" 354
"Local" 581
"Management" 500
"Middleman" 613
"Outdoor park" 665
"Owner" 854
"Paved" 453
"Police officer" 219
"Post graduate" 127
"Public utilities" 886-88
"Reducing" 847
"Regulations" 96
"Rendering" 847
"Repair" of streets 92
"Sanitarium" 349
"School" 128, 399
"Seating capacity" 332
"Serve" 803
"Service connection" 863
"Shore" 114, 115
"Special policeman" 219
"Statute" 72
"Street" 499
"Structure" 433, 434, 486
"Supplies" 17
"Taxes" 828
"Tenement house" 538
"Transfer company" 535
"Unavoidable delays" 153
"Undergraduates" 127
"Uniform" 556
"University" 128
"Utilities" 886-88
"Water Front" 468
"While" 354
"Wing-walls" 235-38
"Written law" 72

WORKING MINORS—Ordinance regulating 989

WORKMEN'S COMPENSATION ACT—
California 424, 526, 583, 584, 585, 616, 626, 627, 645, 646, 663, 664, 687, 688, 742, 782, 783, 797, 820-22, 904, 905
Massachusetts 905
Minnesota 906

PAGE.

WORKS, BOARD OF—(See Public Works, Board of.)

WRIGHT, WRIGHT & STETSON—Barley contract....1025

WRITTEN—
Charges against employees....900
Contracts....696-99, 735, 1001
Resignations....297, 320

WYATT & CO.—Automobile injuring street sweeper....615-17

Y

YARDS—
Dogs kept in....434, 436, 437
Lodging houses....784, 785
State Hotel and Lodging House Act....784, 785
Use in common....437, 537, 538

YELLOW FEVER CASES—Removal of....848

YERBA BUENA IMPROVEMENT CO.—Grading, Harrison Street..440

YOLO STREET—Franchise rights, Southern Pacific Co....211

YORK STREET—Franchise rights, Southern Pacific Co....212, 217

YOSEMITE VALLEY—Grant....855

YOUNG MEN'S CHRISTIAN ASSOCIATION CAFETERIA—License....556, 557

Z

ZONES—
Bill boards....139, 143-46
Boston....143
Buildings, heights varying....143
Industrial and Residential....145, 250, 461-63, 554
Laundries....551, 554, 555
Los Angeles ordinance....145, 554